National Interest Analysis [2012] ATNIA 6

with attachment on consultation

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

done at New York on 18 December 2002

[2009] ATNIF 10

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002
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Nature and timing of proposed treaty action

1. It is proposed that Australia ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('the Optional Protocol'). Australia signed the Optional Protocol on 19 May 2009. The Optional Protocol can be ratified by any State that has ratified or acceded to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, done at New York on 10 December 1984 ([1989] ATS 21, 'the Convention'). Australia is a Party to the Convention, which entered into force generally on 26 June 1987 and for Australia on 7 September 1989.

2. The United Nations General Assembly adopted the Optional Protocol on 18 December 2002, and it entered into force generally on 22 June 2006. In accordance with its Article 28, the Optional Protocol will enter into force for Australia on the 30th day after it deposits its instrument of ratification. If Australia ratifies the Optional Protocol, it is proposed that Australia lodge a declaration postponing the obligations relating to implementation of a national preventive mechanism for three years, as provided for under Article 24 (paragraph 22 refers).

Overview and national interest summary

3. The Optional Protocol provides for a system of regular visits to places of detention by a national body or bodies to be designated by the State Party (the 'national preventive mechanism') and also by the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Subcommittee').

4. In providing for such visits, the Optional Protocol aims to strengthen the protection of persons deprived of their liberty against acts of torture and other cruel, inhuman or degrading treatment or punishment. It provides for a mechanism to better ensure that detaining authorities are accountable for conditions in places of detention and for greater international transparency. The model of activity provided for under the Optional Protocol is for dialogue and review between the detaining authority and the visiting body to encourage States to improve conditions where necessary.

5. Australian law already strongly prohibits the use of torture in all its forms. The proposed treaty action recognises the importance of supporting and strengthening the measures already in place in Australia. It will further underline our commitment to the values and protections of the Convention and support our efforts to ensure that other countries meet the same standard. Undertaking monitoring of places of detention in accordance with the Optional Protocol will achieve a more national and comprehensive approach with a greater ability to identify gaps and issues particular to individual Australian jurisdictions, or commonly experienced by all.

6. On 8 June 2011, the Australian Government accepted six recommendations arising from the United Nations Human Rights Council's Universal Periodic Review urging Australia to ratify the Optional Protocol. The Australian Government informed the Council that it was working with States and Territories to take the necessary steps towards ratifying the Optional Protocol (Report of the Working Group on the Universal Periodic Review - Australia A/HRC/17/10/Add.1).

Reasons for Australia to take the proposed treaty action

7. Ratification and implementation of the Optional Protocol will improve outcomes in the detention of people in Australia by providing a more integrated and internationally recognised mechanism for oversight. It will provide an opportunity for organisations involved in detention management and oversight to share information, guidelines, practices and problem solving measures with regard to the conditions and treatment of people in detention.

8. The Optional Protocol was previously referred to the Joint Standing Committee on Treaties (JSCOT) by the Senate in 2003 for inquiry and report. The JSCOT Report (JSCOT Report 58, tabled on 24 March 2004) contained a majority recommendation against signature or ratification of the Optional Protocol. The main concern of the majority report was that mandating Subcommittee visits to a jurisdiction such as Australia, in the absence of compelling reasons, was not an appropriate use of the United Nations' resources.

9. In general, there were, and are, in Australia many mechanisms in place for oversight and inspection of places of detention which might be expected to detect and to already address the practices of concern under the Optional Protocol. Analysis since 2004 has shown, however, that there are varying levels of oversight both between different types of detention, and between jurisdictions. There are also some gaps in monitoring – the key area of significance being detention in police detention facilities – which could be addressed by implementing the Optional Protocol.

10. The previous JSCOT consideration was also undertaken before the Optional Protocol had come into force generally. The Optional Protocol has now been in force for over five years and has more than 60 States Parties. A further 22 countries are signatories. States Parties include the United Kingdom, Spain, France, Germany and Brazil. In the Asia-Pacific region, New Zealand, Peru, Mexico, Chile and Cambodia are States Parties. 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 New Zealand Human Rights Commission noted in its 2010 annual report that the Optional Protocol had been valuable in 'identifying issues and situations that are otherwise overlooked, and in providing authoritative assessments of whether new developments and specific initiatives will meet the international standards for safe and humane detention'. The first Annual Report of the United Kingdom National Preventive Mechanism (for 2009-2010), released in 2011, described increased cooperation and coordination among the existing oversight bodies that form their mechanism, including identifying areas of duplication, and setting out the possibilities for cooperative reviews.

