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Dear Mr Manning,

CONSULTATION ON THE POSSIBLE ACCESSION OF AUSTRALIA TO THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Thank for your letter of 11 June 2008 inviting the Law Council of Australia's to submit its views on whether Australia should become a party to the Optional Protocol to the Convention on the Elimination of All forms of Discrimination Against Women ('the Optional Protocol'). The Law Council is pleased to have the opportunity to participate in this important consultation process.

The Law Council strongly supports Australia becoming a party to the Optional Protocol. The following comments are made in that context.

The Convention and the Development of the Optional Protocol

As you are aware, Australia was closely involved in the drafting of the Convention on the Elimination of All Forms of Discrimination Against Women ('the Convention') and has been a Party to the Convention since 1983.

The Convention establishes international minimum standards for the protection of women's human rights and obliges State Parties to take positive steps to ensure that any discriminatory practice against women - whether intentional or unintentional - is eliminated.

The Convention also establishes a Committee ('the CEDAW Committee') made up of independent experts responsible for examining reports of State Parties and monitoring their compliance with their Convention obligations.

Unlike a number of other key UN human rights instruments, the Convention does not grant the CEDAW Committee powers to receive individual complaints of alleged breaches of the Convention, or the power to initiate inquiries into systematic violations of Convention rights.¹

The absence of such a mechanism in the area of women's rights provided the impetus for the negotiation of the Optional Protocol, which opened for signature on 10 December 1999.²

The Optional Protocol contains two procedures:

- a communication procedure allowing individual women, or groups of women, to make complaints about alleged violations of rights protected under the Convention to the CEDAW Committee (regulated by Articles 2 - 7).
- an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights under the Convention (regulated by Articles 8-10).

Under the Optional Protocol State Parties are also obliged to:

- ensure individuals under their jurisdiction are not subject to ill-treatment or intimidation as a consequence of communication with the CEDAW Committee;
- report annually on their activities under the Optional Protocol; and
- make widely known and give publicity to the Convention and the Optional Protocol and facilitate access to information about the views and recommendations of the CEDAW Committee.

The Communications Procedure

Under the Optional Protocol State Parties must recognise the competency of the CEDAW Committee to receive and consider communications alleging violations by State parties of their obligations under the Convention. State Parties are also obliged to give due consideration to the views of the CEDAW Committee and its recommendations and must submit to the CEDAW Committee a written response within six months.

The complaints procedure under the Optional Protocol contains a number of novel features designed to recognise and accommodate the particular difficulties and barriers faced by complainants alleging violations of Convention rights.

For example, while most international communications procedures only allow *victims* of violations of rights to make a complaint, the Optional Protocol permits communications to the CEDAW Committee both

¹ For example, the International Covenant on Civil and Political Rights (and its First Optional Protocol), the Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, all empower their respective committees power to investigate alleged violations of human rights, and to receive communications from individuals.

² Following four years of negotiations, the Commission on the Status of Women adopted the Optional Protocol on 12 March 1999. The Optional Protocol was adopted by the UN General Assembly in October 1999 and opened for signature on 10 December 1999.

- by an individual or group of individuals claiming to be victims of a violation of any of the rights in the Covenant; or
- by another person on behalf of an individual or group of individuals claiming to be victims of a violation of any of the rights in the Covenant.

This provision for extended standing recognises the various barriers that may be faced by women contemplating or wishing to make a complaint alleging a violation of their rights. These barriers include low literacy levels, particularly legal literacy; insufficient access to financial or other resources; and potential dangers to women's personal safety.

The Optional Protocol also authorises the CEDAW Committee to recommend interim measures be taken by the State Party before the Committee reaches a final determination. This is important in cases where women fear reprisal or their circumstances require urgent action.

The Optional Protocol also provides for a degree of confidentiality in the handling of complaints. Article 6(1) provides that:

Unless the Committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.

