

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 2

Program 1.3

Question No. 153

Senator Wright asked the following question at the hearing on 16 October 2012:

Ratification and implementation of the Optional Protocol to the Convention Against Torture (OPCAT)

1. In February, the National Interest Analysis proposed that Australia ratify OPCAT, this proposal was reiterated in June by a recommendation of the Joint Standing Committee on Treaties. Can you please provide an update as to the timetable of Australia's ratification and implementation of OPCAT? Will OPCAT be ratified by the end of this year?
2. What is the total expected annual cost of ratifying OPCAT?
3. What are the expected savings from ratifying OPCAT? Please be specific in terms of expected short-term and long-term cost savings following ratification of OPCAT.
4. Will the Commonwealth government introduce legislation to ratify OPCAT?
5. If not, is it expected that OPCAT will be ratified at a State level?
6. Please provide an update on the progress of States and Territories ratification of OPCAT.
7. Please provide a concrete timeframe for the introduction of model legislation in each State and Territory.
8. Is this matter currently being considered by the Standing Council on Law and Justice?
9. If so, what is the Standing Council considering in relation to ratification and implementation of OPCAT?
10. What does the Commonwealth government propose to do if States and Territories haven't introduced enabling legislation within the set timeframe?
11. What current monitoring arrangements for places of detention exist at a Federal and State/Territory level?

The answer to the honourable senator's question is as follows:

1. The Australian Government is committed to ratifying the OPCAT as soon as possible, however this will not be possible in 2012. Australia's policy is that action to bring a treaty into force will not be taken until any necessary implementing legislation has been passed, either by the Commonwealth or by State and Territory Governments. In accordance with this policy, the

first step in the ratification process is to develop legislation that ensures the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'UN Subcommittee') can visit Australian places of detention under the conditions required by the OPCAT. The Australian Government has therefore been working with States and Territories to develop model legislation for introduction in all Australian parliaments.

At the October 2012 meeting of the Standing Council on Law and Justice, Ministers agreed that States and Territories will review the model legislation and have committed to advising the Commonwealth of their support, or otherwise, by the end of 2012.

2. Visits by the UN Subcommittee are funded by the Subcommittee. The National Preventive Mechanism will likely require some additional funding by Australian Governments. The precise cost of the National Preventive Mechanism is not known at this time because the details of the Mechanism have not been settled with States and Territories.
3. Savings deriving from OPCAT ratification are difficult to precisely quantify because OPCAT is based on preventive inspections. Determining future savings relies on estimations about events that may occur in the future. However, the experience of countries that have ratified the OPCAT indicates that Australia can expect to avoid costs through the early identification and management of issues that would otherwise be unnoticed and/or unmanaged. There are significant costs to governments resulting from allegations that the actions of departments, agents and employees involved in detention are cruel, inhuman or degrading – including compensation, inquests, court costs, Government legal representation expenses, bureaucratic staffing cost and legal aid for complainants. In addition, where such treatment occurs, there can be medical and related costs that might otherwise be avoided.

The New Zealand Human Rights Commission noted that the Optional Protocol has 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'¹.

The New Zealand Ombudsman, which serves as the National Preventive Mechanism in New Zealand, has provided information to the Attorney-General's Department specifying that they have detected more than 150 cases where documentation authorising detention of mental health detainees was absent and remedial action has been taken – potentially avoiding litigation and damages arising from unlawful imprisonment.

In Australia, although some inspection mechanisms exist in States and Territories, the adoption of a best-practice, nationally integrated system of inspection that can draw on the expertise of the UN Subcommittee, puts Australia in the best position to avoid the human and financial costs of cruel, inhuman or degrading treatment.

4. The Australian Government proposes to introduce legislation based on the model legislation being considered by the Standing Council on Law and Justice to provide for visits by the UN Subcommittee to places of detention within the Australian Government's jurisdiction and control.

