

Our reference: PF:FG:722

29 March 2012

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
CANBERRA ACT 2600

By e-mail: jsct@aph.gov.au

Dear Sir/Madam

Response to National Interest Analysis for Optional Protocol to the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment or Punishment

1. The Australian Centre for Disability Law (ACDL) is a community legal centre which specialises in disability discrimination and human rights law and policy. We provide legal advice and representation to persons with disability and their associates and undertake law reform, continuing legal education, and community legal education activities.
2. ACDL strongly believes that ratification of the Optional Protocol to the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment or Punishment (**OPCAT**) is in Australia's national interest for the following reasons:
 - 2.1 It will assist in strengthening Australia's existing institutional framework for the protection of the human rights of persons deprived of liberty;
 - 2.2 It will mandate the development of institutional oversight mechanisms in sectors where persons are deprived of liberty where such mechanisms do not presently exist; and
 - 2.3 It will signify to the international community Australia's commitment to the protection of fundamental human rights and give credence to Australia's human rights advocacy in the international community.

3. ADCL therefore calls on the Joint Standing Committee on Treaties (**JSCOT**) to recommend to the Australian Parliament that it immediately ratifies the Optional Protocol.
4. ADCL is opposed to the possibility that Australia may make a declaration pursuant to Article 17 of the OPCAT postponing its obligations with respect to the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the subcommittee) and or the National Preventative Mechanism (**NPM**) for the following reasons:
 - 4.1 due to its existing workload, limited resources, and other priorities the Subcommittee is unlikely to visit Australia for some years. It is therefore not necessary for Australia to postpone the commencement of this oversight mechanism in order to be OPCAT ready when the Subcommittee reviews Australia;
 - 4.2 because of this, if the entry into force of this oversight mechanism is postponed there will therefore be a very long delay before the Subcommittee reviews Australia. This is inconsistent with Australia's national interest as outlined at paragraphs 2.1 to 2.3 above;
 - 4.3 the underlying policy of OPCAT, as this is reflected in Articles 11 and 12 in particular is to assist State Parties in the establishment and strengthening of NPMs. OPCAT anticipates an interactive capacity building approach to the designation and development of NPMs. Full OPCAT compliance prior to ratification is therefore unnecessary and inconsistent with the underlying policy of the treaty;
 - 4.4 it is also undesirable because it will potentially result in a situation where Australia has designated and developed its NPMs in isolation from the Subcommittee. This could potentially result in Australia designating and developing NPMs which are not considered by the Subcommittee to be OPCAT compliant;
 - 4.5 additionally, the terms of Article 17 of OPCAT provide that Australia does not need to have designated its NPMs on ratification of OPCAT but has 1 year to do so from ratification; and
 - 4.6 in our view, it is not possible or appropriate to attempt to conclusively anticipate in advance of ratification or activation of the oversight of the Subcommittee or NPMs the scope of work necessary for Australia to become fully OPCAT compliant. Some flexibility ought to be maintained to accommodate issues and priorities that emerge in with implementation experience. This is particularly important in the disability services sector

which to date, in our submission, has been under-considered in terms of OPCAT's applicability (see further following).

5. ADCL therefore calls on JSCOT to recommend to the Australian Parliament that it not postpone the implementation of any of the OPCAT obligations.

OPCAT and persons with disability

6. Australia's ratification of OPCAT has particular significance for the protection of the human rights of persons with disability in Australia. This is because persons with disability are disproportionately deprived of their liberty in a wide variety of settings. These settings include:
 - 6.1 adult and juvenile criminal justice facilities - in every jurisdiction in Australia persons with disability (including those with psycho-social impairments) are over-represented among detainees;
 - 6.2 mental health facilities where persons with psycho-social impairments are detained on an involuntary basis;
 - 6.3 residential facilities accommodating persons with disability on an involuntary basis (such as secure treatment facilities; persons residing in a particular facility subject to the terms of a 'coercive' guardianship order); and
 - 6.4 residential facilities accommodating persons with disability, in circumstances where residents are compelled or obliged to remain because of the need for support services and the absence of any alternative.
7. In this respect we draw to JSCOT's attention the Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment's to the Sixty-third session of the United Nations General Assembly¹.
8. The Special Rapporteur reported that persons with disability in detention "are frequently subjected to unspeakable indignities, neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence".²

¹ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 63rd session of the United Nations General Assembly A/63/175 p 8

² Ibid p 9

9. In addition, he notes particular vulnerabilities of persons with disability in detention and otherwise to irreversible medical treatment without their consent, such as abortion, sterilisation, electro-convulsive therapy and the administration of mind altering medication.³
10. We also draw to JSCOT's attention the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**) which in a number of Articles places major emphasis on the effective protection of persons with disability from torture and cruel, inhuman and degrading treatment. These include Article 14 – Liberty and security of the person, Article 15 – Freedom from torture or cruel, inhuman or degrading treatment or punishment, Article 16 – Freedom from exploitation, violence and abuse and Article 17 – Protecting the integrity of the person.
11. Australia has ratified the CRPD and Australia's obligations under that treaty are relevant to ensuring that OPCAT is implemented in Australia in a manner that ensures that persons with disability are protected from torture and from cruel, inhuman and degrading treatment and punishment on an equal basis with others.
12. We are authorised to advise that People with Disability Australia endorses this submission. People with Disability Australia is a national peak cross-disability human rights organisation of and for people with disability.

Please contact me at fgiven@disabilitylaw.org.au if you would like to discuss this submission further.

Yours sincerely

FIONA GIVEN
Policy Officer

³ Ibid p 9