Inquiry into the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Submission to the Joint Standing Committee on Treaties

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Introduction

I welcome the opportunity to provide to the Joint Standing on Treaties my submission that Australia should sign and ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

The Universal Declaration of Human Rights, the pre-eminent human rights document, states that "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment". Torture is prohibited in article 7 of the International Covenant on Civil and Political Rights. Torture is also the subject of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which was approved by the United Nations General Assembly some twenty years ago. Since then, the CAT has been ratified by 136 countries, including Australia.

The CAT defines torture[1] and obliges state parties to take action to prevent torture. The CAT also establishes a treaty monitoring body, the Committee against Torture, which receives and responds to periodic reports from state parties and representations from victims of torture.

Nonetheless, despite the high level of ratification of the CAT, torture continues to be widespread throughout the world[2] and, in fact, there are signs that, ironically, it is becoming even more commonly used as a response to global terrorism.[3]

It is apparent that the CAT is insufficient to curtail torture. An additional mechanism is needed. After more than ten years of negotiations, a draft optional protocol to the CAT was submitted to the General Assembly of the United Nations and overwhelmingly approved in December 2002. It received 127 votes for, four against, and 42 abstentions. Australia was amongst the abstentions.

The objective of OPCAT is stated as being to prevent torture by visits conducted by international and national bodies:[4]

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[1] The definition is found in article 1.1. The CAT does not define "cruel, inhuman or degrading treatment or punishment". In Australia's second report to the Committee against Torture, it is stated Australia understands "that the acts or conduct encompassed by this expression entail some lesser degree of severity that those defined as 'torture', which nevertheless are inconsistent with the inherent dignity and rights of the person". This understanding is adopted in this submission and "torture" is used to encompass cruel, inhuman or degrading treatment or punishment as well as torture as defined.

[2] According to Amnesty International: "Torture is a real problem around the world with many hundreds of thousands of victims. Amnesty International has documented torture in more than 150 countries, including the United States. In more than 70 countries it is widespread. People in 80 countries have died as a result of torture. The victims are mainly detained on minor criminal charges, including women and children, and the methods include rape and brutal violence". www.amnestyusa.org

[3] Alan Dershowitz, a leading criminal-defence lawyer, has argued in cases of "ticking bomb" urgency for "torture warrants". The Washington Post in December 2002 published a lengthy article on the use of torture by the United States in response to global terrorism.

[4] CAT, article 1.

> The objective of this Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

The members of the international body – the Sub-Committee on Prevention – must be suitably qualified for their task of preventing torture in places of detention:

> The members of the Sub-Committee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.[5]

Part III of the OPCAT specifies the mandate of the Sub-Committee in terms of making visits to places of detention, working cooperatively with the national preventive body, providing advice and assistance, and making recommendations and observations with a view to prevention of torture. Article 16 provides that the Sub-Committee's recommendations and observations must be communicated confidentially. Governments must give the Sub-Committee members unrestricted access to information and places of detention, the opportunity to have private interviews with detained persons and the freedom to choose the places that it visits.

The OPCAT is now open for signing and ratification by state parties that have ratified the CAT. At the end of October, it had been signed by 20 countries and ratified by two.

I wish to submit that Australia should be one of the first countries to sign and ratify OPCAT for the following reasons.

Ratification of OPCAT will assist prevention of torture in Australia

Australia committed itself to outlaw torture by ratifying the CAT and enacting the *Crimes (Torture) Act 1988* to extend the existing prohibitions on torture found in Commonwealth and State legislation and in the common law.

The Minister for Foreign Affairs has robustly claimed that torture does not occur in Australia: "Our position is this. Obviously we are totally opposed to torture and nobody in Australia that I've ever met supports torture".[6]

Despite Mr Downer's claim, there is evidence of torture in Australia.

In its report of 13-24 November 2000 in response to the second report of Australia under the CAT, the Committee against Torture identified several concerns relating to the treatment of prisoners that could amount to torture and which require attention by the

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[5] CAT, article 5.2.
[6] DFAT Doorstop transcript, 26 July 2002, Carlton Hotel, Brisbane.

Australian Government.[7] The Committee against Torture asked the Australian Government to address these concerns in its next periodic report due by November 2004.

Further, the Human Rights Committee of the United Nations found on 28 October 2002 in the case of *C v Australia* that Australia had acted in violation of article 7 of the International Covenant on Civil and Political Rights which provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[8]

Mr C was held for an extended period of time in a detention centre following his attempt to obtain asylum in Australia. Through counsel, he made communication No 900/1999 to the Human Rights Committee that claimed, amongst other things, that his right under article 7 not to be subject to torture or to cruel, inhuman or degrading treatment or punishment had been violated.

The Human Rights Committee accepted Mr C's claim in the following terms:

> 8.4 As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.

It is submitted therefore that torture has occurred in Australia and may occur again unless effective preventive steps are taken.

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[7] The Committee expressed its concern about the following:
(a) The apparent lack of appropriate review mechanisms for ministerial decisions in respect of cases coming under article 3 of the Convention;
(b) The use by prison authorities of instruments of physical restraint that may cause unnecessary pain and humiliation;
(c) Allegations of excessive use of force or degrading treatment by police forces or prison guards;
(d) Allegations of intimidation and adverse consequences faced by inmates who complain about their treatment in prisons;
(e) Legislation imposing mandatory minimum sentences, which has allegedly had a discriminatory effect regarding the indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system.

