COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

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

MONDAY, 9 FEBRUARY 2004

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JOINT COMMITTEE ON TREATIES

Monday, 9 February 2004

Members: Dr Southcott *(Chair)*, Mr Wilkie *(Deputy Chair)*, Senators Bartlett, Kirk, Marshall, Mason, Santoro, Stephens and Tchen and Mr Adams, Mr Bartlett, Mr Ciobo, Mr Martyn Evans, Mr Hunt, Mr Peter King and Mr Scott

Senators and members in attendance: Senators Kirk, Mason, Stephens and Tchen and Mr Adams, Mr Ciobo, Mr Martyn Evans, Dr Southcott and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

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

WITNESSES

Committee met at 10.13 a.m.

LEIGH, Ms Kathy, First Assistant Secretary, Civil Justice Division, Attorney-General's Department

LEON, Ms Renee, First Assistant Secretary, Office of International Law, Attorney-General's Department

FEWSTER, Mr Alan, Executive Director, Treaties Secretariat, Legal Branch, Department of Foreign Affairs and Trade

FRENCH, Dr Greg, Assistant Secretary, Legal Branch, Department of Foreign Affairs and Trade

McGUIRE, Mr Gerard Francis, Director, Human Rights and Indigenous Issues Section, Department of Foreign Affairs and Trade

MILLAR, Ms Caroline Jane, Ambassador for People Smuggling Issues, First Assistant Secretary, International Organisations and Legal Division, Department of Foreign Affairs and Trade

CHAIR—Welcome. I declare open this meeting of the Joint Standing Committee on Treaties. Today the committee will take evidence on the inquiry into the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The optional protocol was referred to the committee for inquiry by the Senate on 26 November 2003. The committee is required to report its findings to the Senate by 23 March 2004. The objective of the optional protocol is to establish a system of regular visits to be undertaken by independent international and national bodies to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. The functions of the optional protocol are carried out by two mechanisms: the subcommittee on prevention, and independent national preventative mechanisms.

This is the first opportunity for the committee to take evidence for this inquiry. I should remind witnesses that today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses, it would be helpful if they would raise this issue now.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Ms Leigh—No, thank you, Chair.

CHAIR—What provisions are there in domestic law now to ensure that Australian conditions of detention do comply with international human rights standards, including those on torture?

Ms Leigh—Australia is a party to the convention against torture, which is the relevant substantive convention, so Australia complies with all of the obligations under that treaty. At the Commonwealth level we have the Crimes (Torture) Act 1988, which implements all of the requirements under that treaty to make torture a criminal offence, and the supporting mechanisms. Of course, insofar as we are talking about any government facilities, we are talking about not only Commonwealth but also state facilities, so we would be looking at both state and Commonwealth laws in terms of broader issues of implementation of that treaty.

CHAIR—Is the UN committee which looks at the convention against torture able to visit a member state with the consent of the member state right now?

Ms Leon—Yes, there is a provision in the convention that enables the committee to seek the cooperation of a member state if the committee has concerns about any acts or practices that might be occurring in that state and, with the agreement of the state, to visit, make a report, hold discussions with the member state and the government, make recommendations and engage with the state on proposals to address any matters of concern.

Senator KIRK—Has there been any permission sought by the committee in order to make a visit to an Australian facility?

Ms Leon—Not that I am aware of.

Senator KIRK—Would you outline for us what the significant differences are between the convention and the protocol that we are examining here today?

Ms Leon—The convention is the substantive instrument that sets out the prohibitions on torture and other cruel, inhuman or degrading treatment or punishment. It requires state parties to make those acts criminal offences. It also requires appropriate procedural mechanisms to be in place to address any people who might be victims of torture or inhuman treatment or punishment. So it provides substantive obligations in relation to the elimination of torture and those other forms of treatment.

