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UnitingJustice AUSTRALIA

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES FOR THE NATIONAL INTEREST ANALYSIS ON THE

OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (OPCAT).

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1 | INTRODUCTION

UnitingJustice Australia is the justice unit of the National Assembly of the Uniting Church in Australia, pursuing matters of social and economic justice, human rights, peace and the environment. It works in collaboration with other Assembly agencies, Uniting Church synod justice staff around the country, and with other community and faith-based organisations and groups. It engages in advocacy and education and works collaboratively to communicate the Church's vision for a reconciled world.

The Uniting Church in Australia is committed to involvement in the making of just public policy that prioritises the needs of the most vulnerable and disadvantaged in our society. In 1977, the Inaugural Assembly of the Uniting Church issued a Statement to the Nation.[1] In this statement, the Church declared that "our response to the Christian gospel will continue to involve us in social and national affairs." In part, this statement reads:

> We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond. We affirm the rights of all people to equal educational opportunities, adequate health care, freedom of speech, employment or dignity in unemployment if work is not available. We will oppose all forms of discrimination which infringe basic rights and freedoms.

The Uniting Church's support for human rights is based on how we understand the Christian faith. Christians believe that human beings are created in the image of God who is three persons in open, joyful interaction. As bearers of God's image, human beings are inherently deserving of dignity and respect. Humans, made in God's image, are inherently relational, finding life and sustenance in relationship and community. Being called into community with the whole of humankind as we are, when one person is diminished, we are all diminished.

The Uniting Church believes that it has a responsibility to contribute to the building of societies in which all people are valued and respected. In the context of public policy and international affairs, this means participating in the development of systems, processes and structures, such as the international human rights system and the protection of human rights domestically, that function to both protect and promote human dignity and peace, and hold all of us mutually accountable in this.

The Uniting Church's support for human rights and the upholding of the dignity of all people was fully articulated in its statement on human rights, *Dignity in Humanity: Recognising Christ in Every Person*, adopted by the National Assembly of the Church in 2006.[2] As well as outlining the theological basis of our commitment to human rights, this statement expresses the Church's support for "the human rights standards recognised by the United Nations."

In *Dignity in Humanity*, the Uniting Church also urged the Australian Government to fulfill its responsibilities under the human rights covenants, conventions and treaties that Australia has ratified or signed, and pledged to assess current and future national public policy and practice against international human rights instruments, keeping in mind Christ's call and example to work for justice for the oppressed and vulnerable. It is these promises that continue to drive the Church's involvement in the development of just and responsible government policy and practice in Australia.

1 This statement is available at: http://www.unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation

2 http://www.unitingjustice.org.au/human-rights/uca-statements/item/484-dignity-in-humanity-a-uniting-church-statement-on-human-rights

In July 2006 the Assembly Standing Committee resolved to request that the Australian Government "ensure that torture and other such treatment does not occur within detention centres and prisons in Australia."[3]

We are disappointed that progress on the ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) has been such a protracted process. The Australian Government initiated the preparation of a National Interest Analysis in 2008 and, despite the overwhelming majority of submissions supporting full accession, we are still faced with significant gaps in the current array of mechanisms to protect human rights violations. While the Australian Government signed OPCAT in May 2009, the lack of subsequent action with regards to ratification has led to international criticism, including Australia's Universal Periodic Review in 2011. Additionally, a number of United Nations Human Rights Council Member States have strongly recommended that Australia expedite the accession process.[4]

In January 2012, UnitingJustice Australia and 28 other human rights advocacy groups wrote to the Attorney-General urging the immediate ratification of OPCAT.[5] We are hopeful that this National Interest Analysis is a firm and genuine commitment – and the final step – in the full and immediate implementation of OPCAT into Australia's commonwealth legislation.

2 | BACKGROUND

Torture is among the most heinous of all human rights violations. It is a crime which can never be justified and which must be vigorously opposed wherever it occurs, and whomever the perpetrators or victims. The utmost vigilance and transparency are required when dealing with torture and ill-treatment, with scrupulous adherence to all necessary methods of prevention and full use of international law.

Currently, the relevant Australian legislation governing torture includes:[6]

- Criminal Code Act 1995
- Crimes Act 1900 (ACT)
- Criminal Code Act of 1899 (Qld)
- Criminal Code Act of 2007 (NI)

While we acknowledge the value of these pieces of legislation, UnitingJustice is concerned that they do not go far enough in fulfilling our commitment to the prevention of grave human rights abuses. In particular, we voice our concern over the following issues:

- the high rates of Indigenous Australian deaths in custody,
- the detention of asylum seekers, and
- the role of the Australian Government and military forces internationally.

