

Optional Protocol to the Convention on the Rights of Persons with Disabilities

Background

- 2.1 The proposed treaty action is accession to the *Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities*.
- 2.2 The United Nations Convention on the Rights of Persons with Disabilities (CRPD) entered into force for Australia on 16 August 2008 (see JSCOT Reports 92 and 95). Parties to the CRPD are obliged to ensure and promote recognition of the economic, social and cultural rights of people living with disabilities.¹ As a Party to the CRPD Australia can now accede to the Optional Protocol to the CRPD.²
- 2.3 The Committee was informed that there are essentially two aspects to the Optional Protocol. First, it enables individuals living with disabilities within Australia to lodge unresolved complaints with the United Nations Committee on the Rights of Persons with Disabilities (the Disability Committee) once all domestic remedies have been exhausted. Second, it permits the Disability Committee to initiate and conduct its own inquiries where it suspects a grave or systemic breach of the CRPD is taking place.³

1 NIA on the United Nations Convention on the Rights of Persons with Disabilities, p. 3.

2 NIA, paras 1& 2.

3 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 7.

- 2.4 The Disability Committee consists of 12 independent experts elected by State Parties to the CRPD. Currently an Australian, Professor Ronald McCallum AO, is an elected member of the Disability Committee.⁴
- 2.5 As at February 2009, there are 137 State Parties to the CRPD and 28 State Parties to the Optional Protocol.⁵

Obligations

- 2.6 The primary obligations of State Parties to the Optional Protocol are to recognise the Disability Committee's competence, assist in its inquiries and to provide written responses to the Disability Committee's communications and recommendations.
- 2.7 Article 1 provides that parties to the Optional Protocol recognise the ability of the Disability Committee to receive and consider communications from individuals subject to its jurisdiction. These communications may be received by the Disability Committee only after all domestic remedies for the complaint have been exhausted, and only in relation to events occurring after the Optional Protocol enters into force for the relevant State Party. The Disability Committee will then consider whether to accept the communication as admissible (Article 2).⁶
- 2.8 Any communications submitted to the Disability Committee are confidentially brought to the attention of the State Party. The State Party is then required to provide a written response, within six months, to the Disability Committee clarifying the matter and any solution that may have been implemented (Article 3).
- 2.9 The Disability Committee, at any time after receiving a communication and before determining its admissibility, may make a non-binding request to the State Party that urgent interim action be taken to avoid possible irreparable damage to the victim (Article 4).
- 2.10 The Disability Committee will then consider the communication and forward its suggestions and recommendations, if any, to the State

4 NIA, para 9.

5 Office of the United Nations High Commissioner for Human Rights 2009, OHCHR, Geneva, viewed 12 February 2009
<<http://www2.ohchr.org/english/bodies/crpd/index.htm>>

6 NIA, paras 4 & 15.

- Party and the complainant. All communications and meetings are in-confidence (Article 5).⁷
- 2.11 Articles 6(1) and 6(2) of the Optional Protocol set out that, following receipt of reliable evidence indicating a grave and systemic breach, the Disability Committee will invite the State Party concerned to cooperate in the examination of the information and submit observations. The Disability Committee may then designate one or more of its members to conduct an inquiry and to report back urgently. Where warranted, and with the consent of the State Party concerned, the inquiry may include a visit to the territory of the State Party. All inquiries are conducted in cooperation with the State Party and are in-confidence.⁸
- 2.12 Once the Disability Committee has completed its inquiry, it will convey its conclusions, comments and recommendations to the State Party concerned. The State Party will then have six months in which to respond by submitting its observations to the Disability Committee (Articles 6(3) and 6(4)). The Disability Committee's findings and recommendations are not legally binding on State Parties.⁹
- 2.13 Whilst recommendations made by the Disability Committee are not binding, one submission to the inquiry pointed out that the obligations of the CRPD itself are binding. The submitter argued that if the Disability Committee finds that a systemic violation is taking place and makes a recommendation via the mechanisms provided by the Optional Protocol, the State Party may be obliged to take action to remedy this violation to ensure it is abiding by its obligations under the CRPD.¹⁰
- 2.14 The Attorney-General's Department also suggested that, whilst the recommendations are not binding, they may be a very persuasive moral force which governments will need to take seriously.¹¹

7 NIA, para 17.

8 NIA, para 18.

9 NIA, para 4 & 19.

10 Regulatory Institutions Network, *Submission No. 11*, p. 2.

11 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 9.