¹ New Zealand Human Rights Commission, *Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT)* (2010) p 3. At http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/15-Dec-2010_11-21-36_HRC_MonitoringPlacesofDetention_2010.pdf

5. Answered as above.
6. As agreed at the recent Standing Council on Law and Justice, States and Territories will advise the Australian Government whether they support the model legislation, that provides for visits by the UN Subcommittee, by the end of 2012.
7. Introduction of the model legislation in State and Territory parliaments is a matter for States and Territories. The Australian Government has argued that this occur as soon as possible.
8. The Standing Council on Law and Justice considered the OPCAT at its meetings of April 2012 and October 2012.
9. In April 2012, Ministers agreed to continue to work towards ratification of the OPCAT and, in particular, to prioritise the preparation of jurisdictional legislation to provide for visits to Australia by the United Nations Subcommittee on the Prevention of Torture.
10. In October 2012, Ministers agreed that States and Territories will review the model legislation and have committed to advising the Commonwealth of their support, or otherwise, by the end of 2012.
11. Within Australia, existing bodies carry out inspections or visits to most major categories of detention at the Commonwealth, State and Territory level. The table below provides a description of many of the bodies that currently undertake monitoring or would mainly deal with complaints from detainees:

Federal	Commonwealth Ombudsman	The Commonwealth Ombudsman is an independent statutory body whose primary role is to investigate action relating to a matter of administration which they may do on their own motion or in response to a complaint. The Commonwealth Ombudsman has additional statutory functions in relation to certain persons held in immigration detention (triggered once a person has been in detention beyond a specified period). The Ombudsman's responsibilities include investigation of matters relating to detention (if any) by the Australian Federal Police and the Australian Crime Commission and examining any place of detention under their control. The Commonwealth Ombudsman is also the Defence Force Ombudsman. The Ombudsman investigates complaints about the Australian Defence Force (ADF) relating to or arising from present or past service.
	Australian Human Rights Commission	The Commission is an independent statutory body responsible for protecting and promoting human rights. The Commission carries out visits to Commonwealth detention facilities to monitor whether the conditions and treatment of detainees comply with Australia's human rights obligations. The Commission has statutory information gathering powers and the power to examine witnesses when conducting an inquiry under the <i>Australian Human Rights Commission Act 1986</i> (Cth).
	Inspector-General of Intelligence and Security	The IGIS is an independent statutory office holder who reviews the activities of the six intelligence agencies in the Australian Intelligence Community. The IGIS has a power to inspect any place where a person is being detained under the <i>Australian Security</i>

	(IGIS)	<i>Intelligence Organisation Act 1979</i> (Cth) (ASIO Act) and has the power to require a person to produce documents or give evidence. The ASIO Act also provides that the IGIS must be advised of the issue of a questioning warrant or a questioning and detention warrant and can be present at questioning or the taking into custody of a person
	Inspector-General of the Australian Defence Force	The Inspector-General of the Australian Defence Force (ADF) does not hold military rank although, for administrative purposes, the position is established at a senior level. The Inspector-General of the ADF reports directly to the Chief of the Defence Force and is independent of the normal ADF and Public Service chain of command and line management. The role of the Inspector-General of the ADF is twofold: to provide the Chief of the Defence Force with internal audit and review of the military justice system independent of the ordinary chain of command; to provide an avenue by which failures of the system, systemic or otherwise, may be examined and remedied as necessary. The Inspector-General considers complaints and may investigate on their own motion.
	Defence Visiting Officers	A Visiting Officer is a member of the ADF and is required to be appointed in respect of each area detention centre or corrective detention centre. Visiting Officers may interview detainees out of the hearing of corrections staff.
	Aged Care Standards Accreditation Agency	The Aged Care Standards Accreditation Agency (ACSAA) has powers to conduct visits to ensure compliance with the Aged Care Act 1997. ACSAA obtains entry to facilities and information by consent.
New South Wales	Police Integrity Commission (PIC)	The PIC is an independent statutory authority whose principal functions are to detect, investigate and prevent police corruption and other serious police misconduct in NSW. Under the <i>Police Integrity Commission Act 1996</i> (NSW), the PIC has statutory powers to enter onto premises occupied by a public authority, and to obtain documents and statements of information. This includes the power to investigate matters relating to police cells and police vehicles within NSW.
	The New South Wales Ombudsman	The NSW Ombudsman is functionally independent from State authorities and makes regular visits to prisons and juvenile detention centres in NSW.
	Official Visitor Schemes	Official visitor schemes conduct regular visits to prisons, juvenile detention centres and mental health facilities in NSW. These schemes provide visitors with varying legislative powers. For example, the <i>Mental Health Act 2007</i> (NSW) (NSW Mental Health Act) provides that official visitors to mental health facilities may make unannounced visits at any time. There is a requirement on the medical superintendent or administrator to answer questions about the facility or patients and produce documents and records relating to the treatment and care of the patients. All official visitors are appointed by the Minister for a fixed term. In NSW, visitors appointed to undertake visits to youth detention centres and mental health facilities are required to have some