The OPCAT is intended to aid States implement their obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[7] While there are no clauses to create substantive new rights for victims, OPCAT does provide for new and improved mechanisms for monitoring and preventing any kind of torture or cruel, inhuman or degrading treatment or punishment. Specifically, accession to OPCAT will necessitate that the Australian Government establish independent National Preventive Mechanisms (NPMs) to monitor and conduct regular visits to places of detention. The NPMs are also charged with the task of making recommendations and/or submissions to the Government on existing or proposed legislation to ensure compliance with all aspects of OPCAT.[8]

3 Eleventh Standing Committee, Uniting Church in Australia (2006), *Implementation of Dignity in Humanity*, Resolution 06.75.01, available at http://www.unitingjustice.org.au/human-rights/uca-statements/item/483-implementation-of-dignity-in-humanity

4 Recommendations 86.1 – 86.6, UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, A/HRC/17/10.

5 http://www.cla.asn.au/Article/2011/OPCAT.pdf

6 Association for the Prevention of Torture, *Compilation of Torture Laws*, available at: http://www.apt.ch/index.php?option=com_k2&view=item&layout=item&id=819&Itemid=266&lang=en

7 See Articles 2 and 16, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: http://www.hrweb.org/legal/cat.html

8 http://www.irct.org/legal-instruments---mechanisms/complaint-mechanisms-and-legal-proceedings/national-mechanisms/national-preventive-mechanism-(under-opcat).aspx

In addition to the NPMs, ratification of OPCAT would also provide for additional visits by the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or degrading Treatment or Punishment (the Sub-Committee). The Sub-Committee represents an important independent mechanism to review detention in Australia and to review national measures and bodies to prevent cruel, inhuman and degrading treatment and punishment. The Sub-Committee does not require the consent of parties to OPCAT prior to visiting places of detention, although Article 13 provides that parties will be notified of the visit in advance. The Association for the Prevention of Torture believes that the 'dual system' of NPMs and the Sub-Committee is essential for the success of OPCAT, as it "serves as the basis for constructive dialogue with the authorities on improving conditions and treatment in detention… and promotes transparency in places of detention."[9]

UnitingJustice believes that such scrutiny should be welcomed as a form of continuous improvement to detention in Australia. Many existing mechanisms currently used to monitor places of detention do not meet OPCAT standards.[10] The Australian Human Rights Commission has identified four key areas of failing in existing reporting bodies:[11]

1. they report to their relevant Department, rather than an external independent body,
2. restricted access to places of detention, particularly immigration detention centres,
3. a lack of autonomy for reporting bodies, and
4. the low level of effect reports have on policy and practice changes.

It would be naïve to assume that conditions of imprisonment are always above reproach and could not benefit from additional independent review and expert advice. We note that the Government has expressed on multiple occasions that their human rights record is one to be proud of. We believe then that there should be no objection to processes that would enhance accountability and transparency in Australian places of detention. An expedited accession to OPCAT would also ensure Australia does not repeat the mistakes that befell us during the protracted ratification of the Rome Statute and the watering down of the final provisions of that important piece of international legislation.[12]

3 | INDIGENOUS DEATHS IN CUSTODY

It is just over 20 years since the Royal Commission into Aboriginal Deaths in Custody and while several of the Report's 339 recommendations have been implemented, many vital areas of reform remain largely neglected. Indigenous peoples are grossly over-represented in our legal system, making up 24% of the prison population, while representing only 2.4% of the total Australian population.[13] Over half of the Indigenous people who have died in custody have been detained for no more than public order offences, indicating a systemic failure in our justice and detention system.[14]

The Human Rights Commission and the Committee on the Rights of the Child have both expressed alarm at these rates of detention, and the lack of fair treatment for Indigenous peoples within the Australian legal system.[15]

Additionally, the Committee Against Torture noted their concern in their Concluding Remarks with regards to:[16]

9 Association for the Prevention of Torture (2009), *OPCAT: An Opportunity for Refugee and Migrant Rights Protection*, available at http://www.apt.ch/index.php?option=com_docman&task=cat_view&gid=130&Itemid=256&lang=en

10 Harding, R. & Morgan, N. (2008), *Implementing the Optional Protocol to the Convention Against Torture: Options for Australia*, Australian Human Rights Commission.

