

REFUGEE COUNCIL OF AUSTRALIA

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OPCAT

Submission No:11.....

BY: *[Signature]*

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES INQUIRY INTO THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMANE AND DEGRADING TREATMENT

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Introduction

The Refugee Council of Australia (RCOA) welcomes the opportunity to provide input into the inquiry being conducted by the Joint Standing Committee on Treaties into the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (hereafter CAT), the objective of which is to establish an independent monitoring system for places of detention in order to prevent breaches of Convention obligations.

The Refugee Council of Australia is the peak non-governmental agency in Australia concerned with issues relating to refugees and asylum seekers and represents over 90 organisational members and a similar number of individual members. The Council works to promote humane, flexible and legally defensible policy towards refugees, asylum seekers and displaced peoples by the Australian Government and the Australian community.

It thus follows that the Council's particular interest in the current inquiry rests with its relevance to the detention of asylum seekers, be this in Immigration Detention Centres or in Immigration Reception and Processing Centres. The Council will argue in this submission that signing the Optional Protocol will assist the resolution of this major human rights issue.

This being said, the Council also wishes to stress that there are many other sound reasons why accession should proceed and because of their broader focus, the submission will outline these first.

The Broader Perspective

The Refugee Council sees that there are a number of strategic and political reasons why it would be advantageous for Australia to sign the Optional Protocol:

- It would demonstrate a commitment to uphold the principles outlined in the Convention Against Torture.
- It is an appropriate act of leadership from the Chair of the United Nations Human Rights Commission.

- It would set a good example for the smaller states in our region by demonstrating acceptance of accountability and transparency.
- It would enhance Australia's position in the human rights dialogue conducted between the Australian Government and regional States, in particular China.

In saying this, it is important to stress that the Optional Protocol should not be seen as imposing additional obligations on the signatory State. Nor does it create additional rights for people. The Protocol is, and should be seen as, a mechanism whereby the commitments that a State has already made in signing the Convention Against Torture can be demonstrated in tangible ways.

The Optional Protocol requires of a State that:

- there be compliance with and support for the work of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee on Prevention);
- a national preventative mechanism be established.

The clear focus on prevention in both of these must be recognised. Accession does not denote an acceptance of the existence of problems but rather a commitment to ensure that activities contrary to the Treaty will not occur, and if they do, that appropriate action will be taken.

Immigration Detention

Immigration detention has become an increasingly contentious issue in Australia, in particular when used for people seeking asylum. The current detention regime was introduced in 1992. Since then there have been a number of changes, not least in relation to detention centre management, but from the outset the detention regime has drawn criticism on two fronts:

- the mandatory and non-reviewable nature of the detention policy: this has been found on a number of occasions by various international human rights arbiters, including the UN Human Rights Committee, to be contrary to Australia's obligations under the International Covenant on Civil and Political Rights;
- the conditions within the detention centres: these are seen to fall short of accepted international standards for the treatment of asylum seekers and others in detention.

The CAT Optional Protocol has no direct relevance to the former but it is very important to the latter.

For as long as the Government has a policy that involves the deprivation of the liberty of asylum seekers – who are by definition people who are seeking Australia's protection - it has an obligation to:

- ensure that detained asylum seekers are not subjected to torture, cruel, inhuman or degrading treatment; and
- be able to demonstrate to the Australian public and the international community that appropriate prevention measures are in place.

It is the contention of the Refugee Council that good faith compliance with the CAT Optional Protocol would do much on both symbolic and practical levels to demonstrate the Government's stated desire to uphold fundamental principles ... after all, States that are fully complaint have nothing to fear from the Optional Protocol.

Protection of People who have been Tortured

It is suggested that it is also relevant for the Committee to consider Australia's non-derogable obligations under the Convention Against Torture not to return a person to a country where there are substantial grounds for believing that he or she will be subjected to torture,¹ noting the relevance of this to any consideration of prevention.

Australia currently does not have an administrative process in place to determine whether protection obligations are owed under CAT. The only way such a consideration can take place is for the person to lodge a claim for refugee status, be rejected at both the primary and review stages and then seek the intervention of the Minister for Immigration (under S417 of the Migration Act).

The Refugee Council has long argued that Ministerial discretion is not the appropriate way to determine Convention obligations and that there is a need for an administrative process that can enable visa to be granted to those determined to be in need of complementary protection. Introducing such a process would:

- ensure obligations under CAT and other relevant treaties are met;
- bring Australia into line with international practice;
- fulfil an undertaking that Australia made when it adopted the Agenda for Protection.²

RCOA is currently finalising a paper outlining how complementary protection can work in practice and is happy to forward this to the Committee should there be a desire to look at this issue in more depth.

Until such time as there is a proper administrative procedure for ensuring that persons facing torture are not returned, it is necessary to recognise that the only avenue of appeal such a person has if the Minister decides not to exercise her non-compellable, non-reviewable powers is to the Committee Against Torture in Geneva which was set up under Article 17 of CAT.

Further, the Refugee Council stresses the importance of also introducing a formal mechanism that will ensure Australia's compliance with directions from the Committee Against Torture not to remove a person until a full investigation is carried out as to the validity of his or her claims.

Australia's Stated Concerns about the Optional Protocol

The Refugee Council notes that on the various occasions when the text of the Optional Protocol has been discussed in the United Nations, Australia has either:

- voted against (ECOSOC July 2002); or
- abstained (UNGA Third Committee, November 2002; UNGA Plenary December 2002).

On each of these occasions, however, the vote went strongly in favour of the text:

- ECOSOC, July 2002: 35 in favour, 8 against, 10 abstentions;
- UNGA Third Committee, November 2002: 104 in favour, 8 against, 37 abstentions;
- UNGA, December 2002: 127 in favour, 4 against, 42 abstentions.

When Australia voted against the text (at ECOSOC), it did so in the company of China, Cuba, Egypt, Japan, Libya, Nigeria and Sudan.

¹ CAT Article 3.

² The Agenda for Protection is the culmination of two year's of consultations by UNHCR and sets out an action plan for States, UNHCR and NGOs. It was adopted in Geneva in October 2002.

The overwhelming endorsement of the Optional Protocol at each step along the way through the UN process, in particular by the General Assembly, is clear evidence of the acceptance of the need for the preventative mechanisms it creates, especially the Subcommittee on Prevention.

Australia's concerns rested, as the Council is led to understand, on procedural aspects. No arguments were presented to suggest that there is no need for additional measures to prevent torture. At ECOSOC, the Australian representative argued that Human Rights Treaties should be adopted by consensus to ensure universality, but as Amnesty International quite correctly argues in their submission to this inquiry "realistically, consensus is no more than an ideal". Many international treaties have been adopted by a formal vote and have gone on to achieve widespread acceptance, not least the Convention on the Elimination of Racial Discrimination.

The Refugee Council argues that now that the technicalities of the adoption process are in the past and the General Assembly has voted in favour of the Optional Protocol, there should be no reason why the Australian Government should refrain from signing.

Conclusion

In conclusion, the Refugee Council urges JSCOT to recommend that the Australian Government sign the CAT Optional Protocol.