Reasons for Australia to take treaty action

- 2.15 The Committee received a number of submissions supporting accession to the Optional Protocol. Many of the submitters considered that accession to the Optional Protocol would promote the inclusion and participation of people living with disabilities in all aspects of life and the law within Australia.¹²
- 2.16 Additionally, a representative from the Australian Federation of Disability Organisations (AFDO) suggested that accession to the Optional Protocol would raise public awareness of the barriers faced by people with disabilities and how the public can be a part of the solution.¹³
- 2.17 The Attorney-General's Department considered that accession to the Optional Protocol would provide an extra layer of accountability to Australia's antidiscrimination measures.¹⁴
- 2.18 A number of submitters to the inquiry were also of the view that participation in the Optional Protocol would demonstrate to the international community Australia's confidence in its human rights record and its willingness to be open and accountable when it comes to human rights. Some submitters also suggested that accession to the Optional Protocol would promote the rights of people with disabilities within our region and on the international stage.¹⁵
- 2.19 The Government considered that accession to the Optional Protocol would reinforce the Australian Government's commitment to membership of the United Nations (UN) as one of the three pillars underpinning its approach to foreign policy.¹⁶ This view was further advocated in a range of submissions to the inquiry.¹⁷

12 Regulatory Institutions Network, *Submission No. 11*, p. 2; NSW Disability Discrimination Legal Centre, *Submission No. 5*, p. 2; Blind Citizens Australia, *Submission No. 7*, p.1; Public Interest Advocacy Centre, *Submission No. 8*, p. 1; Australian Association for Families of Children with a Disability, *Submission No. 12*, p. 2.

13 Mr Frank Hall-Bentick, *Transcript of Evidence*, 23 February 2009, p. 16.

14 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 9.

15 Regulatory Institutions Network, *Submission No. 11*, p. 2; NSW Disability Discrimination Legal Centre, *Submission No. 5*, p. 2; Blind Citizens Australia, *Submission No. 7*, p.1; Public Interest Advocacy Centre, *Submission No. 8*, p. 1; Mr Stephen Brown, *Submission No. 4*, p. 1; Dr Ben Saul, *Submission No. 10*, p. 1; NSW Young Lawyers, *Submission No. 13*, p. 3.

16 NIA, para 7.

17 Regulatory Institutions Network, *Submission No. 11*, p. 2; Mr Stephen Brown, *Submission No. 4*, p. 1; Human Rights Law Resource Centre, *Submission No. 6* p. 10.

- 2.20 Australia is a party to four other treaties that provide for similar external appeal mechanisms. These treaties are:
- First Optional Protocol to the International Covenant on Civil and Political Rights;
 - Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment;
 - Convention on the Elimination of all Forms of Racial Discrimination; and
 - Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁸
- 2.21 A number of submissions to the inquiry argued that, in light of Australia's accession to the above-mentioned treaties, accession to the Optional Protocol to the CRPD is imperative to ensure that the rights of people with disabilities are on an equal footing with the rights ensured by these other treaties.¹⁹
- 2.22 The Attorney-Generals Department considered that the number of communications made under the Optional Protocol is likely to be relatively few, given that Australia is in compliance with the immediately applicable obligations outlined in the CRPD.²⁰ A number of submissions to the inquiry supported the view that accession to the Optional Protocol is unlikely to prompt a large number of communications to the Disability Committee.²¹ However, one submitter to the inquiry stated their intention, upon Australia's accession to the Optional Protocol, to appeal to the Disabilities Committee about alleged on-going breaches of the CRPD.²²
- 2.23 Submitters also suggested that accession to Optional Protocol would help to give effect to the CRPD by helping to identify and ensure compliance with Australia's obligations under the CRPD. It was also considered that the recommendations of the Disability Committee

18 NIA, para 11.

19 Regulatory Institutions Network, *Submission No. 11*, p. 2; Australian Federation of Disability Organisations, *Submission No. 3*, p. 3; NSW Young Lawyers, *Submission No. 13*, p. 4.