The protocol is an enforcement and preventative type mechanism rather than something which imposes substantive obligations in relation to acts of torture. So the twin mechanisms that the protocol proposes are the establishment of a national mechanism for monitoring, visiting and so on places of detention in any state that becomes a party and the setting up under the protocol, were it to come into force, of a standing invitation to a subcommittee of the Committee against Torture to visit any state that is a party to the protocol.

Senator KIRK—How does that standing invitation differ from what there is under the convention that you mentioned before—that is, the opportunity for the committee to visit?

Ms Leon—The convention provides a mechanism for the committee to seek the assistance of a state party to visit, and the protocol would in effect be a party giving that permission once and for all time, not on a case-by-case basis.

Senator KIRK—I understand.

CHAIR—On the procedural objections that Australia has raised, your submission mentions that there was a UN working group looking at this since 1992. What were the sticking points in developing an optional protocol to the convention against torture?

Ms Leon—I think probably all we can say on that is that it was a very lengthy process of negotiation. Various iterations probably went back and forth, but I do not believe any of us here were involved in the negotiations over that period, and it would be difficult, I think, without that personal involvement, to give a summary of the way the negotiations might have gone back and forth. There were certainly many years of deadlock in the negotiations when no text came close to being agreed and, as I think the government has mentioned as part of its procedural objections, in the end the text never was agreed by all the parties that had been negotiating it. In the absence of that agreement, the chair put together a text and just put it to the vote. So there were a range of issues that had been under negotiation for many years but I do not think any of us are in a position to summarise exactly the points for and against the different positions this time.

CHAIR—Thank you.

Mr MARTYN EVANS—It has been open for signature for around a year now, and I notice that there are not that many countries that have signed. The most significant signature of a country that has also ratified the protocol is that of the United Kingdom. They have moved obviously very rapidly to sign and ratify, making them only the third country to do so. Albania and Malta, while no doubt important as countries themselves, are not quite in the same league in this context as the United Kingdom. Interestingly, despite their enthusiasm for these areas, the countries of the European Union do not seem to feature very strongly. Sweden is there, as are Denmark and Finland—but they are not EU countries. Is there anything to indicate why the United Kingdom is the only major EU country to have done this? Given the European Union's enthusiasm for commenting on others in this area, they do not seem to feature strongly in this list.

Ms Millar—That is a perfectly valid point, but we do not really have any information on that.

Mr MARTYN EVANS—No. Despite the fact that it has been open for a year, we do not have that many countries on the list. You are not aware of any sort of movement in this direction? Is there any sort of diplomatic gossip in the context of what is occurring on that front?

Ms Millar—With respect to this protocol, I am not aware of any particular push for countries to move on it. It has not had a lot of impetus, and I think that is probably because—and I am speculating here—the substantive treaty, the convention against torture, already provides for a mechanism to investigate allegations of torture. This particular protocol in fact allows experts to visit facilities regardless of whether there are any substantive concerns that there could be allegations of torture. So I think there may be a sense on the part of some countries that it may not add enormously to the existing convention, so that the impetus for signature and ratification even for countries that are broadly supportive of it perhaps is not quite there to the same extent it might be for other human rights instruments.

Mr MARTYN EVANS—It is interesting that a number of countries that one might have concerns about on an international front—without particularly wishing to say that we do—have

in fact signed the treaty. Countries that are not some of the world's major offenders but may be in a grey area and are occasionally mentioned in dispatches have signed the treaty. I wonder why that might be the case. Indeed, one country that has ratified it—and I do not mean the United Kingdom, although in terms of asylum seekers, detention and so on there might be some issues there. But it seems remarkable that a number of countries that have come up for signature on this have done so. So it is rather hard to work out just what the politics of this are on the international front. I take it that it is also very hard to speculate about it in that context.

Senator MASON—Let us just go to the nub of it. The chair did mention procedural issues, but let us leave that for the moment. We have an optional protocol and let us look at that. There are substantive concerns about, in effect, monitoring bodies from the United Nations looking at human rights violations in this country. Are there any other—I think there are—analogous examples of UN human rights monitoring bodies coming to this country?