		professional expertise or knowledge.
	Juvenile Justice Officers	Juvenile detention centres are inspected once every 12 months by a juvenile justice officer, appointed by the Director-General of the Department of Attorney-General and Justice. Officers must provide a report to the Director-General on a range of matters prescribed in the regulations following an inspection.
	Judges and Visiting Magistrates	The <i>Children (Detention Centres) Act 1987</i> (NSW) provides that any Judge of the Supreme Court or District Court, any Magistrate and any member of the Children's Court may visit a juvenile detention centre at any time. The <i>Crimes (Administration of Sentences) Act 1999</i> (NSW) (Administration of Sentences Act) provides that any Judge of the Supreme Court or District Court, and any Magistrate, may at any time visit and examine any correctional complex or correctional centre. In addition, the NSW Sentences Administration requires there to be a visiting magistrate for each correctional complex and correctional centre in NSW.
	NSW Audit Office	The Audit Office of NSW is a statutory authority that conducts independent financial and performance audits. As circumstances require, the Auditor-General may also prepare 'special reports', which seek to confirm that specific legislation, directions and regulations have been adhered to by government agencies.
Victoria	The Victorian Ombudsman	The Ombudsman is functionally independent from State authorities is primarily responsible for investigating any administrative action by a public authority. The Victorian Ombudsman conducts regular visits to youth detention centres. These visits are for the purpose of hearing complaints relating to an administrative action under the <i>Ombudsman Act 1973</i> (Vic).
	Office of Correctional Services Review (OCSR)	The OCSR has an oversight function for prisons within Victoria. The OCSR sits within the Department of Justice and reports directly to the Secretary of the Department of Justice and the Minister for Corrections.
	The Office of the Public Advocate	The Office of Public Advocate is functionally independent from State Authorities. The Public Advocate has the power to enter and inspect any premises on which an institution is situated in Victoria. An institution includes a mental health service providing residential services for people with a mental disorder. The Public Advocate also has the power to inspect any document relating to the admission, care, detention, treatment or control of any person or see any person receiving a service from the institution.
	The Office of Police Integrity	The Office of Police Integrity (OPI) is a Victorian independent police oversight and anti-corruption agency established by the Victorian Government in November 2004. Following a review of OPI's coercive powers in 2007, The Police Integrity Act 2008 re-established OPI as a permanent standing body. However, the current Victorian Government has decided that the OPI will be replaced by another anti-corruption body. While it does not have a specific mandate to review detention practices the OPI has conducted an audit of conditions in certain Victorian police cells.