20 NIA, para 13.

21 Regulatory Institutions Network, *Submission No. 11*, p. 2; Mr Stephen Brown, *Submission No. 4*, p. 4; NSW Disability Discrimination Legal Centre, *Submission No. 5*, p. 4; Human Rights Law Resource Centre, *Submission No. 6* p. 13.

22 Mr Stephen Kilkeary, *Submission No. 9*, p. 2.

would benefit Australia's pursuit of human rights as they would be made by informed independent experts with a wide range of experience in disability rights issues.²³

2.24 One submitter argued that:

the Disability Committee ... would be able to consider whether or not Australian laws, policies and procedures are compliant with and are being interpreted and applied consistent with the Convention rights and State Party obligations. Where the Disability Committee determines they are not, their reasoning will provide important guidance on the challenged law or policy and how it can and should be modified to ensure Convention rights are protected and obligations are fulfilled.²⁴

Opposition to Optional Protocol

2.25 The Committee received one submission from FamilyVoice Australia opposing Australia's accession to the Optional Protocol.²⁵

2.26 The key issues raised were:

- allowing complaints to be considered by a UN Committee could undermine Australian domestic law and legal sovereignty at both the federal and state/territory level;
- the Optional Protocol could lead to increased liberalisation of Australian laws; and
- the Disability Committee lacks neutrality and has a particular ideological focus.

2.27 FamilyVoice Australia argued:

The fundamental notion of Australia as a sovereign nation is compromised by allowing a committee of foreigners, appointed by the nations which have ratified the Convention,

23 Regulatory Institutions Network, *Submission No. 11*, p. 2; NSW Disability Discrimination Legal Centre, *Submission No. 5*, p. 2; Human Rights Law Resource Centre, *Submission No. 6* p. 7; Blind Citizens Australia, *Submission No. 7*, p.1; Public Interest Advocacy Centre, *Submission No. 8*, p. 2; Dr Ben Saul, *Submission No. 10*, p. 1; Australian Association for Families of Children with a Disability, *Submission No. 12*, p. 2.

24 Public Interest Advocacy Centre, *Submission No. 8*, p. 2

25 FamilyVoice Australia, *Submission No. 2*.

to second guess the outcome of domestic judicial proceedings or the validity of laws passed by our parliaments.²⁶

- 2.28 Representatives from the Attorney-General's Department outlined the department's position on these issues. First, the recommendations made by the Disability Committee, whilst persuasive, are non-binding. Thus the Australian Government will maintain sovereign control over its own affairs including its antidiscrimination and human rights laws.²⁷ Secondly, members of the Disability Committee are independent human rights experts elected by the will of all of the countries who are party to the CRPD. These members do not serve on the Disability Committee as representatives of their respective governments but rather as independent experts in the field of protecting the rights of people with disability.²⁸

Implementation

- 2.29 The Optional Protocol will not require changes to current Commonwealth, State and Territory legislation, policies or programs.
- 2.30 Australia will need to submit a written response to any communications from the Disability Committee. Australia will be expected to cooperate with the Disability Committee and may be requested to permit the Disability Committee to visit Australia in the course of its inquiries. No legislative or procedural changes are required in order for Australia to recognise the competence of the Disability Committee to receive and inquire into complaints in this manner.
- 2.31 The Office of International Law (OIL), within the Attorney-General's Department, will be responsible for drafting all reports and submissions to the Disability Committee. In preparing submissions, OIL will consult with the Australian Government department with portfolio responsibility for the issue raised, as well as any State or Territory Governments whose policies may be affected.
- 2.32 A number of submissions to the inquiry suggested mechanisms for considering any recommendations or views of the Disability
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26 FamilyVoice Australia, *Submission No. 2*, p. 1.

27 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 9.

28 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 14.