11. Implementation of the Optional Protocol should minimise instances giving rise to concerns about the treatment and welfare of people detained in prisons and other places of detention in Australia. In addition to the human rights benefits, monitoring pursuant to the Optional Protocol has the potential to minimise the costs of addressing such instances, including avoiding some costs of litigation and compensation payments.

Obligations

12. Each State Party must allow both the Subcommittee and the national preventive mechanism (described in detail below) to make visits '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 consent or acquiescence' (Article 4(1)). Specific examples of places of detention are not provided in the Optional Protocol. The definition is deliberately generic and broad, consistent with its purpose. The practice of the Subcommittee indicates that its inspections usually focus on traditional places of detention such as prisons, police stations and immigration detention, rather than places where smaller numbers of individuals may occasionally be detained (such as airport facilities).

United Nations Subcommittee

13. Article 2 of the Optional Protocol provides for the establishment of a Subcommittee to the Convention's Committee against Torture. The Subcommittee membership comprises 25 independent and impartial experts who are nationals of States Parties, serving in their individual capacities. In the election of members due consideration is to be given to an equitable geographic distribution and to the representation of different forms of civilisation and legal systems of the States Parties and no two members of the Subcommittee may be nationals of the same State (Article 5). The main functions of the Subcommittee, as described in Article 11, are:

- to visit places of detention and make recommendations to States Parties regarding the protection of persons deprived of their liberty against torture and other forms of ill-treatment; and
- to advise and assist States Parties in the establishment, maintenance and strengthening of their national preventive mechanisms, including through the provision of technical assistance and training and by making recommendations to States Parties regarding the capacity and mandate of the mechanism.

14. The Subcommittee currently has a programme for visits to State Parties, pursuant to Article 13. These currently take place approximately once every five years. Visits are to be conducted by at least two members of the Subcommittee who may be accompanied by experts (Article 13(3)). The regularity of visits will ultimately depend on the number of States Parties to the Optional Protocol and the resources of the Subcommittee.

15. To enable the Subcommittee to fulfil its mandate, Articles 12 and 14 of the Optional Protocol require that States Parties guarantee to the Subcommittee unrestricted access to places of detention; access to all relevant information, including on conditions of detention; and the opportunity to conduct private interviews with detainees and other relevant persons (e.g. medical personnel). States Parties may only object to the Subcommittee visiting a place of detention if urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder warrant the temporary delay of the visit (Article 14(2)).

16. The Subcommittee states that in undertaking its functions "[it] is guided by core principles: confidentiality, impartiality, non-selectivity, universality and objectivity" and that the Optional Protocol is based on "co-operation between the SPT [Subcommittee on the Prevention of Torture] and the States Parties".

17. States Parties are obliged to examine the recommendations of the Subcommittee and enter into dialogue with it on possible implementation measures (Article 12). Consistent with this cooperative spirit, reports of the Committee are generally confidential unless the State Party requests publication or the State Party itself makes part of the report public. In addition, if the State Party has refused to cooperate with the Sub-Committee, the Committee Against Torture may, following consultation with the State Party, decide to make a public statement or to publish the Subcommittee's report (Article 16).

National preventive mechanism

18. Article 3 requires States Parties to establish, maintain or designate one or several independent visiting bodies as the national preventive mechanism. The national preventive mechanism may consist of decentralised units as long as each is in conformity with the requirements of the Optional Protocol (Article 17).

19. States Parties must guarantee the functional independence of the national preventive mechanism and the independence of its personnel and make available the necessary resources for the performance of its functions (Article 18). States Parties must grant the national preventive mechanism, at a minimum, the power to regularly examine the treatment of persons deprived of their

liberty in places of detention; make recommendations to relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty and to prevent torture and other ill-treatment; and the power to submit proposals and observations concerning existing or draft legislation (Article 19).

20. Article 20 requires States Parties to grant the following to the national preventive mechanism to enable it to carry out its mandate: information concerning the numbers of detainees and the location of their places of detention; a right of access to places of detention and to information concerning the treatment of detainees and their conditions of detention; the opportunity to conduct private interviews with detainees; the liberty of choosing where it will visit and whom it will interview; and a right to contact and meet with the Subcommittee.

