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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000
By email: lasc@parliament.qld.gov.au

Dear Secretary,

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

Thank you for the opportunity to provide comments on the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022 (**Bill**). We appreciate being consulted on this very important piece of legislation and support the objectives of the Bill in relation to the implementation of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**) in Queensland.

Firstly, we wish to express our concerns regarding the short timeframe to provide comments on this very important Bill, in particular, noting that responses are required by midday on 11 January 2023 and that the proposed consultation period includes within it a two-week Christmas skeleton staff period. The Bill is a critical one, particularly for Aboriginal and Torres Strait Islander people in detention, and noting that OPCAT implementation in Queensland is already significantly overdue, we feel that the timeframe and time of year for consultation has made the provision of meaningful and considered comment based on deep analysis of the Bill and the context thereof challenging.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (**ATSILS**), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation

was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by nearly five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

General comments on OPCAT implementation

We welcome the introduction of the Bill as it represents a significant step towards fulfilling Queensland's commitment to become compliant with its obligations under OPCAT, which Australia ratified in December 2017.

Human rights abuses in places of detention including, but not limited to the following, must be addressed as a matter of priority:

(a) the use of:

  (i) **solitary confinement**, or any other term referring to the same or similar treatment (the confinement of a person in detention for 22 hours or more a day without meaningful human contact)[1]; and

  (ii) **prolonged solitary confinement**, or any other term referring to the same or similar treatment (where a person in detention has been held in such conditions for more than 15 days)[2],

  for adults[3] and, in particular, children[4];

(b) the use of **dangerous restraint techniques** (for example, the figure 4 hold)[5] and **excessive use of force** against prisoners;

[1] *The Nelson Mandela Rules*, rule 44.
[2] Ibid.
[3] Tamara Walsh, Helen Blaber, Claudia Smith, Lucy Cornwell & Karen Blake, 'Legal perspectives on solitary confinement in Queensland', University of Queensland and Prisoners Legal Service, 2019.
[4] Refer to Queensland Parliament Tabled Paper 774-2022, Question on Notice asked by the Hon. Michael Berkman of the Hon. Leanne Linard, Minister for Children and Youth Justice and Minister for Multicultural Affairs, found at <https://documents.parliament.qld.gov.au/tableoffice/questionsanswers/2022/774-2022.pdf>.
[5] Coronial Inquest findings into the death of Lyji Vaggs (2012).

(c) excessive/unlawful **strip searching**[6], including sexual assaults occurring to children (and possibly adults) during strip searches[7];

(d) the use of **spit hoods**[8];

(e) exposure of detainees to **excessive heat** (for which overcrowding is a relevant factor)[9];

(f) the **lack of access to adequate health care**[10]; and

(g) the **over-representation of and mistreatment of people with disabilities, and in particular, Aboriginal and Torres Strait Islander people with disabilities,** in places of detention[11].

Particular impact for Aboriginal and Torres Strait Islander persons

Mistreatment of persons in custody is of particular and urgent concern for Aboriginal and Torres Strait Islander peoples due to a range of factors including the disproportionate numbers of Aboriginal and Torres Strait Islander people in custody and remnants of systemic racism that Aboriginal and Torres Strait Islander persons often face when in custodial circumstances which exposes them to an enhanced risk of violence against them (including by prison guards and police) and, sometimes – tragically - death.

According to the Australian Bureau of Statistics (**ABS**) Census data, as at 30 June 2021, 42,970 Australian people were remanded or sentenced to adult custodial corrective services agencies. Of that figure, 13,039 were Aboriginal and/or Torres Strait Islander persons[12]. **Therefore, despite Aboriginal and Torres Strait Islander peoples making up only 3.2% of the Australian population, Aboriginal and Torres Strait Islander peoples represent 30% of incarcerated (adult) Australians[13].**

[6] Strip searches of First Nations people have been recognised to be particularly detrimental, including in the Royal Commission into Aboriginal Deaths in Custody where it was stated in its Report "it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention." (Volume 3, Recommendation 181). Also see the 2014 report of the Queensland Ombudsman, *The Strip Searching of Female Prisoners Report: An investigation into the strip search practices at Townsville Women's Correctional Centre* available at < https://www.ombudsman.qld.gov.au/improve-public-administration/investigative-reports-and-casebooks/archived-investigative-reports/strip-searching-of-female-prisoners-report-2014>.

