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CENTRE FOR INTERNATIONAL GOVERNANCE AND JUSTICE
REGULATORY INSTITUTIONS NETWORK (RegNet)

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Joint Standing Committee on Treaties
Parliament House
Canberra ACT 2600
Via email: jsct@aph.gov.au

10 October 2008

Dear Secretary

We are pleased to make a submission on the question of accession to the Optional Protocol to the Convention on the Elimination of Discrimination against Women (OP CEDAW), plus the NIA and Consultation on the OP CEDAW text.

Australia should accede to the OP CEDAW

We support the full implementation of the CEDAW Convention into Australian domestic law. Accession to the Optional Protocol should be seen as further encouragement to ensure that there are adequate national measures to safeguard the rights of Australian women.

The OP CEDAW was adopted by the General Assembly on 6 October 1999, and as of 1 October 2008 there were 92 States Parties to the treaty. The OP CEDAW establishes both an individual communications procedure (Articles 1-7) and an inquiry procedure (Articles 8 and 9). States which ratify or accede to the Optional Protocol must accept the individual communications procedure, and are also subject to the inquiry procedure unless they make a declaration under Article 10. (Of the 92 States Parties to the treaty, only four have made such a declaration – Bangladesh, Belize, Colombia, and Cuba.)

By accepting the individual communications procedure established by Articles 1-7 of the OP CEDAW, Australia would subject itself to the competence of the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) to receive and consider complaints from individuals who claim that their rights under the Convention have not been adequately protected under Australian law and practice. However, this is possible only after the individual concerned has exhausted all available domestic remedies.

While Australia's experience under other treaties suggests that some complaints will be lodged under the individual communications procedure, accession to the Optional Protocol is unlikely to prompt a flood of complaints. Since the OP CEDAW entered into force on 22 December 2000, the Committee has published decisions or views on less than a dozen cases in total.

Under Article 8 of the OP CEDAW, the Committee has the competence to initiate an inquiry into the situation in a State Party when it 'receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention'. That inquiry is to be carried out in cooperation with the State. The procedure is based on the similar inquiry procedure under Article 20 of the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, which Australia accepted when it ratified that Convention in 1989. The CEDAW Committee has so far completed only one inquiry under the OP CEDAW (in relation to Mexico), while the Committee against Torture has conducted only six inquiries in 20 years.

Accepting individual communications and inquiry procedures in the United Nations human rights treaty system demonstrates a country's willingness to be fully accountable and open to international scrutiny. It reflects a confidence that a country has a good human rights record, by demonstrating a preparedness to be scrutinised. It also sends a strong signal to our region that women's rights are important, which is consistent with Australia's development programme and multilateral positions.

Acceding to the Optional Protocol is not an alternative to other efforts to fully implement Australia's obligations under CEDAW. We note that the Senate Legal and Constitutional Affairs Committee is currently considering the effectiveness of the Commonwealth *Sex Discrimination Act 1984* (SDA). Several submissions have recommended that the SDA definitions of discrimination be reviewed to give full effect to Australia's CEDAW obligations pertaining to formal equality and substantive equality.¹ This point has been previously noted by the Australian Law Reform Commission and Australian Human Rights Commission. Becoming a party to the Optional Protocol may increase the attention given to such issues in the domestic sphere, so as to avoid the need for an individual complaint.

It is also important that the rights of Australian women under CEDAW are put on the same footing as the rights guaranteed under the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture, and the International Covenant on Civil and Political Rights. Australia accepted almost identical complaint mechanisms under these treaties in the early 1990s. We therefore endorse the submission made by the Human Rights Law Resource Centre on the text of the Optional Protocol and NIA.

We also support the contention that Australia's domestic machinery needs to be improved to handle responses to individual complaints and Committee Views. In particular, we urge that the Government adopt a consistent practice not only of tabling the Views and Concluding Observations of the UN human rights treaty bodies relating to Australia in parliament, but that these be referred to the appropriate parliamentary committee(s) to ensure that their implementation is subject to parliamentary scrutiny. The Commonwealth should also endeavour to ensure, through appropriate channels, that these documents are also placed before relevant committees of the State and Territory legislatures where their implementation falls within areas of State or Territory responsibility.

Political Context

Accession by Australia to the OP CEDAW would reinforce the clear message that the current Australian Government has already sent to the international community through its public statements and recent and proposed treaty actions, namely that Australia is once again strongly committed to supporting the United Nations and to engaging constructively with the UN human rights treaty bodies and other UN human rights mechanisms.