This provision ensures that the identity of the complainant is kept confidential from the State and the public in cases where disclosure would put her personal safety at risk, but allows the complainant to waive confidentiality and publicise the complaint where doing so would be instrumental in obtaining a satisfactory outcome.

The Optional Protocol provides that, when the CEDAW Committee has made a finding that a violation of a Convention right has occurred, State Parties are required to give due consideration to the views of the Committee and its recommendations and submit to the Committee a written response, including information on any action taken in light of the Committee's views and recommendations. The CEDAW Committee is also empowered to request the State to appear before it to discuss the steps it has taken and to keep the matter under review until it is satisfied that it has been appropriately remedied.

The Law Council supports each of these features of the communication procedure that provide for international scrutiny of violations of women's rights while attempting to address the needs of vulnerable women or women suffering discrimination.

Inquiry Procedure

The Optional Protocol authorises the CEDAW Committee to initiate and conduct an inquiry and report urgently where it receives reliable information indicating grave or systemic violations by a State Party of rights set out in the Convention. When warranted, and with the consent of the State Party concerned, this can include a visit to the territory of the State Party.

When the Optional Protocol was being developed, the inquiry procedure was considered necessary to overcome possible standing difficulties within the communication procedure and to enable the CEDAW Committee to address particularly egregious cases or large scale violations on timely basis. It was envisaged that the inquiry process could address matters

such as dowry-related violence, trafficking of women, massive violations of women's rights during times of armed conflicts and practices of other gender-based violence such as female infanticide.³

The consent of the State Party is not required in order for the CEDAW Committee to proceed with an inquiry. However, Article 10 provides that a State party may declare, at the time of ratification of the Optional Protocol, that it does not recognise the competency of the CEDAW Committee in respect of the inquiry powers contained in articles 8 and 9.

The Law Council would strongly recommend that, if acceding to the Optional Protocol, Australia *not* exercise its right under Article 10 to opt out of the inquiry procedure. To do so would significantly undermine Australia's commitment to honour its obligations under the Convention, threaten the authority and jurisdiction of the CEDAW Committee and undermine the effectiveness of the inquiry procedure.

Implications for Australian Law and Policy

Enhancing the protection and promotion of gender equality

Australia's ratification of the Convention in 1983 provided Federal Parliament with the constitutional power to enact the *Sex Discrimination Act* in 1984. This saw some, but not all of the Convention's provisions enacted into Australian law.

Accession to Optional Protocol has the potential to provide the impetus for the full implementation of Convention rights in Australia, stimulate changes in discriminatory laws and practices and provide redress for individual instances of violations of women's rights.

Currently, Australian women can bring complaints of discrimination on the grounds of sex to the Human Rights and Equal Opportunity Commission, which has its own conciliation service. If conciliation does not effectively resolve the complaint, the claim may be pursued in the Federal Court or Federal Magistrate's Court – at significant personal and financial cost to the complainant.

If Australia accedes to the Optional Protocol, Australian women whose complaints are not resolved through the HREOC procedure or the court process may be able to pursue their complaint before the Committee, by relying on the communication mechanism in the Optional Protocol. Provided it can be demonstrated that the complainant has exhausted all available domestic remedies, the CEDAW Committee could consider a communication made by an Australian woman, or group of women. This it could act as important 'back up' to the domestic procedure and provide a level of international scrutiny previously missing from Australia's sex-discrimination regime.

In addition to promoting women's rights in Australia, accession to the Optional Protocol would generate greater awareness of international human rights standards relating to discrimination against women and place the Convention on an equal footing with other major human rights treaties, most of which have complaints procedures.

³ Emilia Della Torre, 'Women's business: The development of an Optional Protocol to the United Nations Women's Convention' (2000) *Australian Journal For Human Rights* 9.

Addressing gaps in the protection of vulnerable women

The Government has detailed a range of initiatives aimed at promoting Women's Economic Security; Women's Safety and Women's International Engagement in the Women's Budget Statement 2008-09⁴.