[7] Michael Atkin, 'Two Aboriginal men claim they were sexually abused during strip searches in youth detention', *ABC News*, (online, 25 May 2021) <https://www.abc.net.au/news/2021-05-25/aboriginal-men-claim-sexual-abuse-youth-detention-strip-search/100143968>.

[8] While we understand the Queensland Police Service announced in August 2022 that they will no longer use spit hoods in watch houses, spit hoods are still able to be used in detention settings such as correctional facilities.

[9] Crime and Corruption Commission (December 2018), *Taskforce Flaxton - An examination of corruption risks and corruption in Queensland prisons*, available at <https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf>.

[10] Coronial Inquest Findings into the death of Mr Vanelee Curtis Mitchell (2020).

[11] Human Rights Watch (2018), *"I Needed Help, Instead I Was Punished"*, available at < https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>.

[12] Australian Bureau of Statistics (2021), *Prisoners in Australia*, available at <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

[13] Australian Bureau of Statistics (2021), *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians*, available at <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/latest-release>.

In their publication entitled *Youth Detention Population in Australia 2021*, the Australian Institute of Health and Welfare (**AIHW**) recorded that in the June quarter of 2021, **half (or 410 of 819) of all young people in detention on an average night were Aboriginal or Torres Strait Islander people despite making up a mere 6% of the Australian population aged 10–17[14].** It was further found that **young Aboriginal and Torres Strait Islander persons aged 10–17 were 20 times as likely as young non-Indigenous Australians to be in detention on an average night in the June quarter 2021**, and that this figure fluctuated between 16–25 times the non-Indigenous rate over a 4-year period dating back to 2017[15].

While the figures themselves are appalling, the rate of incarceration of Aboriginal and Torres Strait Islander peoples is increasing despite the overall crime rate decreasing. From 30 June 2020 to 30 June 2021, the percentage of Aboriginal and Torres Strait Islander prisoners increased by 8%[16]. During the same time period, the Aboriginal and Torres Strait Islander imprisonment rate increased by 5% from 2,294 to 2,412 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population. However, the overall crime rate in 2020–21 was recorded by the ABS as being 11.2% lower than in 2018–19 and 12.2% lower than in 2019–20.[17]

One of the contributors to the significantly disproportionate numbers of Aboriginal and Torres Strait Islander persons (adult and youth) in places of detention is due in part to entrenched systemic racism and discriminatory policing such as racial profiling[18]. Therefore, Aboriginal and Torres Strait Islander persons are already at a disadvantage by being placed in custodial settings at higher rates than their non-Indigenous counterparts and once inside a custodial setting, the risks of mistreatment including violence and/or death are very real and present for the same reasons.

Accordingly, we are very supportive of measures to bring more transparency and accountability to those responsible for places of detention (as broadly defined in OPCAT) and addressing with urgency the mistreatment of those who have been deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment.

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[14] Australian Institute of Health and Welfare (2021), *Youth detention population in Australia* Cat. no. JUV 136, page vi.
Canberra: AIHW, page 11-12.
[15] Ibid, page 11–12.
[16] Note 2.
[17] Queensland Government Statistician's Office, Queensland Treasury, (2020–21), *Crime report, Queensland*, , page 3.
[18] It is out of the scope of this submission to comprehensively list examples and authorities for this statement, however, by way of recent examples, we refer to the Independent Commission of Inquiry into Queensland Police Service Reponses to Family and Domestic Violence report, "A Call to Change" (2022) which found evidence of systemic racism with QPS and that QPS were found to have over-policed Aboriginal and Torres Strait Islander persons as respondents and under-policed Aboriginal and Torres Strait Islander people as victims of family and/or domestic violence. Available at <https://www.qpsdfvinquiry.qld.gov.au/about/assets/commission-of-inquiry-dpsdfv-report.pdf>, page 18.

