



**Supplementary submission by the  
Commonwealth and ACT  
Ombudsman**

**OPTIONAL PROTOCOL TO THE  
CONVENTION AGAINST TORTURE  
AND OTHER CRUEL, INHUMAN OR  
DEGRADING TREATMENT OR  
PUNISHMENT (OPCAT)**

**NATIONAL INTEREST ANALYSIS**

Submission by the A/g Commonwealth Ombudsman, Ms Alison Larkins

**11 April 2012**

## INTRODUCTION

The Commonwealth and ACT Ombudsman was a signatory to the joint submission of Commonwealth, State and Territory Ombudsmen regarding the National Interest Analysis provided to the Joint Standing Committee on Treaties on 30 March 2012. This supplementary submission addresses issues particular to the Commonwealth and ACT Ombudsman jurisdictions.

## BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

In respect of the monitoring of places of detention under the Commonwealth and ACT jurisdictions, the Commonwealth Ombudsman has certain specialist roles: Immigration Ombudsman, Defence Force Ombudsman, and Law Enforcement Ombudsman. The Commonwealth Ombudsman is also the ACT Ombudsman in accordance with s.28 of the *ACT Self-Government (Consequential Provisions) Act 1988 (Cth)*.

## RESPONSE TO TERMS OF REFERENCE

The Commonwealth and ACT Ombudsman (the Ombudsman):

- supports the ratification and implementation of OPCAT;
- notes that the Ombudsman has a legislated and well-developed inspection role in relation to immigration places of detention that could be enhanced to meet OPCAT requirements;
- notes that the Ombudsman would be able to inspect places of detention by the Australian Federal Police under its existing investigation powers but does not have a specific inspection function;
- notes that while the Commonwealth and Defence Force Ombudsman may have powers to inspect ADF places of detention this is not certain and that at present another authority undertakes such inspections;
- notes that the ACT Ombudsman has an inspection role and powers in respect of ACT adult places of detention, as do other ACT authorities; and

- recommends that if the Commonwealth Ombudsman is to be a National Preventative Mechanism in respect of places of detention apart from immigration detention centres that specific legislative authority for such inspections be given.

Expanding the Ombudsman's current inspections and monitoring functions at the Commonwealth level to undertake a further, resourced role in conducting regular preventive monitoring of places of detention under Commonwealth jurisdiction would represent an efficient and effective outcome for government.

## RELEVANT OMBUDSMAN FUNCTIONS

### Immigration Ombudsman

The Ombudsman is designated as the Immigration Ombudsman and currently performs an inspection role in relation to places of immigration detention. In this role, the Ombudsman conducts inspections of all immigration detention facilities, including immigration detention centres, immigration transit accommodation, immigration residential housing and specified alternative places of detention, including at Christmas Island. In providing this function the office not only oversees the Department of Immigration and Citizenship (DIAC) but also contracted service providers who in essence administer immigration detention facilities.<sup>1</sup>

The Ombudsman is currently undertaking a joint project with the Australian Human Rights Commission (AHRC) and the Attorney General's Department to develop National Immigration Detention Standards that can be used by oversight authorities in anticipation of the OPCAT protocols being adopted. In the event the protocols are not adopted these standards will continue to provide the baseline against which this office will develop comprehensive guidelines for assessment of both physical detention facilities, the administrative processes and procedures that govern the facilities, and the processing of persons detained therein.

This office provides holistic and integrated oversight of the functioning of immigration detention facilities and processes including oversight of DIAC and all contracted service providers through:

- the Ombudsman's statutory review and reporting on those persons who have been detained for two or more years and the non-statutory oversight of persons detained for periods in excess of six months;
- program of regular inspections across the detention network (at this stage a minimum of two per annum per location);
- the exercise of the statutory powers of this office to undertake own motion inquiries and investigations (such as the present investigation into suicide and self-harm within the immigration detention network); and
- our management and investigation of complaints received from or on behalf of immigration detainees.

This office has statutory powers to enter into and access detention facilities, require persons to produce documents and information relevant to our oversight role, and to inquire into processes and procedures within the detention environment. In addition to our statutory powers we regularly enter into both formal and informal dialogue with the relevant agencies and their contractors to provide feedback on specific issues of concern.

The Immigration Ombudsman also monitors compliance and removal activity by the DIAC. In this role, the Ombudsman assesses the effectiveness of DIAC's policies

---

<sup>1</sup> Serco Pty Ltd and International Health and Medical Services

and procedures governing the location, identification, detention and removal from Australia of unlawful non-citizens.

## **Other Commonwealth places of detention – potentially subject to Ombudsman inspection**

### ***Australian Federal Police***

The Commonwealth Ombudsman has oversight responsibility for the AFP, whether in its performance of functions in the ACT, elsewhere in Australia or overseas. There is no specific legislative capacity for the Commonwealth Ombudsman to inspect AFP places of detention. If the Ombudsman needed to inspect such a place, at present they would have to rely on the powers that arise from the conduct of an investigation – either in respect of a complaint or on their own motion. Under s 9 of the *Ombudsman Act 1976*, the Ombudsman has the power to compel the provision of information or documents or other records ‘relevant to an investigation’. The Ombudsman may also, ‘for the purposes of an investigation’, enter a place occupied by a Department, prescribed authority or a Commonwealth service provider (if the place is occupied primarily for the purposes of their contract with the Commonwealth).