11 Ibid.

12 http://untreaty.un.org/cod/icc/statute/romefra.htm

13 Australian Bureau of Statistics (ABS) (2006), *Prisoners in Australia*. It should be noted with concern that the rate is substantially higher in Western Australia, particularly for juvenile offenders.

14 Australian Institute of Criminology (2006), *Trends and Issues in Crime and Criminal Justice: Deaths in Custody in Australia 1990 – 2004*.

15 Concluding Observations of the Human Rights Committee: Australia, UN Doc A/55/40 (2000); Concluding Observations of the Committee on the Rights of the Child: Australia, UN Doc CRC/C/15/Add.268 (2005), [73-74].

16 Article 11 (2008). Available at http://www.unhcr.org/refworld/country,,CAT,,AUS,45b632e02,4885cf7f0,0.html.

(c) the disproportionately high numbers of Indigenous Australians incarcerated, notably among them the increasingly high rates of children and women

(d) the continued reports of Indigenous deaths in custody due to causes that are not clearly determined.

Full ratification of OPCAT and the independent monitoring that it facilitates would be a valuable step in ensuring equitable and fair treatment for Indigenous peoples. An independent investigative process, separate to the police force and criminal justice departments, would not only ensure compliance with Australia's international human rights obligations, but would also ensure transparency and increase the level of public confidence in the Government's attempts to overcome the horrifying statistics that characterise the relationship between our justice system and the First Peoples.

A recent report prepared by the Corruption and Crime Commission highlighted the increased use of force by way of Tasers and capsicum spray on those in police custody.[17] UnitingJustice is most concerned by the findings of this report, particularly when undue force is used instead of de-escalation techniques. The use of these tactics and tools on Indigenous persons already in custody is a shameful practice and most certainly amounts to cruel and inhuman treatment as proscribed by OPCAT.[18]

4 | THE DETENTION OF ASYLUM SEEKERS

Since its introduction in 1992, the policy of mandatory immigration detention has been the subject of intense scrutiny and multiple scathing reports. UnitingJustice has long been opposed to the protracted detention of vulnerable men, women and children who are fleeing persecution. We believe that immigration detention centres (IDCs) are gross violations of our international human rights obligations, and that they are highly destructive to the physical, spiritual and psychological wellbeing of all who are detained.[19]

In October 2011, the Government issued a statement indicating a move towards community processing and the issuing of bridging visas for asylum seekers arriving in Australia by boat. Despite this, the Government remains vocally committed to abrogating its international responsibilities through the introduction of offshore processing, and indefinite mandatory detention remains the cornerstone of our immigration legislation. Clearly, there is an inexplicable disparity between Governmental promises and legislative reality with regards to immigration in Australia.

As early as 1994, the Government's own reports noted the deleterious effects of indefinite mandatory immigration detention, describing the practice as "inappropriate and unacceptable."[20] Highlighted in the Standing Committee's report in 1994 was a concern over the length of time spent in detention – an issue of continuous contention over the last twenty years. Despite this, as of 31 October 2011, nearly 40% of those in immigration detention had languished in prison-like conditions for more than 12 months.[21]

Even more alarmingly, a recent visit to Australian IDCs by Amnesty revealed that some detainees had spent several years in detention:[22]

- Northwest Point IDC, Christmas Island: longest time in detention was over 800 days,
- Curtin IDC, Western Australia: longest time in detention was 831 days,

17 Corruption and Crime Commission (2010), *The Use of Taser Weapons by Western Australia Police*, 12.

18 "Recent research and consultations conducted by the Human Rights Law Centre have found that excessive use of force is already a significant issue for people with a mental illness, the homeless, Aborigines and Torres Strait Islanders and young people, particularly of African descent. Tasers are likely to exacerbate this issue." http://www.hrlc.org.au/content/op-ed-tasers-are-a-potentially-lethal-weapon-in-the-hands-of-those-charged-to-protect-us-20-march-2012/#more-8434

19 To view a sample of the multiple submissions made by UnitingJustice on this issue, see: http://www.unitingjustice.org.au/refugees-and-asylum-seekers/submissions

20 Joint Standing Committee on Migration (1994), *Asylum, border control and detention*, Commonwealth of Australia, Canberra, p. 147.