21. The Optional Protocol requires that relevant Government authorities examine the reports and recommendations of the national preventive mechanism, enter into dialogue with the national preventive mechanism on the implementation of its recommendations and publish and disseminate the annual report of its national preventive mechanism (Articles 22 and 23).

22. Article 17 provides that the national preventive mechanism is to be established within one year of the entry into force of the Optional Protocol, or of ratification or accession. However, Article 24 provides that States Parties may make a declaration upon ratification, postponing the implementation of their obligations with respect to either the Subcommittee or the national preventive mechanism, but not both. This postponement is valid for up to three years and, with the consent of the Committee Against Torture, may be extended for a further two years.

Protections, Confidentiality, Privileges and Immunities

23. To protect the free flow of information to the Subcommittee and the national preventive mechanism, the Optional Protocol provides that there is to be no sanction or prejudice exercised against any person or organisation for communicating any information to the Subcommittee or national preventive mechanism (Articles 15 and 21). All confidential information collected by a national preventive mechanism is privileged (Article 21). Personal data may not be published by the Sub-Committee or the national preventative mechanism without the express consent of the individual concerned (Articles 16(2) and 21).

24. The members of the Subcommittee and of the national preventive mechanism must be allowed such privileges and immunities as are necessary for the independent exercise of their functions (Article 35). For the Subcommittee, the privileges and immunities are those specified in section 22 of the *Convention on the Privileges and Immunities of the United Nations*, done at New York on 13 February 1946 ([1949] ATS 3).

Implementation

25. It is intended that necessary legislative or administrative arrangements to provide for Subcommittee visits will precede ratification. It is proposed that a declaration would be made on ratification pursuant to Article 24, that Australia's obligations under the Optional Protocol in relation to the national preventive mechanism would be delayed by three years.

26. This approach has been adopted by countries such as the United Kingdom and Germany. It provides a clear and reasonable timeframe for managing any necessary administrative and legislative changes to effectively implement the Optional Protocol.

27. Australia's inspection systems, while substantial, do not fully meet the Optional Protocol requirements. It is anticipated that implementation will involve designating a range of existing inspection regimes at the jurisdictional level, utilising a cooperative approach between the Commonwealth and the States and Territories.

28. A working group of officials from all jurisdictions, reporting to the Standing Committee on Law and Justice, has been formed to carry forward implementation arrangements.

Obligations relating to the Subcommittee

29. Existing legislation is sufficient to provide for the required privileges and immunities of Subcommittee members performing their duties in Australia. The *Convention on the Privileges and Immunities of the United Nations* is given effect in Australia by the *International Organisation (Privileges and Immunities) Act 1963* and the *United Nations (Privileges and Immunities) Regulations 1986*. However, some changes to Commonwealth, State and Territory laws and policies will be required to clearly enable the Subcommittee to carry out its functions in the context of other statutory, and common law duties and responsibilities and contractual arrangements, for example, in regard to privacy and security.

Obligations relating to the national preventive mechanism

30. As noted, having consulted with the States and Territories, it is anticipated that at least some existing monitoring and complaints bodies will be designated to form the national preventive mechanism. At present within Australia, existing bodies carry out visits or inspections to most major categories of detention, including prisons, juvenile detention centres, mental health facilities and immigration detention centres. Reliance on these existing bodies to fulfil national preventive mechanism obligations would be possible provided that the necessary and, in many cases, relatively minor changes are made to the structure, mandate or powers of these bodies in order to comply with the Optional Protocol obligations.

31. The particular bodies and agencies that would form the national preventive mechanism, and the arrangements between these for the purposes of the Optional Protocol, have not been settled. Some gaps in coverage exist, particularly relating to police cells and detainee transfer vehicles, and more may be identified on further review. These gaps might be removed by expanding the mandate of an existing independent body or establishing a new independent body to specifically carry out the national preventive mechanism functions with respect to these places of detention. For instance, in the UK, Her Majesty's Inspectorate of Constabulary and Her Majesty's Inspectorate of Prisoners had their powers extended to cover police stations across the UK. These and other implementation details are expected to be managed cooperatively. Time will, however, be needed to make and implement across each jurisdiction the necessary decisions and arrangements for the national preventive mechanism including to prepare and pass relevant legislative amendments, undertake training and to agree upon and institute effective liaison and cooperation arrangements.