Further steps are still required

*Nomination of a National Preventative Mechanism (**NPM**)*

We note that, notwithstanding the introduction of this Bill, Queensland is yet to nominate an NPM as it is obligated to do under the articles of OPCAT.

In the explanatory speech for the Bill delivered by the Hon. Shannon Fentiman, as recorded in the Queensland Parliament Hansard of the Legislative Assembly dated 1 December 2022, it was stated:

> *NPM nomination for Queensland is subject to continuing discussions with the Commonwealth, as ongoing and sufficient funding is important to ensure NPM functions are performed effectively.*[19]

It is very disappointing that 5 years have elapsed since Australia ratified OPCAT and Queensland has not yet nominated an NPM, nor enacted the full suite of legislative reform required to comply with Australia's commitment to OPCAT (in the Queensland jurisdiction).

Composition of the NPM

Article 18 of OPCAT states:

> *The State Parties shall take the necessary measures to ensure that the experts of the national preventative mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.*

In our view, taking into account the disproportionately high numbers of Aboriginal and Torres Strait Islander peoples in custodial settings, it is essential that, once Queensland is in a position to nominate an NPM,:

(a) the NPM includes persons of Aboriginal and Torres Strait Islander heritage;
(b) in particular, NPM visitors include appropriate community members with the same gender as the prisoner/s that they are intending to interview on their visit;
(c) appropriate levels of cultural competence training should be provided to the non-Indigenous members of the NPM;
(d) there should be at least one Indigenous health expert available to the NPM; and
(e) due to the high level of psychological risk and psychiatric harm in places of detention, independent and appropriately qualified psychologists and psychiatrists should be retained to be part of the NPM.

Cultural competence is crucial to improving systems in correctional centres to prevent deaths. There have been a number of occasions where Aboriginal and/or Torres Strait Islander prisoners have died in circumstances where culturally competent health assessment/care may have meant the difference between death and receiving potentially life-saving treatment[20].

[19] Queensland, *Parliamentary Debates,* Legislative Assembly, 1 Dec 2022, page 3845, The Hon. Shannon Fentiman.
[20] Inquest into the death of Mr Vanelee Curtis Mitchell (2022).

Application of the Inspector of Detention Services Act 2022 (Qld)

We are unsure as to what is intended with respect to the (uncommenced) *Inspector of Detention Services Act 2022* (Qld) (**IDS Act**), which we understand is to be the governing legislation the NPM once a Queensland NPM is appointed, noting that the IDS Act contains a different and narrower definition of a "place of detention" when compared with the Bill. In our view, in order to be compliant with OPCAT, the definition of a "place of detention" needs to include all places of detention in both the Bill and the IDS Act.

Comments on Bill

Clause 4 – Meaning of *place of detention*

Article 4 (1) of OPCAT states that each State Party is to allow visits by NPMs to:

> *…any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consequent or acquiescence.*

Article 4 (2) goes on to state that:

> *…deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.*

Accordingly, the scope of places of detention to with OPCAT applies is broad and inclusive of both public and private custodial settings.

The Bill appears to have opted for a more prescriptive definition of the term "place of detention" in that it expressly includes community corrections centres, prisons, work camps, youth detention centres, inpatient units of authorised mental health services, the forensic disability service, police watch-houses, police holding cells and other places in a police station where a person is detained, court holding cells and any other place where a person is detained (other than a private residence) which is prescribed by regulation to be a place of detention. The definition also expressly includes vehicles that are primarily used or operated for the purpose of transporting a person who is detained from a place of detention as listed in section 4.

The explanatory notes, at page 2, state that:

> *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.*

While we understand the importance of certainty with respect to the application of this Bill, and we consider that the list in section 4 of the Bill covers the majority of contexts in which a person may be held

in custodial circumstances, there appears to be some contexts which are not captured by the Bill (unless prescribed in a subsequent regulation) but for which OPCAT applies, for example:

(a) community facilities with locked wards, such as for dementia patients and those with an intellectual disability;
(b) accommodation used to house those under Continuing Detention Orders and Community Supervision Orders; and
(c) places where children are placed under Child Protection Orders.