Committee. One submission suggested that the Government should table any views and observations of the Disability Committee in all Commonwealth, State and Territory legislatures and adopt the practices of referring any recommendations to the relevant parliamentary committees.²⁹ Submissions further argued that any recommendations of the Disability Committee should be the subject of consultations with the disability sector.³⁰

Access to appeal mechanisms

- 2.33 A representative from the Attorney-General's Department described the current domestic complaint mechanisms available to Australians living with disabilities. At the state and territory level there are antidiscrimination laws which permit complaints to be heard by various state and territory-level human rights commissions and courts. At the federal level, people are protected by the *Disability Discrimination Act 1992*. According to the Act, complaints can be made to the Human Rights and Equal Opportunity Commission. The Commission will then try to resolve the complaint. If the complaint remains unresolved, a person can take action in the Federal Court or the Federal Magistrates Court. The court then orders which measures should be taken, including compensation, apology or restricting the complainant from pursuing the matter further.³¹
- 2.34 If a complainant is still not satisfied with the ruling of the Federal Court, a communication could then be lodged with the Disability Committee. This communication would most likely take the form of a written letter which would have to demonstrate that all domestic remedies have been exhausted. If the communication is accepted by the Disability Committee, it would then conduct its inquiry in consultation with the Australian Government, relevant State/Territory governments and interested non-governmental organisations.³²
- 2.35 A representative from the AFDO suggested that it is not clear when all domestic remedies would be exhausted and when an appeal could

29 Regulatory Institutions Network, *Submission No. 11*, p. 3

30 Mr Stephen Brown, *Submission No. 4*, p. 3; Public Interest Advocacy Centre, *Submission No. 8*, p. 2.

31 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 8.

32 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 11.

be made to the Disability Committee. The representative expressed the need for the Government to make clear to complainants the pathway they would have to follow in order to make an appeal to the Disability Committee.³³

Costs

- 2.36 The costs of preparing and submitting written explanations or statements to the Disability Committee are expected to be absorbed within the usual budget of the Attorney-General's Department. Any costs associated with visits by the Disability Committee would also be absorbed within the usual budget of the Departments involved.³⁴

Future treaty action

- 2.37 Article 15 provides that any State Party may propose an amendment to the present Optional Protocol. Amendments will only be binding on those State Parties that have accepted the amendment.³⁵
- 2.38 Article 16 provides that a State Party may denounce the Optional Protocol by written notification to the Secretary-General of the UN. A denunciation becomes effective one year after receipt of notification.³⁶

Consultation

- 2.39 Relevant Commonwealth Ministers and agencies and State and Territory Governments were consulted about the Optional Protocol and have provided support for accession.
- 2.40 Consultation on the Optional Protocol was undertaken with the disability sector during Australia's initial accession to the CRPD. These consultations were undertaken by the AFDO, the National Association of Community Legal Centres, People With Disabilities

33 Mr Frank-Hall Bentick, *Transcript of Evidence*, 23 February 2009, p. 17.

34 NIA, para 26.

35 NIA, paras 28 to 30.

36 NIA, para 31.

and the State and Territory Disability Advisory Councils. All consultations strongly supported Australia's accession to both the CRPD and its Optional Protocol.

- 2.41 The Attorney-General's Department also sought submissions specifically on the implementation, and obligations under, the Optional Protocol. A range of disability and other organisations responded to this request. The large majority of submissions urged Australia to become a Party to the Optional Protocol.³⁷

Conclusions and recommendations

- 2.42 The Committee notes the concern put forward by the AFDO that the means by which a complainant can determine that all domestic avenues have been exhausted, and thus that a complaint can be made to the Disability Committee, are not clear. The Committee therefore considers that as part of the implementation of the Optional Protocol every effort should be made by the Australian Government to clearly identify for potential complainants when all domestic avenues would be considered to be exhausted, and how to lodge a communication with the Disability Committee.
- 2.43 The Committee is of the view that the Optional Protocol will provide an additional mechanism to protect and promote the rights of persons with disabilities. The Committee considers that accession to the Optional Protocol will demonstrate Australia's commitment to human rights and allow international scrutiny of this commitment to take place. It therefore supports binding treaty action being taken.

³⁷ Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 8; NIA, Attachment on consultation, para 40.

Recommendation 1

The Committee recommends that the Australian Government makes advice available via the Attorney-General's Department website and/or other fora as to:

- when all domestic avenues of complaint under Australia's anti-discrimination regime would be considered to be exhausted; and
- the process a complainant would need to undertake in order to lodge a complaint with the *United Nations Committee on the Rights of Persons with Disabilities*.

Recommendation 2

The Committee supports the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* and recommends that binding treaty action be taken.