Ms Leon—Yes. I should preface my answer by saying that the government does not have any concern about being subject to UN scrutiny. The government reports under the human rights conventions, it is a party to all the optional complaint mechanisms, and it responds promptly to complaints against Australia for human rights violations. The concern that the government has expressed about the way in which some of the UN scrutiny mechanisms work is that the committees are not focusing on the areas of greatest concern in terms of human rights violations across the world but on the most well-behaved, human rights abiding countries. And there are a range of broader concerns that the government announced in the context of its treaty body reform initiative.

The government has offered invitations and has accepted requests from UN bodies to visit—even since its announcement on the treaty body reform agenda—and there have been visits by the UN Working Group on Arbitrary Detention and by the special envoy of Mary Robinson, the then UN High Commissioner for Human Rights, who visited a range of immigration detention centres and other facilities in Australia, at the invitation of the government and with the agreement of the government. So the government does not have any objection to such visits and has, in cases, allowed those visits even since the announcement of the treaty body reform agenda.

Senator MASON—Sure, but the issue is that the government has a concern that there is no substantial evidence to justify the visits in the first place.

Ms Leon—The government reserves the right to make these decisions on a case-by-case basis.

Senator MASON—That is the nub of it, isn't it? It is not just in relation to this optional protocol. I think it is fair to say that, over the last few years when I have been on this committee, the conservative complaint about many of these UN human rights monitoring bodies has been that countries like Albania, for example, who are signatories, might come here and, if we give them carte blanche, will make findings about our nation, whereas this nation has no problem with torture. But countries that do have a problem with torture will not sign the optional protocol in the first place.

Mr MARTYN EVANS—You mean 'no problem of torture'.

Senator MASON—Yes. Thank you, Mr Evans. Does that make sense? In other words, it is the old chestnut that the country that has a good human rights record does not need to sign these things, because it has its own institutions to protect people.

Ms Leon—Perhaps I should mention that it was not that many years ago that Australia last appeared before the Committee against Torture. At that time, the committee was considering a regular periodic report under the convention. The committee always issues concluding observations and, at that time, there was not any suggestion in any of those observations that the committee considered Australia to be in breach of its obligations under the convention. The committee commended Australia on the excellent work on information and training and institutions and so on that had been established to ensure that there is the greatest possible institutional protection against any of those sorts of practices.

Also, there has never been a case of alleged torture or inhuman treatment that has been the subject of a communication to the Committee against Torture of any institution in Australia. The only communications that have gone to the committee have been allegations that people who had been seeking to remain in Australia feared that, if they were returned to other countries, they might be tortured in another country. There has never been even an allegation of torture being committed in Australia communicated to that committee.

Senator MASON—What sort of evidence do you think the government would find appropriate? Would it have to be prima facie evidence—using the common law term? Should it be necessary to prove that there should be prima facie evidence of, for example, torture before the UN committee comes in? What level of proof does the government think is appropriate before a UN body should be able to come in?

Ms Leon—The government has said that it would allow visits by UN committees where there are compelling reasons to do so. The government has not explicated any further criteria under that and would make a decision on a case-by-case basis. When the government agreed to allow the visits by the Human Rights Commissioner's special envoy and the Working Group on Arbitrary Detention, it was certainly not because the government thought that there were any instances of arbitrary detention occurring here, but rather that the government wanted to give the relevant UN bodies an opportunity to come and see for themselves that these facilities were being operated in a way that was perfectly appropriate and consistent with human rights standards. So, if there were a request by the Committee against Torture to visit under the existing provisions under the convention, the government would assess that request on a case-by-case basis having regard both to the purpose of the proposed visit and the situation in Australia that the committee was interested in.

Senator MASON—So, in conclusion, the government's view would be that the Convention against Torture proper is a sufficient monitoring tool?