21 DIAC (2011), *Immigration detention statistics summary*. Available at http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20111031.pdf

22 http://www.amnesty.org.au/images/uploads/news/Amnesty-International-Australia-DetentionFacilitiesVisit-2012-FINAL.pdf

- Perth IDC: longest time in detention was over 12 months,
- Phosphate Hill APOD for unaccompanied minors: longest time in detention was 4 months,
- Northern IDC, Darwin: longest time in detention was 700 days,
- Airport Lodge APOD 1/2: longest time in detention was 314 days (for an unaccompanied minor),
- Airport Lodge APOD 3: longest time in detention was 745 days.

With the long-term detention of asylum seekers being characterised by the Australian Medical Association as a practice that is "medically harmful, violates basic human rights, has no known beneficial effects and is a form of child abuse,"[23] it is abundantly clear that a new form of monitoring the conditions in these centres must be implemented.

Ratification of OPCAT would provide for greater transparency of the management of our immigration detention centres, and would place pressure on the Government to act in a manner which is in accordance with our international legal obligations to those seeking asylum here in Australia. Article 4 of OPCAT provides for a broad definition of 'places of detention' and would permit the monitoring of all areas in which asylum seekers are held, including airport holding centres, prisons, detention centres, psychiatric institutions and hospitals. UnitingJustice strongly believes that this level of review and the promotion of transparency in our immigration detention centres is an essential stage in realising the rights of asylum seekers.

5 | THE ROLE OF THE AUSTRALIAN GOVERNMENT AND MILITARY FORCES INTERNATIONALLY

There have been strong and persistent calls for an independent inquiry into the role of the Australian Government and military forces overseas, particularly in relation to the participation of the ADF in the abuse of prisoners at Abu Ghraib. Despite this, the Minister for Defence recently announced the deployment of a team of interrogators to Afghanistan. More than 1000 individuals have been detained and questioned by Australian forces in the Oruzgan province since August 2010, most of whom are then handed over to US or UK forces – a deliberate avoidance by the Australian Government of its international obligations to these detainees. Minister Smith believes the deployment of the interrogators will enable a "greater role in the collection of vital intelligence,"[24] however there are no external safeguards in place for the regulation of the behaviour of these members of the defence force.

UnitingJustice remains strongly opposed to the use of torture for the collection of military intelligence in international conflicts, despite domestic laws that essentially condone the use of such practices. While current international legal obligations prohibit the admittance into evidence of information gained through the use of torture, several pieces of Commonwealth legislation are inconsistent with this prohibition, including:

- S. 26 of the Foreign Evidence Act (Cth),
- S. 138 of the Uniform Evidence Act (Cth), and
- S. 8(1A) of the Mutual Assistance in Criminal Matters Act.

Permitting the use of intelligence acquired through acts that have been identified as torture, is tantamount to supporting the acts themselves.

While the Australian Government has relied on the excuse that it has no jurisdiction to investigate many of the claims that human rights agencies have raised, including the treatment of Australian citizens detained by the United States Government in Guantanamo Bay, there is a clear duty on the Federal Government both under the extraterritorial provisions of the Convention Against Torture and in view of its possible involvement in the rendition of detainees to protect the inherent rights and dignity of all Australian nationals.

23 Australian Medical Association (AMA) (2011), *AMA Submission to the Joint Select Committee on Australia's Immigration Detention Network*.

24 http://www.theage.com.au/national/drawing-the-line-on-torture-20120323-1vp5c.html?skin=text-only

6 | FINANCIAL IMPLICATIONS AND SUITABLE MODELS OF COMPLIANCE

While the human cost of failing to implement OPCAT is tremendous, the financial obligations of full accession are minimal. The cost of establishing and maintaining the Subcommittee is borne by the United Nations. The benefits of allowing NPMs to have access to detention sites, and the improvements that these visits will likely facilitate, outweigh any financial costs.[25] While several State Governments have expressed concern over the costs of full accession to OPCAT, there is strong international evidence to suggest that their concerns are misplaced. In Canada, for instance, the NPM established to monitor prisons costs only 0.15% of the overall prison budget. Similarly, in the United Kingdom, the cost of OPCAT compliance is approximately 0.4% of the operating budgets of the facilities inspected.

With regards to the model of implementation in a federalised nation such as Australia, UnitingJustice supports the mixed-model approach outlined in the National Interest Analysis.[26] We strongly support the introduction of an overarching or central body to co-ordinate the actions of the various states, with the most suitable choice being an organisation such as the Australian Human Rights Commission.

25 Attorney-General's Department (2012), *National Interest Analysis*, ATNIA 6, para. 35.

26 Ibid, para. 45.