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BY: *Gillian Gould*

OPCAT
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From: James Thomson [jthomson@ncca.org.au]
Sent: Monday, 2 February 2004 5:02 PM
To: Committee, Treaties (REPS)
Cc: James Thomson; John Ball
Subject: CWS-NCCA Submission - Inquiry/Otional Protocol to CAT

Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Phone: 02 6277 4002
Fax: 02 6277 2219
email: jsct@aph.gov.au

Dear Sir/Madam

Please find attaches the submission of Christian World Service, National Council of Churches in Australia, to the Joint Committee on Treaties Inquiry into the Optional Protocol to the Convention Against Torture and Other forms of Cruel, Inhuman and Degrading Treatment.

<<CWS-NCCA Submission - OP on Torture - Feb 03.doc>>

On behalf of CWS, I thank you for the opportunity to comment.

Yours Sincerely,

Caesar D'mello

Director

Christian World Service

National Council of Churches in Australia

Note: please confirm receipt of this submission to:

James D. Thomson

National Education and Advocacy Officer

National Program on Refugees and Displaced People

Christian World Service

National Council of Churches in Australia

Locked Bag 199, Sydney 1230

Tel: 9299 2215, Fax: 9262 4514

Email: jthomson@ncca.org.au

Website: www.ncca.org.au

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Submission to the Joint Standing Committee on Treaties Inquiry into the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Other Degrading Treatment

Introduction

The Christian World Service (CWS) Commission of the National Council of Churches in Australia (NCCA) welcomes the opportunity to submit its views to the Joint Standing Committee on Treaties Inquiry into the Optional Protocol to the Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment (CAT).

The NCCA is comprised of fifteen major Christian churches working together to strengthen relationships and understanding of each other and to fulfil common witness, mission and service. Through the NCCA, member churches come together to break down the structures that create and perpetuate poverty, oppression, injustice and division.

The National Program on Refugees and Displaced People operates under the Christian World Service Commission of the NCCA. It is concerned with policy relating to refugees, asylum, settlement, access and equity. It is also involved in awareness raising, education, community development and advocacy. This work is done in partnership with the State Councils of Churches, which each have a refugee program that maintains close links to the community and involves member churches in providing services to refugees and asylum seekers.

The elimination of torture and other forms of cruel, inhuman and degrading practices has been a key concern within the goals and objectives of the Churches and international ecumenical movement and institutions like the World Council of Churches and the National Council of Churches in Australia. Our interest in this inquiry stems from our concerns for asylum seekers and refugees detained in Australia and overseas.

CWS would like to commend the Optional Protocol to the Australian Government as a valuable mechanism that will assist the Australian Government in demonstrating to the Australian and international community its responsibilities under the CAT.

Background

1. The Convention Against Torture

The CAT, which was adopted by the General Assembly in 1984 and which entered into force on 26 June 1987, obliges the 132 States parties who have ratified it to make torture a crime and to prosecute and punish those guilty of it. It notes explicitly that neither higher orders nor exceptional circumstances can justify torture.

The CAT defines torture as *“any act by which severe physical or mental pain or suffering is intentionally inflicted by, at the instigation of, or with the acquiescence of someone acting in an official capacity, to obtain information or a confession. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”*

In signing the CAT, Australia recognised that freedom from torture and other forms of cruel, inhuman or degrading treatment is an absolute right, which cannot be derogated from under any circumstances, including in times of armed conflict and other situations of public emergency.

2. The Optional Protocol to Convention Against Torture

The Optional Protocol to the CAT was formulated as a mechanism to help existing signatory states to CAT implement their obligations under the Treaty. It does not impose additional obligations on CAT signatory states nor additional human rights.

The Protocol requires of a state that there be compliance with and support for the work of the Subcommittee of the existing Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as the Subcommittee on Prevention), which was established under the CAT to report on state compliance.

It requires that a national preventative mechanisms be established¹ (a condition already largely satisfied by Australia through the creation of the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman and Parliamentary Committees of inquiry) and allows for visits by independent experts of the Subcommittee to places where people are detained. It also provides for a mechanism for states to enter into a cooperative dialogue with the Subcommittee in order to help them ensure that torture does not take place.