Ms Leon—That is correct.

CHAIR—There are two parts to the optional protocol: there are the subcommittee visits and the national prevention mechanisms. What prevention mechanisms exist at the moment in Commonwealth, state and territory jurisdictions to prevent torture?

Ms Leigh—In terms of the equivalent of the national institution under the protocol—because of course not being a party we do not actually have an obligation to have such an institution—the Human Rights and Equal Opportunity Commission does have broad ranging responsibilities in relation to understanding and compliance within Australia with regard to human rights. Specifically, under the Human Rights and Equal Opportunity Act, there is a function for the commission to inquire into any act or practice that might be inconsistent with any human right. 'Human right' is defined very broadly and it includes any breach of the torture obligations. Section 11(1)(f) of the Human Rights and Equal Opportunity Act establishes the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right. When you look at the definition of 'human right' you see that it is defined as covering any of the rights and freedoms recognised in the covenant—that is, the International Covenant on Civil and Political Rights. Article 7 of that covenant prohibits torture. Article 7 says:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

So there is a direct function for our national human rights body to inquire into any issues of breach of that obligation.

CHAIR—As I understand it, there are some limits to HREOC's human rights complaints handling function in that it is limited to acts or practices done, or engaged in, by, or on behalf of, the Commonwealth and wholly or partly within a territory—which does not include the ACT and the Northern Territory—or under a Commonwealth or territory enactment. It has been put to us that the limitation excludes people detained in institutions run by the states, the ACT and the Northern Territory. What sorts of prevention mechanisms exist in those jurisdictions?

Ms Leigh—That is correct. The Human Rights and Equal Opportunity Commission is an Australian government body—a national body—so, of course, its responsibilities relate to acts of the Australian government. The various state governments also have a range of monitoring mechanisms. Ms Leon is going to give you more details on that.

Ms Leon—Perhaps it would be best to refer you to our most recent report under the Committee against Torture, which sets out, jurisdiction by jurisdiction, the whole range of mechanisms that are available, both in terms of preventive work—where police and prison officers have to be trained in appropriate behaviour, methods of restraint and so on—and in terms of the complaint mechanisms that are available if anyone thinks that those proper procedures have not been followed. The third point the report makes, which I would add to as well, is that, from time to time, there have been special scrutiny mechanisms established when there have been concerns—the Royal Commission into Aboriginal Deaths in Custody is probably the most well known—whereby, if a concern comes up in a country like Australia of something of that sort occurring, there is a capacity to set up independent inquiries to look into particular allegations. I am happy to provide the committee with the most recent report we made to the Committee against Torture, which details all the procedures in place in all of the jurisdictions to ensure that any allegations of torture are investigated and dealt with appropriately.

CHAIR—Thank you. Does the current Committee against Torture review every member state, and does it make visits on an as needed basis? If so, do we have any idea of which countries the Committee against Torture has visited to conduct inspections?

Ms Leon—The procedure for contacting a state and seeking consent and wishing to visit is a confidential one. So, if the committee were visiting someone else, they prefer to do that on a confidential basis. I think the view was probably taken in the drafting of the convention that bilateral dealings with the committee were more likely to achieve an outcome than megaphone diplomacy about possible abuses would, so the committee would seek to engage on a confidential basis with other states and to assist a state that might be having difficulties of implementation to resolve its problems between it and the committee.

Senator KIRK—Ms Leigh, regarding the role of HREOC you said there is a capacity to investigate breaches of human rights. Is that upon complaint by an individual?

Ms Leigh—It is both; it is either on complaint or self-initiated.

Senator KIRK—Once the investigation is completed, what is the outcome? Is a report prepared?

Ms Leigh—That is correct. If the Human Rights and Equal Opportunity Commission believes it cannot satisfactorily conciliate the complaint—in that circumstance—it makes a report to the Attorney-General, and the Attorney has the obligation of tabling that in parliament.