### ***Australian Defence Force***

The Inspector-General of the Australian Defence Force (the IGADF) currently undertakes reviews/internal audits of ADF correctional establishments. The IGADF is appointed by the Minister under the *Defence Act 1903*. The staff of the IGADF are members of the ADF made available by the appropriate service chief or employees of the Defence Department. The Ombudsman has made no assessment of whether the IGADF is sufficiently independent for the purpose of inspecting places of detention under the OPCAT.

The Commonwealth Ombudsman is also the Defence Force Ombudsman (DFO) and as such has a special jurisdiction in respect of matters of administration related to the service of a member of the ADF. However, that jurisdiction does not extend to action taken in connection with ‘proceedings’ against a member of the ADF for an offence relating to defence force discipline. It is unknown if this restriction on jurisdiction would extend to matters concerning the conduct of places of detention for those convicted of military offences. Even if it did not, as noted above, the Ombudsman could only conduct any inspection of such places for the purposes of the investigation of a complaint or an own motion investigation.

## **ACT jurisdiction**

There are a number of oversight bodies within the ACT that have some authority with respect to various aspects of the operations of closed environments within the Territory. These include:

- the ACT Ombudsman
- the ACT Human Rights Commission (including the Human Rights and Discrimination Commissioner, the Health Services Commissioner, and the Children and Young People Commissioner)
- the ACT Auditor-General
- the Commissioner for Public Administration
- the Public Advocate of the ACT.

Each of these oversight bodies has its own scope of responsibilities (as defined in the relevant enabling legislation) which are, by and large, non-overlapping. Each body operates independently although each may, from time to time, liaise with

another or refer matters to ensure the most relevant agency is dealing with the issues of concern raised in a complaint or investigation.

The effect of this is that juvenile detention centres and places of detention for mental health purposes are within the jurisdiction of the Children and Young People Commissioner and the Health Services Commissioner, respectively.

### ***ACT Police Watch House and holding cells***

Watch houses and holding cells are managed by ACT Policing which is a unit of the AFP. As noted above, where the AFP is in charge of a place of detention in the ACT, the Commonwealth Ombudsman would be able to enter that place for the purposes of an investigation of a complaint or an own motion investigation.

### ***Adult places of detention***

Adult places of detention in the ACT are adult prisons, the periodic detention centre and court cells which all operate under the *Corrections Management Act 2007*. That Act allows for inspections to be conducted by a judge, a magistrate, a member of the Legislative Assembly, the human rights commissioner, or the ombudsman. The Act also allows for the appointment and functions of official visitors. Official visitors are also permitted to inspect correctional centres and places where detainees are directed to participate in an activity. Additionally, it is mandatory for an official visitor to report to the Minister if they believe the detention of a detainee is not in accordance with the any aspect of the Act.

Official visitors are appointed by and report to the Minister. The Ombudsman has made no assessment of whether they are sufficiently independent for the purpose of inspecting places of detention under the OPCAT. On 28 March 2012 ACT Greens MLA Amanda Bresnan tabled the *Official Visitors Bill 2012* in the ACT Legislative Assembly. One key feature of this bill is to transfer all official visitors appointed under various ACT enactments to the authority of the Public Advocate. If enacted, this would remove the official visitors appointed under the CMA from the direction of the Minister.

Presently there are no formal arrangements in place for conducting regular programs of inspections. The ACT Ombudsman is in the early stages of developing a regular inspection program which it is hoped will be implemented in the medium term. Until then, the ACT Ombudsman's office (and the ACT Human Rights Commission) will continue to receive complaints from detainees (and/or their advocates) and deal with them on a case by case basis. The ACT Ombudsman also has the authority to investigate a matter of administration concerning these places of detention under their own motion.

On 7 November 2011 the Minister announced that the ACT Government was

'... exploring options to utilise a prison inspectorate service. There is a prison inspectorate in Western Australia, an inspector-general of prisons, who is an independent statutory officer, the only one of its type in Australia. The government has been in discussions with our Western Australian counterparts about the possibility of engaging on a fee-for-service basis their inspector-general of prisons to inspect the operation of our prison in an independent manner. That is something which has become somewhat protracted, mostly because Western Australia would need to undertake legislative change to permit their inspector-general to provide services on a fee-for- service basis.'<sup>2 3</sup>

The Ombudsman is not aware of the government's progress of this option to date.

---

<sup>2</sup> <http://www.hansard.act.gov.au/hansard/2009/comms/justice29.pdf>

<sup>3</sup> <http://www.canberratimes.com.au/opinion/editorial/good-news-week-for-jail-system-20111113-1v1f8.html>