We are also unsure as to whether a place where a person is being housed under a Forensic Disability Order is captured under section 4(1)(d) of the Bill (which refers to "the forensic disability service" under the *Forensic Disability Act 2011*).

In order for Queensland to be able to be fully compliant with its commitments under OPCAT, it must have a legislative framework which enables the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (**Subcommittee**) (and NPMs) to access all places where people are or may be deprived of their liberty and all persons deprived of liberty. In our view, the Bill (and IDS Act) should mirror the scope of application which is stipulated in OPCAT (i.e., both the IDS Act and the Bill should apply to all places of detention).

The approach of including a pathway for specific places to be prescribed as places of detention by regulation in section 4(1)(h) of the Bill creates an unnecessary additional step for legislative recognition of a place of detention not covered by the proposed section 4 definition. Further, the proposed designation by regulation may or may not be supported depending on the political will at the time of consideration in each discrete instance.

Best practice OPCAT implementation requires that the powers of NPMs and the Subcommittee as set out in OPCAT are based in legislation. By refraining to include all places where a person is or may be deprived of their liberty in the definition of a "place of detention" in the Bill, this will (except in the case where a place is prescribed to be a place of detention by regulation) leave inspectors/visitors without a legislative basis for visiting such places and there will be no binding legislative obligation upon those that are responsible for such places of detention to allow an inspector/visitor to inspect/visit the place in accordance with the mandate under OPCAT.

We believe it is worth noting that the Vice-President of the Subcommittee, Ms Aisha Shujune Muhammad, stated in her address to the National OPCAT Symposium 2022 hosted by the Australian Human Rights Commission in Melbourne on 9 September 2022, that two key challenges for NPMs in undertaking their mandate was the absence of legislative basis and the lack of access to all relevant places and persons[21]. Lack of legislative basis was also noted by Ms Muhammad to be a cause for a potential lack of visibility of NPM operations.

[21] While we understand that the Bill relates to the functions and powers of the Subcommittee, and not the NPM, we have chosen to raise this point as, after having reviewed the Bill, in our view, the IDS Act will need to be amended to achieve consistency in its scope of application.

Part 2 – Access by Subcommittee to places of detention

One of the most fundamental features of the responsibilities of NPMs is the ability to conduct unannounced visits. Accordingly, we have carefully considered the legislative framework proposed in this Bill which would enable a Minister or detaining authority to object to or postpone a visit from an NPM.

We note that pursuant to Article 14(2) of OPCAT:

> *Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.*

We welcome standalone obligations in sections 7 and 8 of the Bill for the Minister and the detaining authority (respectively) to ensure that the Subcommittee is permitted to visit and access a place of detention. We also welcome section 9 relating to the ability for the responsible Minister for a place of detention to object to a visit in that section 9 closely aligns with what is prescribed in Article 14(2) of OPCAT as outlined above.

However, we consider that although OPCAT does not define the terms "national defence", "public safety", "natural disaster" and "serious disorder in the place of detention" as is contained in section 9(2)(a) to (d) as grounds for an objection, defining the terms in the legislation may give a degree of certainty and predictability in application. Additionally, there does not appear to be any legislative process regarding what happens if the Subcommittee wishes to dispute an objection to visit pursuant to section 9.

Section 10 of the Bill creates a separate power for a detaining authority to temporarily prohibit or restrict access to a place of detention for a broad scope of reasons as follows:

(a) allowing access to the place or part of the place may prevent the maintenance of:
    (i) security, good order and management of the place of detention; or
    (ii) health and safety of a person in the place of detention (including a member of the Subcommittee and an accompanying person);
(b) allowing access to the place or part of the place may prevent the conduct of essential operations by the detaining authority.

This is a very broad power and one which is not contained or contemplated in OPCAT. We are concerned that a detaining authority may lean on this broadly drafted power to be able to prohibit or restrict access to a place of detention or part thereof for a broad range of reasons which may not be in the spirit of OPCAT. In our view, this provision is counterproductive to one of the keystones of OPCAT which is the ability of the Subcommittee to undertake unannounced visits. For this reason, we are not supportive of the enactment of section 10 of the Bill.