Senator KIRK—The Attorney has the obligation to table the report, whether or not there is evidence of a breach?

Ms Leigh—That is correct.

Senator KIRK—Is there any further obligation on the Attorney to take any further steps, apart from tabling it in the parliament?

Ms Leigh—There is nothing specific in the act, but I think it then moves on to the democratic process. Once it has been tabled in the parliament it is open to scrutiny by all members of the parliament and, of course, by the public.

Senator KIRK—If that is the extent of it, there is not really an effective enforcement mechanism in Australia, is there?

Ms Leigh—I cannot endorse your comment.

Senator KIRK—What about in the states? There was some discussion about there being various standards, and the like, in place, but again there is no compulsory mechanism, is there, for investigation of complaints and for enforcement?

Ms Leon—The difficulty about trying to give you a summary is that there are different mechanisms in every state. These acts of torture or cruel and inhuman treatment would be criminal offences, and the bodies that might be seen as public authorities, or bodies that have

practices where torture or cruel or inhuman treatment may be thought to be an issue, are largely state bodies—police, prison officers and so on—so each state has established its own mechanism.

Senator KIRK—Perhaps you could provide the committee with a summary. That might be the best way of dealing with this instead of going through each state.

Ms Leon—I am happy to do that. I believe it is all set out in the torture report, but we will check to make sure that that is the case and, if there is any information to add, we can do that on notice.

Senator STEPHENS—There is an issue I want to pursue with Ms Leigh. Trying to speak hypothetically about cases is a bit difficult, but I do understand that there has been at least one case where prolonged immigration detention has constituted a violation of article 7. That was the case of Mr C, who was held in detention from, I think, 1992 to 1994. The Human Rights Committee found that the minister's failure to ameliorate Mr C's mental deterioration constituted a violation of his rights under article 7. That is a concrete example. Can you tell us what happened to that decision and the government's response to that decision? Did the Attorney-General actually table that report? What was the government's response to that report?

Ms Leon—The government always tables the views of committees in parliament, but the government has not yet responded to that communication, and, because it is a matter of which the substantive nature is with the department of immigration, I cannot say exactly where that response is at the moment. But the government always tables the views of the committees in the parliament. If there were to be a response, the government would make that response public

Senator STEPHENS—Ms Leigh, could you respond to Senator Kirk's question about there being no genuine process, I suppose, of actually responding? That case is several years old and we still do not have a response from the government.

Ms Leigh—There are two different levels which we have been discussing—the international level mechanism and the domestic level mechanism. The matter you referred to was pursued through an international complaints mechanism to the UN Human Rights Committee. Ms Leon has been talking about the response to that, which is still in process. Senator Kirk was asking me about the national mechanisms in relation to the Human Rights and Equal Opportunity Commission, and I understand HREOC are appearing separately. I am not aware of whether they specifically made any inquiries into that particular matter, but certainly they have the power to do so under their legislation.

Ms Leon—Incidentally—and I stand to be corrected by the department of immigration on this—my understanding of the person in that case is that they were released from immigration detention. There might not have been a formal response to the committee's views yet, but my understanding is that the person was released from immigration detention into home custody. The formal response might be one matter, but that is not to say that attention was not given to that person's particular circumstances.

Senator STEPHENS—Thank you.

Mr WILKIE—A number of submissions to the committee pointed out that, in light of Australia's appointment as chair of the UN Commission on Human Rights, we really need to take a leadership role on this issue of torture. Do you have any comments about that view?

Ms Millar—Can you be a bit more precise? I am not quite sure what it is that you are asking.

Mr WILKIE—What has been expressed in a number of submissions is that, given we are now chair of the peak body concerned with human rights—the UN Commission on Human Rights—we should be taking a more proactive leadership role in this whole issue of torture generally, whereas here we are not really looking at progressing much with this particular protocol, are we?

