THE AUSTRALIAN NATIONAL UNIVERSITY

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

http://www.regnet.anu.edu.au

Research School of Pacific and Asian Studies
ANU College of Asia and the Pacific
Coombs Building #8, Cnr Fellows & Garran Roads
The Australian National University
Canberra ACT 0200
AUSTRALIA

t: +61 2 6125 6768
f: +61 2 6125 1507
e: sue.harris-rimmer@anu.edu.au
http://cigj.anu.edu.au

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

6 February 2009

Dear Secretary

Treaty tabled on 3 December 2008 - Optional Protocol to the Convention on the Rights of Persons with Disabilities

We are pleased to make a submission on the question of accession to the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP CRPD), plus the NIA and Consultation on the OP CRPD text.

Australia should accede to the OP CRPD

We support Australia's accession to the CRPD. Accession to the Optional Protocol should be seen as further encouragement to ensure that there are adequate national measures to safeguard the rights of Australians with disabilities.

The OP CRPD was adopted by the General Assembly on 13 December 2006, and entered into force on 3 May 2008. As of 31 January 2009 there were 81 signatories and 28 States Parties to the treaty. The OP CRPD establishes both an individual communications procedure (Articles 1-5) and an inquiry procedure (Articles 6 and 7). States that 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 8.

By accepting the individual communications procedure established by Articles 1-5 of the OP CRPD, Australia would allow the Committee on the Rights of Persons with Disabilities (the CRPD 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. As an example, since the Optional Protocol to the Convention on the Elimination

of All Forms of Discrimination against Women (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 6 of the OP CRPD, 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. Australia has also accepted the similar inquiry procedure established by the OP CEDAW. 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 the rights of people with disabilities 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 CRPD; indeed the Convention and Optional Protocol see the national level as the most appropriate level for ensuring implementation (including providing avenues for seeking remedies for alleged violations). We note that Senator Chris Evans has called for an inquiry into disability and migration issues, especially the health requirement – the subject of a reservation by Australia when it acceded to the Convention. This point has been previously noted by the JSCOT as an issue in relation to its consideration of the Convention text itself. 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 or a request for an inquiry into the law and policy in this area.

It is also important that the rights of Australians with disabilities under CRPD 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 on the Elimination of All Forms of Discrimination against Women, the Convention against Torture, and the International Covenant on Civil and Political Rights. Australia accepted almost, as noted above, identical complaint mechanisms under these treaties in the early 1990s, and CEDAW last year, and has accepted inquiry procedures under the Torture Convention and the CEDAW Convention (ICERD and ICCPR do not have inquiry procedures).

Domestic procedures for considering and giving effect to Committee views

We also argue that Australia's domestic machinery needs to be improved to handle responses to individual complaints and Committee Views. These views are not formally binding in themselves as a matter of international law, in the same way as a judgment of the International Court of Justice would be. Nevertheless, the obligations themselves are binding and they provide an authoritative interpretation of the body entrusted by States parties to monitor the implementation of the Convention. The UN Human Rights Committee recently stated in its *General comment No 33*:[1]

> 13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of

[1] CCPR/C/GC/33 (2008)

that instrument**.** These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

14. Under article 2, paragraph 3 of the Covenant, each State party undertakes "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity." This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found:

> "In accordance with article 2, paragraph 3(a) of the Covenant, the State party is required to provide the author with an effective remedy. By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views."

15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.

In light of these comments and the relevant literature,[2] we argue that Australia should normally give effect to decisions of the UN human rights treaties bodies a matter of course. To ensure that these decisions are given broad circulation and due consideration, we urge that Australia 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 placed before relevant committees of the State and Territory legislatures where their implementation falls within areas of State or Territory responsibility.

Remedies under Australian law

A further issue arises in relation to the provision of remedies under Australian law under this and other individual complaint procedures under UN human rights treaties Australia has accepted. The Human Rights Committee noted in *General Comment No 33* that:

> 20. Most States do not have specific enabling legislation to receive the views of the Committee into their domestic legal order. The domestic law of some States parties does, however, provide for the payment of compensation to the victims of violations of human rights as found by international organs. In any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee.

We recommend that the Committee consider whether Australia should adopt legislation facilitating the implementation of decisions of the international human treaty bodies.

---

[2] See the discussions in International Law Association Committee on International Human Rights Law and Practice, *Interim report on the impact of the United Nations treaty bodies on the work of national courts and tribunals*, in International Law Association, *Report of the Seventieth Conference*, New Delhi (2002) 507-555, and *Final report on the impact of the United Nations treaty bodies on the work of national courts and tribunals*, in International Law Association, *Report of the Seventy-First Conference*, Berlin (2004) 621-687.

Political Context

Accession by Australia to the OP CRPD 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.

Early acceptance of the Optional Protocol to CRPD is therefore linked to Australia's relationship with the UN human rights system as a whole. Accession at this time will be seen by the international community and in the region as a further affirmation of Australia's renewed, more positive approach to the UN human rights committees.[3] This can only be of assistance to Australia's bid to be elected to the UN Security Council in 2013. The Government is to be congratulated on its recent ratification of the Convention, which made possible the nomination and election of Professor Ron McCallum as a member of the Committee.

Optional Protocol for the International Covenant on Economic Social and Cultural Rights

One of the lessons learnt from the drafting process behind the Convention on the Rights of People with Disabilities is that economic, social and cultural rights are crucial to the realisation of these rights. The new Optional Protocol for the International Covenant on Economic Social and Cultural Rights is now open for signature. As a sign of Australian support for the UN human rights system, and to provide harmony with the suite of instruments and procedures Australia is now a party to, this is an instrument the Australian Government should support by early ratification.

[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.

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 8).

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

Yours sincerely,

Professor Hilary Charlesworth
Director, Centre for International Governance and Justice, RegNet, ANU

Professor Andrew Byrnes
Chair, Australian Human Rights Centre, Faculty of Law, University of New South Wales &
Associate, Centre for International Governance and Justice, RegNet, ANU

Associate Professor Andrea Durbach
Director, Australian Human Rights Centre, Faculty of Law, University of New South

Dr Susan Harris Rimmer
Centre for International Governance and Justice, RegNet, ANU
President, Australian Lawyers for Human Rights (alhr.asn.au)

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 with a particular emphasis on economic, social and cultural rights 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 is Professor of International Law at UNSW. He has written extensively on UN human rights treaties, including the CRPD Convention. During the elaboration of the CRPD, he served international legal adviser to the delegation of the Asia Pacific Forum of National Human Rights Institutions to the UN General Assembly Ad Hoc Committee drafting the Convention and its Optional Protocol (2004-2006), as well as providing expert advice to UNESCAP and the Office of the UN High Commissioner for Human Rights on monitoring mechanisms under the new convention.

Associate Professor Andrea Durbach

Andrea Durbach joined the Faculty of Law, UNSW and the Australian Human Rights Centre in 2004 after 13 years (7 as Director) at the Public Interest Advocacy Centre (PIAC), a litigation and policy centre in Sydney. Her research interests continue to be informed by her work as a human rights practitioner in South Africa and Australia with a focus on access to justice via the application of international human rights treaties, standards and procedures.

Dr 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 received 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.