¹ See for example, submission no 60 - http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/submissions/sub60.pdf

It is relevant to recall the political context in which the earlier consideration of Australia's acceptance of the Optional Protocol took place. The initial refusal of Australia in 2000 to sign and ratify the Optional Protocol had little to do with the merits of the instrument itself. Indeed, Australia refused to sign the Optional Protocol even though it had helped to draft the text and was championing it to other States in the region at Ministerial level. Elizabeth Evatt AC, a former Chair of the CEDAW Committee and member of the UN Human Rights Committee, and Dame Sylvia Cartwright, former New Zealand Governor-General, High Court judge and CEDAW Committee member, were closely involved at various stages of the development of the treaty, as were Australian human rights lawyers.² The Australian government's response appeared to be based on the fact that it had recently been the subject of a critical hearing and report by the UN Committee on the Elimination of Racial Discrimination.

On 29 August 2000 the Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs issued a joint press release titled: *Improving the Effectiveness of United Nations Committees*. The press release read in part:

Cabinet decided Australia's strategic engagement with the treaty committee system should be dependent on the extent to which effective reform occurs. In pursuit of reform the Government will take the following measures:

... Australia will immediately implement a package of measures to improve our continued interaction with UN human rights treaty committees, including the following:

... (d) Australia will not sign or ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which establishes a new complaints procedure.

Acceptance of the Optional Protocol to CEDAW has therefore been linked to Australia's relationship with the UN human rights system as a whole, and accession at this time will be seen as a new, more positive approach to the UN human rights committees by the international community and in the region.³ This can only be of assistance to Australia's bid to be elected to the UN Security Council in 2013.

Recommendation

That the Committee recommend that the Australian Government should accede to the Optional Protocol in its entirety (i.e., without making a declaration under Article 10).

We would be pleased to discuss these issues further with the Committee if required.

² See, Byrnes and Connors, 'Enforcing the Human Rights of Women: A Complaints Procedure for the Convention on the Elimination of All Forms of Discrimination Against Women?' (1996) 21(3) *Brooklyn Journal of International Law* 679-798.

³ Further information on Australia's relations with the UN human rights system can be found in the book *No Country is an Island: Australia and International Law* (UNSW Press, Sydney) 2006 by Hilary Charlesworth, Madelaine Chiam, Devika Hovell & George Williams.

Yours sincerely,

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Who we are

The Centre for International Governance and Justice

CIGJ aims to develop regulatory theory in the context of peacekeeping and peacebuilding. Our research projects focus both on empirical questions, such as what works and what fails in peacekeeping and peacebuilding, and also on the role that international law can play in strengthening the development of democracy after conflict.

Regulatory Institutions Network, ANU

RegNet is a large research group within the College of Asia and Pacific. It is also a network of institutions, practitioners and academics involved in exploring and understanding critical domains of regulation. Members of the network differ in their approaches to regulation but their work is interconnected. The key motivation driving RegNet is to advance current understanding and approaches to issues such as human security, policing, environment, cyber crime, illicit organisations and markets, intellectual property and the governance of knowledge, development, peacebuilding, human rights, international law, micro foundations of democratic governance, health and occupational health and safety through a regulatory framework that develops evidence-based theory, policy and practice.

The Australian Human Rights Centre, UNSW

The Australian Human Rights Centre (AHRC) is an inter-disciplinary research and teaching institute based in the Faculty of Law at the University of New South Wales (UNSW). Established in 1986, the AHRC aims to increase public awareness about human rights procedures, standards and issues within Australia and the international community. The Centre undertakes research projects on contemporary human rights issues and provides accessible information on developments within the field.

Professor Hilary Charlesworth

Hilary Charlesworth is an Australian Research Council Federation Fellow, Professor in RegNet and Director of the Centre for International Governance and Justice, ANU. She also holds an appointment as Professor of International Law and Human Rights in the ANU College of Law. Her research interests are in international law and human rights law.

Professor Andrew Byrnes

Andrew Byrnes joined the UNSW Law Faculty as Professor of International Law in May 2005. Previously, he was Professor of Law at the Australian National University (2001-2005) and prior to that was Associate Professor of Law at the Faculty of Law, University of Hong Kong, where he was Director of the Centre for Comparative and Public Law. He has written extensively on UN human rights treaties, including the CEDAW Convention. His most recent publication on the work of the Committee is 'Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women – Recent Developments' (2008) 8(3) *Human Rights Law Review* 517-533 (with Eleanor Bath).

Susan Harris Rimmer

Susan Harris Rimmer is a Research Fellow with the Centre for International Governance and Justice. Susan graduated from the University of Queensland in 1997 with a BA (Hons)/LLB (Hons) and received a University Medal in 1996. Susan will receive a Doctor of Juridical Science from the ANU College of Law for her thesis "Transitional Justice and the Women of East Timor" in December 2008. Susan is President of national NGO Australian Lawyers for Human Rights.