Ms Millar—Leaving aside the question of this particular protocol, Australia has taken a very strong stance over many years on the issue of torture in the commission on human rights, and we would intend to do so again this year, particularly given that we will be president of the commission. We have traditionally cosponsored a resolution on torture in the commission every year and I see no reason to suggest that we will not be equally strong this year.

Mr WILKIE——I will give you an example: the departments' joint submission affirms that Australia did not attend the 2001 or 2002 UN working group meetings that were established under the Commission on Human Rights to develop the draft optional protocol. The submission states that there was little likelihood of useful progress at those meetings. Why was it considered that there was little likelihood of useful progress at the 2001-02 working group meetings at the UN?

Ms Millar—None of us were involved in those negotiations, but they were protracted over a long period of time and kept getting stuck. My understanding is that a decision was taken at the time that, when looking at priority issues, you put your energy into the ones where there is likely to be progress and where you can make a difference, not into negotiations that look pretty stymied. We do not have any more precise information on that.

Mr WILKIE—The joint submission also states that the chair's draft text of the optional protocol was not adopted by consensus by the Commission on Human Rights. What proportion of votes does the government consider a suitable consensus for human rights instruments?

Ms Millar—There is not a magical number. Greg may wish to comment on this, but with all these human rights instruments, clearly consensus or extremely strong support is the ideal, because otherwise they do not have the same normative effect, which is the big value of them.

CHAIR—Is it normal for UN human rights instruments to be adopted by consensus?

Ms Leon—I do not think we can say conclusively, because some of those go back further than we had ready access to the last time we were asked this. The general feel of people who have been involved in negotiations is that, at least in the Commission on Human Rights, mostly they are adopted by consensus. It is certainly the view of the government that that is the appropriate way to have human rights instrument adopted, or—as Ms Millar said—it should be done with overwhelming support, if consensus cannot be achieved.

Senator MASON—Ms Leon and officers, I think you put the government's case very well. You would be aware that later today and on Friday we will hear from distinguished human rights bodies such as Amnesty International, amongst others. In effect they will be arguing two things. They will argue firstly that Australia has a great human rights record generally and, if Australia does not sign the optional protocol, why would other nations with a less distinguished record bother to sign? They will argue secondly that, if Australia's human rights record with respect to torture is so good, what do we have to hide? How do you answer that?

Ms Leon—I will deal with the latter question, but how other countries might approach it is perhaps a matter for Foreign Affairs.

Ms Millar—It is a matter for speculation, I think.

Ms Leon—Australia has extensive mechanisms in place for ensuring that torture is not committed. If it is, there are mechanisms to deal with that. Australia has said that it is happy with the state of its obligations. Whether the government decides to ratify the optional protocol is something that the government has not formally decided, so that question does not arise at the moment. What the government has said is that it is not consistent with its own attitude to the way the treaty bodies should operate that energy should be put into standing invitations for bodies to visit Australia.

Senator MASON—I hear all that, but the implication of that diplomatically might be—and perhaps this is a question for Dr French—that other nations will say, 'If Australia is not going to do it, why the hell would we, given that Australia supposedly has nothing to hide?' These other countries do not have the internal mechanisms. We may—you are probably right—but that is not the point. The point is that other countries perhaps need international monitoring and, if we do not sign up, why will they sign up?

Ms Millar—Can I just make a couple of points there. Firstly, the main instrument, as we have indicated earlier, is the torture convention itself, which has 134 parties. Secondly, this protocol at the moment has only three, so you are not looking at Australia in isolation here. It is not a case of all the world's most egregious offenders out there not having signed it, whereas all the good guys have; it is a work in progress. In terms of how other countries approach it, that is really a matter for them, so I cannot really comment much more on that. But, as I think we indicated earlier, this is not—to our knowledge—an issue that is generating much international diplomatic heat, perhaps because the main body is the torture convention, which does have the authority to investigate egregious violations and torture.

