



## Précis Paper

### The Optional Protocol to the Convention against Torture

A discussion by two highly regarded and qualified lawyers of Australia's signature and upcoming ratification of the Optional Protocol to the Convention against Torture.

#### **Discussion Includes**

- Australia's compliance with the Convention against Torture
- Features of the Optional Protocol to the Convention against Torture
- Signature and ratification by Australia
- Inspection of places of detention
- Benefits of the inspection processes
- Application within Australia and impact for lawyers

## Précis Paper

### The Optional Protocol to the Convention against Torture

1. In this edition of BenchTV, Edward Santow (Human Rights Commissioner, Australian Human Rights Commission) and Kevin O'Connor AM (Mediator, Tenth Floor Chambers, Sydney) discuss the Convention against Torture and its more recent Optional Protocol.

#### Australia's Compliance with the Convention against Torture

2. The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 (10 December 1984) ("Convention against Torture") was signed by Australia on 10 December 1985 and ratified on 8 August 1989.
3. Under international law, the word "torture" has a broader meaning than how it is conceived in day-to-day parlance, and includes other forms of mistreatment, including being held in detention without access to food and water.
4. Concerns have been raised about Australia's compliance with the Convention against Torture, particularly in the immigration detention context, and complaints have been made to UN bodies about Australia's treatment of immigration detainees, including that they are held too long, arbitrarily, or without access to basic services.
5. As a practical matter, the problem with the Convention against Torture is that it is difficult to make a complaint, and even if the complainant is successful, the country is not bound by the advice given by the relevant UN Committee. The UN Committees have no binding, determinative powers.

#### The Optional Protocol

6. The *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199 ("Optional Protocol") was passed by the General Assembly to recognise that simply setting out the rights and obligations of detainees in a treaty was insufficient and was not achieving the purpose of the Convention against Torture.
7. The Optional Protocol does not contain any new rights or duties on the parties to the Convention, but sets up a regime of inspection for all places of detention in a particular jurisdiction. It does this by calling on governments to establish their own independent inspection bodies to go into all places of detention, and by providing that the Sub-Committee on the Convention of Torture can visit countries and provide external oversight.

8. Australia signed the Optional Protocol in 2009, however in order to have force in Australian domestic law, an international treaty must be ratified and implemented in Australia. The federal government recently announced that it would ratify the Optional Protocol.
9. The Optional Protocol is procedural and is designed to stop problems escalating at an early stage. Mr Santow and Mr O'Connor AM discussed two examples of mistreatment in detention that have occurred in Australia, specifically immigration detention and the abuse of juvenile detainees in Northern Territory juvenile detention facilities. Mr Santow noted that under the Optional Protocol, an inspection would be carried out at an early stage to try to prevent mistreatment from occurring. Where legitimate concerns are raised by authorities regarding objectives for the detention centre, such as health concerns or keeping the peace, inspectors can assist in achieving those objectives in a practical way while respecting the rights of detainees.
10. There are no comparable Optional Protocols that Australia has signed up to, however the experience of countries such as New Zealand, the United Kingdom, and Germany, who have already ratified the Optional Protocol, has been positive, and has led to a greater understanding at a central level of what is happening in detention.
11. It is very rare in Australia to have a policy or intent to cause harm, torture or gross mistreatment. However mistreatment usually occurs because there is inadequate oversight of the policies in place, and the processes in the Optional Protocol can both shine a light on poor practices but also provide examples of good or best practice.
12. In Western Australia, for example, an Inspector of Custodial Services has been introduced with positive results. The Inspector has been able to highlight good practices in providing services for vulnerable prisoners that were occurring in a particular prison, and encourage other prisons to adopt the same. Most detention facilities are open to being more transparent and not fearful of change, and there is therefore scope to change practices within prisons by pointing out lacuna in current policies or where practices could be improved.
13. There is no complaints mechanism within the Optional Protocol, and this means that the Optional Protocol will focus on systemic issues rather than isolated cases.

#### Value of the Optional Protocol for Lawyers and Clients

14. Mr Santow considered that the impact for lawyers of Australia's ratification of the Optional Protocol will be indirect but significant. The Optional Protocol has assisted in better articulating the most basic rights and responsibilities of prisoners, and this will assist in making issues of mistreatment that arise in detention more clear cut. The Optional Protocol will allow for better problem-solving at the higher level and better understanding of the sorts

of problems that arise generally throughout detention centres, which will allow for more positive systemic outcomes.

15. Various inspection mechanisms already exist within Australia at the state and territory levels. The Optional Protocol will allow Australia to build upon the existing processes, as well as avenues for individual complaints such as to state Ombudsmans. Most jurisdictions have given themselves between three to five years to implement the Protocol, as implementing an independent regime of inspections takes time. This will allow for relationships to be built with authorities who run and oversee detention centres in Australia, and hopefully allow for long-term, positive change in conditions for detainees.

## **BIOGRAPHY**

### Edward Santow

Human Rights Commissioner, Australian Human Rights Commission

Edward Santow commenced his five-year term as Human Rights Commissioner at the Australian Human Rights Commission in August 2016. Prior to joining the Commission, Ed was chief executive of the Public Interest Advocacy Centre, a leading non-profit that promotes human rights through strategic litigation, policy development and education.

### Kevin O'Connor

Mediator, Tenth Floor Chambers, Sydney

Kevin P. O'Connor AM was the President of the Administrative Decisions Tribunal of NSW from 1998 to 2013, and a judge of the District Court. He also headed the Commercial Tribunal of NSW between 1997 and 1999 and the Fair Trading Tribunal of NSW between 1999 and 2002. He has held a number of senior positions in Commonwealth and State public sector agencies, has been a member of the Australian delegations to the United Nations, and served as the deputy chairperson of Interpol's Commission for the Control of Files from 2005 to 2011. He currently practices as a mediator and arbitrator, as well as Acting Judge and Deputy President of the NSW Civil and Administrative Tribunal.

## **BIBLIOGRAPHY**

### Treaties

*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 (10 December 1984)

*Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199