Costs

32. The United Nations is responsible for the Subcommittee's expenditure (Article 25). A special fund has been set up by the United Nations, financed by voluntary contributions of governments, non-government organisations and other public or private entities (Article 26). It is not presently proposed that Australia make a contribution to this fund.

33. There should be minimal costs for Australia associated with facilitating visits by the Subcommittee to places of detention. The Subcommittee considers that State Parties should be visited once every four to five years on average. Based on the visits to State Parties to date, Subcommittee visits last between one and two weeks and target a small selection of places of detention (for example, the country visit to Sweden focused on one police detention facility, four police stations, and three prisons during a five day visit).

34. Costs for Australia in establishing and administering its national preventive mechanism should be ongoing and relatively stable. A preliminary assessment undertaken for the Attorney-General's Department confirmed that the cost of operating an Optional Protocol national preventive

mechanism would be the lowest if reliance were placed on use of existing bodies to undertake this role. Individual jurisdictions should bear their own costs because of their responsibility for the welfare of the relevant detainee populations. As significant changes are not expected to be necessary, the costs are expected to be modest. Further consultation with States and Territories on costs will be conducted.

35. Jurisdictions stand to benefit from improved risk management and flow on effects from regular monitoring of their places of detention. Jurisdictions such as New Zealand have stated that preventing ill-treatment of detainees contributes to a costs saving in the use of the legal and health care systems arising from incidents of ill-treatment.

Regulation impact statement

36. The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required.

Future treaty action

37. Article 34 provides that any State Party may propose an amendment to the Optional Protocol, with the support of one-third of States Parties. Amendments come into force upon acceptance by a two-thirds majority of States Parties and are binding only on those States Parties that have accepted them.

Withdrawal or denunciation

38. Article 33 provides that a State Party may denounce the Optional Protocol at any time by written notification to the Depositary. Denunciation takes effect one year after receipt of notification. Following denunciation a State Party will not be released from obligations under the Optional Protocol regarding any act that may have happened prior to the denunciation taking effect, nor shall denunciation affect the continued consideration of any matter under consideration by the Subcommittee prior to the denunciation taking effect.

Contact details

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ATTACHMENT ON CONSULTATION

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CONSULTATION

States and Territories

39. This proposed treaty action will have an impact on the States and Territories. In 2008, the then Attorney-General started consulting with State and Territory counterparts and other relevant State and Territory Ministers. Consultations also took place through the Commonwealth-State Standing Committee on Treaties (SCOT). During June and August 2008, the Attorney-General's Department wrote to relevant State and Territory departments and agencies and non-government organisations explaining the consultation process and inviting them to participate.

40. The purpose of the consultation was to determine the extent to which State and Territory laws, policies, programs and services complied with the obligations in the Optional Protocol, and to identify any areas that would require additional laws, policies or programs. Responses to that consultation were received over the subsequent 12 months.

41. State and Territory responses indicated that amendments to legislation would be required to comply with the Subcommittee obligations due to legislative barriers that would prevent the Subcommittee from obtaining access to information concerning the treatment of persons in detention or obtaining unrestricted access to certain places of detention.

42. State and Territory submissions also indicated that existing laws and programs already substantially implemented the national preventive mechanism obligations. These included existing bodies or programs within their jurisdictions with statutory powers to visit places of detention, obtain information about persons in detention and to conduct interviews with persons in detention. In particular, the bodies or programs that were identified by States and Territories included:

- the Ombudsman in each jurisdiction
- Official Visitors and Community Visitors (adult and juvenile detention and mental health facilities)
- the WA Office of the Inspector of Custodial Services
- Public Advocates
- Children and Young People Commissioners, and
- the ACT Human Rights Commissioner.

43. Responses also indicated that while one or more of the existing bodies could fulfil the national preventive mechanism obligations, amendments to laws, regulations and policies would be required to ensure the mandate of existing bodies was consistent with the Optional Protocol requirements. In particular it was noted that the laws did not provide for access to all places of detention, and did not in all circumstances provide for regular inspection of places of detention, or reporting to detention authorities about the conditions and treatment of persons in detention as required by the Optional Protocol. For example, the New South Wales submission noted that the Ombudsman had a similar mandate to the national preventive mechanism, but that the Ombudsman did not have the power to enter and inspect all relevant places of detention.