Senator MASON—You do not think it is possible that Australia's failure to ratify will send a signal to countries with less distinguished records that perhaps they should not bother?

Ms Millar—Again, as I said, we do have a major instrument, which is the torture convention, and that is a very important normative convention.

Senator MASON—You might argue that international monitoring to protect people against the possibility of torture is not sufficiently stringent. Australia's argument, as I understand it, is that we have domestic institutions and laws that prohibit it.

Ms Leon—And that we report to the relevant international bodies about our compliance with our international obligations.

Senator MASON—Sure. I accept that, but the second part of the question I asked is different. It is: if that is so—and it may well be so; let us assume it is right—then the signal that sends to other countries is not a signal that will benefit human rights protection throughout the world, is it?

Ms Millar—The only other point I would make there is that, in a situation where you have the UN human rights committees overburdened with work, including work to investigate quite serious allegations about human rights, you have to wonder a little about the resource aspect of setting up a body that could go and look at any institution it likes in any country, regardless of whether or not there are any serious concerns or not.

Senator MASON—I agree with you, Ms Millar, absolutely. That is true.

Senator TCHEN—The submission from the Attorney-General's Department explains that the government has certain expressed concerns about both substantive and procedural aspects of this optional protocol. Ms Leon, I think the Australian government's substantive concerns, basically, are about whether the human rights bodies are able to carry out their work and about the need for reform. This was announced back in August 2000. Can you brief the committee on the progress of any discussion with the UN bodies about this?

Ms Leon—Yes. Australia has hosted three workshops in Geneva since that announcement was made. Those workshops have been directed at aspects of treaty body reform. There have been announcements made in relation to each of those, and I am happy to provide the detail of the summaries of those to the committee, if that would assist. They have looked at reporting mechanisms, coordination and communication across the committees, streamlining processes and a range of ways to make the work of the committees more effective. Australia has also provided some funding for an officer—to be based in Geneva in the Office of the High Commissioner for Human Rights—to develop best-practice guidelines on reporting under the human rights instruments.

Australia has also leveraged off that, really, to spearhead a whole range of discussions within the UN to make treaty body reform an item on the mainstream agenda of the UN. Ms Millar might like to say more about that, but the Secretary-General's report on reform of the UN includes questions to do with the operation of the treaty body committees and proposals for reform of the way that they operate. In summary, I think that the government would say that Australia has made it an issue that both the committees and other states parties agree needs addressing and have begun to address but that there is still quite a way to go before we would think the committees were operating as efficiently and effectively as the government would like to see them doing.

Senator TCHEN—Can I ask, Ms Millar, if you could also respond to this. Could you particularly tell the committee what sort of resonance Australia's concern is receiving in the international community? What is the likelihood that we will progress fairly quickly to perhaps having an impact on this optional protocol? It seems to me that at least the first two concerns probably have a direct impact on this optional protocol.

Ms Millar—Was the first part of your question with respect to treaty body reform more broadly?

Senator TCHEN—Yes: whether we received appropriate resonance from the other nations.

Ms Millar—I was in Geneva last year for the last of the three workshops. I was quite impressed by the extent to which a lot of the ideas we have been pushing over the last three years have now become part of a mainstream debate both within the secretariat in the Office of the High Commissioner for Human Rights and among states party to all these various treaties in Geneva. I think that has been quite a big achievement. Of course, you have a situation as well where the Secretary-General of the United Nations, Kofi Annan, has made a big drive for reform across the whole organisation—that has been something Australia has strongly supported—and so you have to look at a broader pattern there. It was very interesting to me to see the extent to which many of these issues, which when we raised them three years ago seemed a bit new and radical, are now completely accepted as the way to go in the human rights committees, even though in terms of the implementation quite a lot more still needs to be done.