		<p>The report titled ‘Update on conditions in Victoria Police cells’ (tabled in the Victorian Parliament in June 2010) sets out the findings of an OPI Audit of all 22 police stations operating 24 hour police cell complexes. The audit was carried out from April to December 2009. The focus of the audit was to examine facilities, systems and processes in place in the cell complexes and to determine whether recommendations from an OPI report in 2006 had been implemented.</p>
Queensland	Official Visitor Schemes	<p>Official visitor schemes carry out visits to prisons, mental health facilities and juvenile detention centres in Queensland. Under these schemes, visitors have the power to enter the relevant places of detention, inspect and obtain documents and conduct interviews in private with persons in detention.</p> <p>Visitors for prisons and mental health facilities are appointed by the relevant Chief Executive for a fixed term and visitors to juvenile detention centres are appointed by the Commissioner for Children for a fixed term.</p> <p>All visitor schemes have a legislative requirement for visitors to have some degree of relevant professional expertise or knowledge and visitor schemes to prisons and mental health facilities also have a requirement for diversity.</p>
	Office of the Chief Inspector	<p>The Office of the Chief Inspector has a function that includes inspecting corrective services facilities in Queensland. The Inspector has the power to enter prisons, inspect and obtain documents kept at the facilities, and conduct interviews in private with persons in detention or staff.</p>
	Youth Detention Inspection Team	<p>A Youth Detention Inspection Team is responsible for carrying out regular inspections of juvenile detention centres within Queensland and at the Brisbane Children’s court cell.</p>
	The Commission for Children, Young People and Child Guardian	<p>The Commission for Children, Young People and Child Guardian is an independent statutory body with powers to obtain access to children in juvenile detention centres and access to information relating to those children when conducting an investigation. The Commission regularly carries out visits to juvenile detention facilities. The Commission is also responsible for coordinating and providing oversight of the community visitor scheme for youth detention centres and other sites where children are deprived of their liberty.</p>
Western Australia	Office of the Inspector of Custodial Services	<p>The Office of the Inspector of Custodial Services (OICS) is the most comprehensive inspection mechanism of places of detention operating within Australia. OICS has responsibility for inspecting each prison, juvenile detention centre, court custody centre and prescribed police lock-up in Western Australia at least once every three years.</p> <p>The Inspector has the power to do all things necessary or convenient to be done in the performance of their functions. This includes having free and unfettered access to all documents in the possession of the Department of Corrections or contractor in relation to the</p>

		place of detention and all detainees or persons whose work is concerned with a detention centre.
	Independent visitors to prisons and juvenile detention centres	OICS is responsible for overseeing an independent visitors scheme for prisons and juvenile detention centres. Visitors under these schemes are required to visit their appointed facility at least once every three months. Visitors have a power to enter the facilities at any time they think fit upon providing sufficient identification
	Council of Official Visitors	The Council of Official Visitors conducts visits to mental health facilities. These visits can be made by official visitors or by a panel. Under the <i>Mental Health Act 1986 (WA)</i> , official visitors have the power to carry out unannounced visits at any time and, subject to the consent of the patient, they may inspect any medical record or other document related to the patient or required to be kept under the Act.
South Australia	Official visitor schemes	The <i>Mental Health Act 2009 (SA)</i> establishes a community visitors scheme for mental health treatment centres in South Australia. The Act provides that community visitors may make a visit to a treatment centre with or without notice at any time. Community visitors, in respect of private hospitals, have the power to require a person to produce documents or records. The Act also provides that visitors must make any necessary inquiries about the care treatment and control of each patient being detained in the centre.
	Visiting inspectors	Visiting inspectors carry out inspections of prisons in SA. The <i>Correctional Services Act 1982 (SA)</i> provides that inspectors may enter and inspect any part of the institution and may question any person within the prison and inquire into the treatment of prisoners.
	Ombudsman	The Ombudsman is an independent office holder who may investigate any administrative act. The Ombudsman may enter or inspect any document or premises for the purposes of an investigation.
	Authorised officers	The <i>Family and Community Services Act 1971 (SA)</i> provides that the CEO of the Department of Families and Communities or an authorised officer may carry out inspections of a children's residential facility. A children's residential facility means any place where more than three children are, for monetary or other consideration, maintained and cared for on a residential basis apart from their guardians and relatives.
Tasmania	The Ombudsman	The Ombudsman is functionally independent from State authorities and is able to carry out visits to prisons pursuant to the Corrections Act 1997 (TAS) (TAS Corrections Act). The TAS Corrections Act provides the Ombudsman with a power to visit a prison at any reasonable time. In the course of its usual functions, the Ombudsman is responsible for investigating a complaint into any administrative action by a public authority. The Tasmanian Ombudsman manages both the Prison Official Visitors Scheme and the Mental Health Visitors Scheme. The Tasmanian Ombudsman is a Mental Health Official Visitor and also holds appointment as Health Complaints Commissioner with jurisdiction over health service providers, including secure units and other facilities in both the public and private sector.