[8] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument

Responsibility for prisons is divided between the Commonwealth, State and Territory Governments and is further divided between state-run and privately-run prisons. With different parties responsible for prisons, different standards could apply, some of which may fall short of the standards required under the CAT and Australian law. Occurrences in prisons and other places of detention, especially for asylum seekers, are shielded from the public eye and torture can occur unless preventive measures are undertaken. Regular visits by international and national bodies with monitoring and educative objectives are necessary preventive measures.

Members of the Sub-Committee must be suitably qualified. The Government could be expected to ensure that members of the national body are also suitably qualified for the task. In addition, the members should be chosen by the Commonwealth, State and Territory Governments acting in concert to minimize State and Territory sensitivity to perceptions of Commonwealth interference in prisons falling within their day to day responsibility.

Ratification of OPCAT will provide comfort to Australians that torture is not used by public officials

Mr Downer was quoted above as saying that the Government is totally opposed to torture and that he has never met an Australian who supports torture. Such opposition to torture is easily understood because of its abhorrent nature which, together with capital punishment, is totally repugnant to human rights and degrading not only to the person tortured but also to the persons responsible, directly and indirectly, for torture. Nonetheless, as I have argued above, there is evidence of torture in Australia.

Accordingly, measures must be put in place to provide comfort to Australians that the Government is taking appropriate steps to ensure torture does not occur in the future.

We expect monitoring and education to try to ensure adequate compliance by corporations and individuals with a range of laws from corporate laws to road traffic laws. We know that to ensure lawful conduct it is not sufficient to prohibit unlawful conduct, especially when the conduct can take place in remote locations behind closed doors. Appropriate preventive measures are also needed. It is understandable that we expect even more strongly the government to put in place mechanisms to ensure public officials comply with laws prohibiting torture.

The government has misled Australians about the conduct of asylum seekers and the reasons for going to war in Iraq. Australians do not wish also to be misled by assurances about torture. A system of visits to places of detention by independent experts as provided for in the OPCAT is needed to provide comfort to Australians that torture is not committed by public officials and others acting in an official capacity in Australia.

Ratification of OPCAT will send a message to other countries on torture

Australia tarnished its international human rights reputation by its opposition to the OPCAT when the draft protocol came before the Economic and Social Council of the United Nations. Other countries which also voted against the draft protocol were China, Cuba, Egypt, Japan, Libya, Nigeria and the Sudan. Very dubious company for Australia to be keeping. In addition, Australia failed to support the draft protocol when it came before the General Assembly for approval.

The reasons the government has given for its opposition carry no weight and consequently Australia has given the impression to the international community that it is soft on torture.[9] The impression has been given to other countries, especially our allies and neighbours whose human rights conduct we might wish to influence, that Australia is unlikely to be too concerned if they engage in torture.

Australia now has the opportunity to redress the damage to its reputation by signing and ratifying the OPCAT.

If Australia signs and later ratifies OPCAT, it will send a message to other countries that torture is abhorrent and that effective measures will be taken within Australia to prevent it. If Australia signs OPCAT, it will indicate that ratification of the CAT was not an empty gesture but was a serious commitment by Australia to prevent torture by its public officials.

Signing of OPCAT by Australia will provide human rights leadership in an era when global terrorism and responses to it threaten human rights in numerous ways, including deliberate killings of innocent people, indefinite detention of persons without charge or trial, interrogation under torture, and curtailment of civil liberties. It will place a degree of moral pressure on other countries to follow suit and also sign OPCAT.

Early signing and ratification of OPCAT would be particularly significant because the number of ratifications now obtained falls short of the 20 required for the OPCAT to come into effect. If Australia acts promptly it may provide one of the ratifications required for this purpose.

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[9] In a letter to me dated 14 August 2002 by an officer of DFAT, I was told that the Australian Government voted against the protocol because of procedural and substantive concerns: "Procedurally, the UN Commission on Human Rights (CHR) voted to adopt the Protocol on 22 April 2002. It is the norm, and Australia's strong preference, that human rights treaties be adopted by consensus at CHR to ensure that they are broadly supported. Substantively, becoming a Party to the Protocol would constitute a standing invitation for the Sub-Committee Against Torture, which would be established by the Protocol, to visit Australia's prisons and other similar facilities. This would be inconsistent with the Government's decision, elaborated as part of its review of Australia's interaction with UN human rights treaty committees, that it will only consent to such visits where there is a compelling reason to do so."{

Ratification of OPCAT by Australia will send a message to the world on value of international institutions in protection of human rights

The need for strong and effective international institutions to promote the rule of law in the protection of human rights has rarely, if ever, been greater than it is now in the face of global terrorism and the responses it has evoked. The UN is the body that people look to for this purpose.

There is no doubt that the UN needs to change to achieve greater credibility and effectiveness. It is appropriate for Australia to promote such change.

Notwithstanding the present problems with the UN, Australia should work with UN institutions wherever possible, and especially where they appear to provide important international human rights protection. By doing so, Australia will send a message to the world on the importance of the international rule of law in protecting human rights.