Nevertheless despite the legislation it has implemented and the programs Government has resourced and developed to date, the issues of domestic violence, human trafficking and sexual servitude remain pressing. Alarming, the prevalence of such ills are even more pronounced in Indigenous and non English than in the general population.⁵

Both the Office of Women and the Office of International Law have stated that the Optional Protocol 'does not give rise to any new obligations', nor does it require any legislative changes.

While the Law Council generally agrees that accession to the Optional Protocol would not necessarily require significant legislative change, the procedure it would establish has the potential to provide additional protection for some of Australia's most disadvantaged women.

For example, in New Zealand and Canada, the Optional Protocol has been relied upon by Indigenous women and women from culturally and linguistically diverse backgrounds as an *additional* forum within which their complaints can be heard.

Maternity Leave

The Law Council notes that Australia's commitment under the Convention to eliminate all forms of discrimination against women remains incomplete. For example, the Australian Government retains its reservation to article 11(2)(b) of the Convention regarding the right of working women to access paid maternity leave.

Accession to the protocol would not technically require Australia to remove this reservation. However, such a step would appear in keeping any move to enhance the protection and promotion of the rights contained in the Convention.

It is assumed that Australia's reservation regarding the right of working women to access paid maternity leave, was never intended to be permanent. Accession to the Optional Protocol would provide a timely opportunity to revisit whether Australia is now prepared to respect and fulfil all the rights contained in the Convention.

The Law Council supports the comments of Federal Sex Discrimination Commissioner Elizabeth Broderick that it is time to remove this reservation and recognise "paid maternity leave is a basic human right for working women."⁶

⁴ Australian Government, Women's Budget Statement 2008-09.

⁵ Australia, *Violence in Indigenous Communities* (Report to the Crime Prevention Branch of the Attorney General's Department, 2001) at 2. see also Australian Law Reform Commission, *Equality Before the Law: Justice for Women, Part 1* (report 69, 1994) at [5.27]; Queensland, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (1999); Partnerships against Domestic Violence, *Rethinking Family Relationships Forum Report* (2001) at iii

⁶ Laura McIntyre, 'Paid maternity leave re-enters public debate' *Lawyers Weekly* 6 June 2008

The Law Council is participating in the Productivity Commission's Inquiry into paid maternity leave and looks forward to imminent governmental policy change. The introduction of universal paid maternity leave would begin to redress the disadvantage that childbearing women experience in a competitive workforce.

Engagement with the UN Treaty Body System

By ratifying the Optional Protocol, Australia undertakes to respect the jurisdiction of the CEDAW Committee to hear complaints and to initiate inquiries. This demonstrates a preparedness to subject Australia's laws and policies to international scrutiny and to defer to the Committee's expert recommendations where necessary.

In the past, in relation to other human rights treaties to which it is a party, Australia has adopted an ambivalent and at times derisory attitude towards the relevant UN treaty monitoring bodies and their role in determining whether States have adhered to their international human rights obligations.

The former Australian Government often simply preferred its own view to that of relevant UN treaty monitoring bodies – ignoring or rejecting the views of the international body whose competence it had recognised to review Australia's human rights compliance.

If the Australian Government accedes to this Optional Protocol, it must commit to undertake its international obligations in a manner not seen by Australia for over a decade. This will require a preparedness to engage in a constructive dialogue with the CEDAW Committee; and a willingness to be guided by the Committee's recommendations in the formulation of future policies and priorities.

Ratification of the Optional Protocol would also require a commitment of resources at the national level to ensure Australians are aware of Australia's obligations under the Convention and of their right to bring complaints under the Optional Protocol.

The Law Council is encouraged by the Rudd Government's moves to re-engage with the UN treaty body system and is confident that Australia can further develop its leadership role the area of international human rights by acceding to this Optional Protocol.

The Law Council strongly supports Australia's accession to the Optional Protocol and thanks the Attorney-General's Department for the opportunity to submit its views.

Yours sincerely



Bill Grant
Secretary-General

30 June 2008