	Official Visitor Schemes	Visitor schemes conduct visits to prisons and mental health facilities in Tasmania. Visitors have varying powers depending on the applicable legislation. For example, the Mental Health Act 1996 (TAS) (Mental Health Act) provides that official visitors to mental health facilities may make unannounced visits, require staff to produce records and answer questions relating to the care and treatment of patients and arrange interviews with patients at the request of the official visitor.
	Children's Commissioner	The Children's Commissioner is an independent statutory office created pursuant to the Children, Young Person's and the Families Act 1997 (TAS). The Children's Commissioner has the additional function under the Act of advising the Minister on any matter relating to the health, welfare, education, care, protection and development of detainees under the Youth Justice Act 1997 (TAS). The Children's Commissioner has appointed a part-time advocate to visit the single juvenile detention centre in Tasmania on a weekly basis to reflect this role.
	Health Complaints Commissioner	The Health Complaints Commissioner is an independent statutory body responsible for investigating complaints into the provision of health services, including the provision of care for a mental illness to persons detained in an approved hospital or secure mental health unit. It does not appear that the Health Complaints Commissioner currently conducts visits to mental health facilities independent of investigating a complaint. The Tasmanian Ombudsman holds a parallel appointment as the Health Complaints Commissioner.
Australian Capital Territory	Ombudsman	The Ombudsman is independent from State authorities and is able to carry out visits to prisons pursuant to the <i>Correctional Management Act 2007</i> (ACT) (ACT Corrections Act). The ACT Corrections Act provides the Ombudsman with a power to visit a prison at any reasonable time.
	Human Rights Commission	The Human Rights Commission is independent from ACT Authorities and is able to carry out visits to prisons pursuant to the <i>Correctional Management Act 2007</i> (ACT). The Commission has compulsory powers under the <i>Human Rights Commission Act 2005</i> (ACT) to require persons to answer questions or produce documents when the Commission is investigating a complaint under the Act.
	Official Visitors Schemes	Visitor schemes conduct visits to prisons, mental health facilities and juvenile detention facilities in the ACT. These schemes provide visitors with varying powers under various acts. The <i>Mental Health (Treatment and Care) Act 1994</i> (ACT) provides that official visitors have the power to carry out unannounced visits, inspect any document or record relating to a patient with their consent, inspect any records required to be kept by the Act and interview patients unless they have asked not to be seen. Under the <i>Children and Young People Act 2008</i> (ACT) (ACT Children's Act), official visitors to juvenile detention centres may visit the centres at any reasonable time and interview young persons in private at the request of the young person. The ACT Corrections Act provides that official visitors may enter a

		prison at any reasonable time, and a corrections officer is required to give an official visitor any reasonable help requested by the visitor.
Northern Territory	Ombudsman	The Ombudsman is functionally independent from State authorities has the power to visit prisons pursuant to the <i>Prisons (Correctional Services) Act (NT)</i> (NT Prisons Act). The <i>Ombudsman Act (NT)</i> provides the Ombudsman with the general power to do all things necessary or convenient to be done in relation to the performance of the Ombudsman's functions.
	Official visitor schemes	Visitor schemes carry out visits to prisons, mental health facilities and juvenile detention facilities in the NT. These schemes provide visitors with varying legislative powers. The <i>Mental Health and Related Services Act 1998 (NT)</i> (NT Mental Health Act) sets up a comprehensive scheme whereby community visitors and community visitor panels conduct inspections of mental health facilities. Visitors or panels have the power to make unannounced visits, to inspect documents and records regarding the treatment or care of patients and visit patients. Under the NT Prisons Act, official visitors may visit prisons at any reasonable time, subject to the terms and conditions the director thinks fit.