44. On 19 July 2010, the former Attorney-General wrote to First Ministers to propose the creation of an officials' working group to facilitate closer collaboration between jurisdictions. All States and Territories agreed to participate in the working group and several meetings took place in 2010 and 2011. On 28 July 2011, the working group members met with members of the Subcommittee, including its Chair, to inquire into and gain a deeper understanding of the Subcommittee's processes and practices when visiting States Parties.

45. On 21 July 2011, the Standing Council on Law and Justice resolved that the Commonwealth Attorney-General would seek the agreement of counterparts from States and Territories to a timetable for ratification of the Optional Protocol. On 22 August 2011, the former Attorney-General wrote to States and Territories seeking in-principle agreement to ratify the Optional Protocol and agreement to a timeline for ratification. The timetable involved an aim for Australia to be in a position to ratify by the end of 2012 (recognising that this could not be guaranteed given that critical steps were under the control of jurisdictions' Parliaments). Further, the Attorney-General sought in-principle agreement to a 'mixed model' approach to the national preventative mechanism, whereby responsibility for inspections is shared between a number of bodies.

46. All jurisdictions have responded to the former Attorney-General's letter of 22 August 2011. As regards ratification all States and Territories, apart from Western Australia, responded positively to the Attorney's letter. Although indicating that it considered ratification of the Optional Protocol to be unnecessary given the existence of a satisfactory monitoring and inspection regime in its jurisdiction, Western Australia nevertheless agreed to cooperate on the passage of jurisdictional legislation to implement obligations in regard to the Subcommittee. Jurisdictions also supported, in principle, the 'mixed model' approach to the national preventive mechanism involving responsibility for monitoring visits being shared between a number of bodies at Commonwealth and State/Territory level and, subject to jurisdictional processes, expressed willingness to work towards ratification as soon as possible. Jurisdictions have expressed caution, opposition or concern in relation to them bearing the costs associated with the operation of their components of a national preventive mechanism. Queensland, New South Wales and Victoria have noted that costing estimates are yet to be agreed. As noted in paragraph 34, the Commonwealth considers the States and Territories should meet the cost of properly running their own facilities, and that the additional cost is expected to be modest.

47. As stated in paragraph 31, decisions on which body or bodies will fulfil the function of the national preventive mechanism will be made in the period following ratification. Under the 'mixed model', each jurisdiction will decide which body or bodies it will designate to form part of the national preventive mechanism.

Non-Government Organisations (NGOs) and the general public

48. The Government has received a number of communications from a range of organisations advocating that Australia ratify the Optional Protocol as soon as possible. For example, in January 2012 the Attorney-General received a letter written on behalf of 29 legal, human rights and prisoner advocacy bodies urging that Australia ratify the Optional Protocol as soon as possible. Bodies such as Amnesty International and the Law Council of Australia have stated their ongoing support for Australia's ratification.

49. The Attorney-General's Department consulted NGOs in writing on 22 May 2008. The consultation closed on 1 July 2008 but late submissions were accepted until 4 August 2008. A total of 19 submissions were received, all of which supported Australia becoming a party to the Optional Protocol. A majority of the submissions advanced reasons as to why it was in the national interest for Australia to become a party. Reasons included:

- to demonstrate the Australian Government's commitment to the prevention of torture and other ill-treatment and serve as a model for other countries in the Asia-Pacific and beyond;

- to enhance compliance with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- to enhance existing domestic monitoring mechanisms and ensure consistent and humane treatment of persons in detention in accordance with international human rights standards; and
- to promote regular and systematic analysis of conditions and treatment of persons in detention in order to prevent torture and other forms of ill-treatment.

50. A number of submissions received noted that existing bodies did not meet the Optional Protocol requirements and made suggestions on how Australia could implement the national preventive mechanism. Suggestions included:

- new or existing bodies could fulfil the role of national preventive mechanism but existing bodies would likely be more cost-effective;
- review existing federal and state-based mechanisms to ensure that their roles and functions comply with the Optional Protocol;
- develop the capacity of existing bodies to ensure each have appropriate resources, expertise and experience; and
- select a national body to ensure greater consistency of standards.