The aim of the visits is to see how people deprived of their liberty are treated and to recommend in confidence to states improvements where necessary. Only if the state party refuses to co-operate with a visit of the Subcommittee or act on its

¹ The Optional Protocol requires that one or more National Preventive Mechanisms (NPMs) be established or designated in respect of all persons deprived of their liberty, but it does not prescribe any particular form that the NPM must take. Such mechanisms already exist in various states and may include bodies such as human rights commissions, ombudsmen, parliamentary commissions, laypeople's schemes, non-governmental organisations, judicial prison inspectorates and so forth. States must make sure that the NPMs are functionally independent entities, so an entirely government-led monitoring body or inspectorate would not fulfil the mandate of the Protocol.

recommendations may the Subcommittee make a public statement without the consent of the state party.²

The Protocol in essence was inspired by the European Convention against Torture, which set in place a visiting system similar to the one envisaged in the Optional Protocol, and which has been successfully operating in Europe since 1989.

The clear focus of the Protocol is thus on prevention with the aim of ensuring that activities contrary to the Treaty do not occur, and if they do, that appropriate action is taken. It is therefore an important tool to assist states like Australia in their efforts to prevent torture. CWS therefore encourages all states, including Australia, sign the Protocol and set up mechanisms allowing such visits to take place.

Response of Christian World Service

3. Why Should Australia Sign?

- Demonstrate Australia's commitment to human rights and leadership as the newly elected Chair of the United Nations High Commission for Human Rights.
- Provide a mechanism through which present and future Australian Governments can demonstrate to both the Australian and international community that they are complying with Australia's international treaty obligations under the CAT.
- CWS believes that signing the Protocol would set a strong example for regional states and give credibility to Australia's regional human rights dialogue.
- States that have a strong desire to fully comply with the CAT have nothing to fear from signing the Optional Protocol. On the contrary, for such states, it will assist in helping to further demonstrate their commitment to uphold Australia's responsibilities as a signatory to the CAT.

² The Protocol requires state parties to give the international entity unrestricted access to all places of detention, including information on where they are holding persons deprived of their liberty and information regarding where they are detained, the conditions under which they are detained, and how they are treated (article 14(1)(a) and (b)). The state concerned must grant the international visiting body unlimited access to such places and an opportunity for the International Visiting Mechanism (IVM) delegation to interview detainees privately (or with a translator), without witnesses being present. The IVM may at liberty choose the places it wants to visit and the persons it wants to interview. The IVM must communicate its observations and recommendations confidentially to the state party and, if relevant, to the national preventive mechanism. If requested by the state party, the IVM must publish its report, together with any comments by the state concerned. Only if the state party refuses to cooperate with the IVM or to act on its recommendations may the IVM make a public statement without the consent of the state party. Securing the cooperation of the state is the core aim of the OPTEC. Instead of upstaging and embarrassing the state, it is nudged and induced confidentially into taking measures to prevent torture, and other forms of cruel, inhuman and degrading treatment or punishment. States that ratify the Optional Protocol must grant the NPM access to all places of detention and must enable it to have interviews, without witnesses, with the persons who are deprived of their liberty, either personally or with a translator. NPMs may visit places of detention regularly and may also choose the places they want to visit and the persons they want to interview. The state party and NPM must then enter into a dialogue for possible implementation of the recommendations emanating from visits (article 22) and state parties are also required to publish and distribute the annual reports of the NPMs (article 23).

Australia's Stated Concerns about the Protocol:

In response to our letter on 16 July 2002 to the Minister for Foreign Affairs and Trade, the Hon. Alexander Downer, which urged the Australian Government to reconsider its position and support the Protocol, Dominic Trindade, responding on Mr Downer's behalf on 26 July 2002 stated that Australia had not supported the Protocol because of "Australia's strong preference that human rights treaties be adopted by consensus at the Commission on Human Rights."

While CWS is mindful that such important treaties are not excluded on procedural grounds (as even such fundamental treaties like the Universal Declaration on Human Rights were voted in rather than being adopted by consensus), it considers this a moot point as it has now become clear that there is an overwhelming consensus in favour of the Protocol as represented in the following voting patterns on the adoption of the Protocol:

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

Recommendation:

1. *The NCCA recommends that the Australian Government sign the Optional Protocol to the CAT and do more to raise the awareness of the Protocol to the Australian public.*

For more information, please contact:

James D. Thomson
National Program on Refugees and Displaced People
Christian World Service Commission of
The National Council of Churches in Australia
Locked Bag 199 Sydney 1230
Tel: 9299 2215 Fax: 9262 4514
Email: jthomson@ncca.org.au