If operationally and/or practically, it is appropriate for the detaining authority to (in addition to the Minister) have powers relating to restricting access to a place of detention that they manage in certain

circumstances, then we recommend that such a power mirrors that which is contained in Article 14(2) of OPCAT, i.e., that such power may only be used in "urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit.".

Part 5 – Protection from reprisals

We welcome section 19 and 20 which make reprisals against a person that has provided or may provide information or other assistance to the Subcommittee an offence under the Bill.

We are not convinced that the maximum penalty of 100 penalty units ($14,300.00) is sufficient when taking into account the seriousness and real risk of reprisals in the detention setting and complexity in the form that reprisals may take[22].

Further, we are interested to know what measures will be implemented by the Subcommittee and NPM (when appointed) to avoid any potential risk of reprisal to any individual that speaks with the Subcommittee or NPM (i.e., is there a way that those individuals could be interviewed without prison guards/management being aware of who the individual is that is being interviewed?).

Section 22 – Responsible Minister may give directions

Under section 22(1), the responsible Minister for a place of detention may give directions to a detaining authority for the place of detention for the purpose of assisting the detaining authority to meet the requirements of the Act. Section 22(2), then provides that that detaining authority must comply with a direction given by the responsible Minister. However, there does not appear to be any consequence/penalty for non-compliance with this provision.

Schedule 1 – Dictionary - Definition of "deprivation of liberty"

In our view, the definition of "deprivation of liberty" in Schedule 1 to the Bill, which refers back to the definition of "deprivation of liberty" in OPCAT, is at odds with the definition of a "place of detention" under section 4 of the Bill for the following reasons:

(a) the OPCAT definition of "deprivation of liberty" refers to any form of detention in a public or private custodial setting;

(b) the term "deprivation of liberty" is not used in the Bill at all, however, the term "deprived of the person's liberty" or "deprived of their liberty" is used twice as follows:

1. In the definition of "detainee" which is defined as "a person in a place of detention who is deprived of the person's liberty" – however, the definition of "place of detention" (which are the only places that the Subcommittee would have the mandate to visit, under the terms of this Bill) in section 4 of the Bill is narrower in scope and, for example, expressly excludes private custodial settings (unless prescribed by regulation); and
2. In section 13(1) of the Bill (relating to the Subcommittee's powers to access information for

[22] Note 11, page 3, 4, 13 and 29; Helen Davidson, 'Dylan Voller fears reprisals if he gives royal commission evidence from prison – mother', *The Guardian* (online, 7 Dec 2016) < https://www.theguardian.com/australia-news/2016/dec/07/dylan-voller-fears-reprisals-if-he-gives-royal-commission-evidence-from-prison-mother>.

the purpose of the evaluation of 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) – however, how can the Subcommittee fulfill this purpose if they are unable to visit all places of detention under the terms of this same Bill?

Accordingly, we reiterate our recommendation that this Bill be amended to mirror the scope of application of OPCAT, i.e., that it apply to all places in which persons are or may be deprived of their liberty.

CONCLUSION

We strongly support the enactment of legislation in Queensland to create a legislative basis for compliance with OPCAT. Upon review of the Bill, we identified some concerns, particularly, that the Bill applies to a narrower scope of places of detention than that which is stipulated in OPCAT. Accordingly, there will be some places of detention which will fall entirely outside this proposed legislative framework, and that is not supported. We also raised concerns regarding the broad ranging powers proposed under this Bill for a detaining authority to temporarily prohibit or restrict access to a place of detention. In this submission, we have also sought to outline some other provisions in the Bill which have considered noteworthy and taken the opportunity to address some concerns that we have with respect to the IDS Act and appointment of an NPM in Queensland.

We thank you for the opportunity to provide feedback on the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2022.

Yours faithfully,

Gregory M. Shadbolt

Principal Legal Officer

Acting Chief Executive Officer