

Our reference: ADM/6689

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

Dear Secretary

Joint Standing Committee on Treaties – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Attached is a submission from this office regarding the Joint Standing Committee on Treaties consideration of the National Interest Analysis for the ratification and implementation on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

I would be pleased to clarify anything in the submission or provide any further information the Committee may require. Any such requests can be facilitated by our Manager of Custodial Services, Jennifer Agius on (02) 9286 1067 or jagius@ombo.nsw.gov.au.

Yours faithfully

Bruce Barbour
Ombudsman

30 March 2012

Joint Standing Committee on Treaties: Consideration of the National Interest Analysis

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Submission from NSW Ombudsman March 2012

Background

Australia signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Optional Protocol”) in 2009 however it has yet to be ratified or implemented.

An important component of the decision to ratify and implement the Optional Protocol is the method by which Australia will designate the National Preventive Mechanism required to undertake the inspections of all relevant places of detention. Australia’s federal system of government requires consultation and consideration of the views and rights of all states and territories. To this end a National Interest Analysis (NIA) has been completed and referred to the Australian Parliament’s Joint Standing Committee on Treaties (JSCOT).

JSCOT is now seeking submissions to assist consideration of the NIA report and to progress the ratification and implementation of the Optional Protocol.

The Optional Protocol requires an ongoing regime of inspections to a wide range of facilities and services where people are detained. Such places of detention are administered by various agencies of commonwealth, state or territory governments in Australia. In many jurisdictions inspecting or complaint handling agencies already exist which visit those facilities.

National Interest Analysis

The substance of the NIA Summary (available on the JSCOT website) is that while there has previously been reluctance to ratify and implement the Optional Protocol (JSCOT Report 58, 2004) the experience in those comparable countries where it has been ratified since coming into force generally has been positive:

“Experience to date indicates that the Optional Protocol is an effective mechanism, including in jurisdictions that already enjoyed preventive monitoring through pre-existing oversight bodies.”

The NIA also identifies the decisions which must be made as to the most appropriate way for Australia to establish National Preventive Mechanisms to achieve compliance with the requirements of the Optional Protocol. In particular it canvasses the likelihood that the Australian federal system will require the use of a 'mixed model' in which a range of agencies are designated to achieve a comprehensive and co-ordinated system of inspection and reporting.

Of relevance to the NSW Ombudsman the NIA Summary outlines the availability of current inspection and complaint handling agencies to achieve the wide ranging coverage required under the Optional Protocol.

NSW Ombudsman submission

The NSW Ombudsman submits this office could be designated as an agency to form the National Preventive Mechanism with appropriate legislative underpinning and resourcing.

In particular the NSW Ombudsman already carries out visits or inspections to prisons, juvenile detention centres and disability services, as well as providing complaint handling to the NSW Forensic Hospital. We have oversight of the NSW Police Force and can readily visit police facilities.

The Official Community Visitor (OCV) scheme for NSW is co-ordinated within this office. The Official Community Visitors attend 'visitable services', being government and non-government residential services operated, funded or licensed to provide accommodation and care by Ageing, Disability and Home Care or Community Services in NSW. Visitable services provide care for:

- Children and young people in out-of-home care
- Adults, children and young people with disability living in supported accommodation
- Adults with disability living in licensed boarding houses.

An important aspect of the OCV role is to identify issues about the quality of care at the services, to provide feedback to the services and follow up these issues, including providing advice to the Minister or the Ombudsman about issues or concerns. As at 30 June 2011 there were 1,477 visitable services in NSW accommodating 7,949 residents.

The NSW Ombudsman has an established tradition of independence and existing credibility and respect to draw on. In NSW establishing a new entity to take on the role of a NPM would have none of these advantages and would run the risk of resistance from agencies to an additional oversight body. In times of economic restraint in the NSW public sector the risk of resistance from agencies being inspected is strong as having

multiple bodies visiting the agencies for similar purposes is costly to them in terms of their resources. It is also an additional burden on those accommodated by the agencies if such visits/inspections interfere with routines or access to programs etc.

Effective coordination and communication between the state and Commonwealth entities charged with responsibilities under the Optional Protocol will be crucial. Ombudsmans' offices across all states, territories and the commonwealth already have established communication and liaison networks.

From our research in this area, which has included consideration of the Optional Protocol, a number of publications by the Association for the Prevention of Torture and contact with our colleagues in the New Zealand Ombudsman's Office which is already a designated NPM, we are aware of the breadth of places of detention required to be inspected, and in Australia could include:

- correctional centres*
- juvenile justice facilities*
- psychiatric institutions.
- police lock ups and police stations*
- immigration detention centres
- court cells and holding facilities*
- aged care facilities
- secure facilities for people with disabilities*
- holding facilities at airports
- military holding facilities
- vehicles for transporting those in detention
- national intelligence service detention facilities including facilities for counterterrorism holding facilities.

This office already run regular visit programs, or co-ordinates such programs, to those types of facilities marked with an asterisk in the above list.

For the reasons set out in this submission, we consider this office is the only existing agency in NSW which is appropriately equipped to take on the role of an NPM agency. We acknowledge the magnitude of the task posed by Optional Protocol - staff we have spoken to in New Zealand were frank about the challenges posed by the breadth of facilities to be inspected and the extensive nature of the inspection process itself.

By way of illustration, *The Guide – establishment and designation of National Prevention Mechanisms* produced by the Association for the Prevention of Torture provides for the following in relation to in-depth visits to prisons:

- less than 50 detainees: one day
- 50-99 detainees: at least two days
- 100-299 detainees: at least three days
- more than 300: four days

In NSW adult correctional centres alone this would require inspections as follows:

Less than 50 detainees	3 correctional centres
50 – 99 detainees	6 correctional centres
100 – 299 detainees	12 correctional centres
More than 300 detainees	12 correctional centres

The Guide proposes a mix of announced and unannounced visits to all places of detention, some in-depth and some ad hoc, in a schedule that means an in-depth visit is made to every official place of detention at least once every five years. It recommends a visiting team of a minimum of three people for an in-depth visit, some of whom have subject matter expertise in the type of facility being inspected.

Clearly the size of NSW means travel costs would be a significant item in addition to the more obvious staffing, education and training costs associated with such an extensive new regime. It is apparent any agency designated an NPM role will require significant resource enhancement. This, however, would still be considerably more cost effective than establishment of equivalent specialist agencies to only fulfil the NPM role within the same jurisdiction and would therefore still have a positive cost/benefit outcome.

As noted in the NIA Summary “Attachment on Consultation”, legislative change would be necessary in NSW to provide the Ombudsman as an NPM with the right of entry to all places of detention at any time. While the *Ombudsman Act 1974* provides for a right of entry, this is limited to circumstances in which this office is conducting a formal investigation or as an agreement/understanding with the organisation concerned. The Optional Protocol contemplates entry to any place of detention at any time. Statutory provision would also need to be made for information sharing with any Commonwealth coordinating body, and between this office and all agencies within the scope of the Optional Protocol in NSW. Legislation would also need to make clear the obligations and responsibilities of agencies whose facilities are identified as being within the scope of Optional Protocol.

The NSW Ombudsman supports the overall considerations set out in the National Interest Analysis of the Optional Protocol for the Australian government to proceed to ratification and implementation. Furthermore, the NSW Ombudsman submits that with proper legislation and resource considerations this office provides government with a viable existing structure to be designated as a National Preventive Mechanism.