Senator TCHEN—Looking at the four points that are listed in the reform agenda in the submission from the Attorney-General's Department, I am not sure how relevant the first one—'to ensure adequate recognition of the primary role of democratically elected governments'—is. I cannot imagine a single government of a state member of the United Nations actually admitting that it is not democratically elected, even though it may not be at this time. But I think that the second issue—'to ensure that committees and individual members work within their mandates'—is crucial in relation to how particular treaties like this optional protocol will operate in effect. There are a lot of concerns about it. Ms Millar or Ms Leon, perhaps you would like to comment on how much of a response we are getting about that particular concern.

Ms Leon—I can comment on the background to that focus of the government at the time. Perhaps Ms Millar might be able to add whether that was a subject of discussion at the most recent workshop. There was a concern in the government's mind at the time of the treaty body reform announcement that some committees took the opportunity to make a range of general statements about human rights observances outside the terms of whatever convention they might be considering. Particularly, I think, we had not long before that appeared before the Committee on the Elimination of Racial Discrimination. Part of the committee's recommendations were directed at the fulfilment of our obligations under the refugee convention. It is that kind of working outside the mandate point that the government feels is inappropriate for the treaty committees to do, because in that case there are mechanisms for monitoring our international protection obligations established under the refugees convention, and it is inappropriate for a committee that is monitoring another convention to decide to make comments outside its mandate and outside its area of expertise.

The issue also reflects the fact that committee members often ask a range of questions when Australia or other states appear before committees that are only very loosely associated with the obligations under the convention, and quite often—and this does tie into the first point—these are issues that have been raised with the committee by NGOs with a particular issue that they seek to progress and that they try to bring within the mandate of the convention, even if there is not really any human rights issue arising under the relevant convention. As I think you said, I do not think there is any real disagreement internationally about those issues—no state is happy

about having to appear before a committee and be asked a range of questions that are of limited relevance to the convention that the state is reporting on. I do not know if there is anything specific to add about these discussions, but there has not been any disagreement with Australia's attitude to that issue.

CHAIR—The first point was the central place of democratically elected governments that actually do uphold their human rights obligations vis a vis the NGOs. What was the state of feeling about that in Geneva?

Ms Millar—There are a number of issues here. One of them relates to the way the different committees function, and the officers from Attorney-General's may be more au fait with that than I am. There was a concern that among the committees treatments of states and NGOs varied and there was a need to make sure that there was an understanding that went across all the committees about how states should be treated and what an appropriate role for NGOs should be. Also, as it states here, it is elected governments that take on the obligations under these conventions, and they have to report to the committees on them. That should be given the prime weight. That is not to say in any way that there should not be an appropriate role for NGOs, and I do not think there is any dispute about that. In fact, throughout all the human rights mechanisms, NGOs have a very strong role, and at times an extremely important role. It was a question of getting that balance right and having the NGOs and states treated in a similar way across the committees.

Ms Leon—I think that is the concern the government has expressed about this issue. I entirely endorse what Ms Millar has said, to the effect that the government in no way would wish to exclude NGOs from providing material to the committees. Of course, for many countries the information provided by non-government organisations is going to be vital for the committees to understand what might be happening in those countries. So Australia is completely happy with the NGOs having a role in providing information to the committees. What Australia and other states want to see, however, are proper mechanisms for that to occur so that it is not reporting by ambush. It is very difficult for a state party to respond effectively and to provide information to a committee if they are not given any notice of the fact that the committee is occupied with a range of concerns that have been raised by non-government organisations and not shared with the state—so that the state has to respond off the cuff to a range of detailed material that has been put before a committee with no notice to the state. I might mention that, from Australia's point of view, that is particularly challenging, given that when we appear before the committees it is the middle of the night in Australia and daytime in Geneva. It is not even really possible for us to phone home and say, 'Please provide information about a particular allegation that has just been raised with us.' So there are issues about ensuring that material provided by NGOs is also given to the state party, so that the state party can respond.

In terms of what occurs after that, there have been instances where NGO material has been provided to a committee and then the state party has provided extensive material in response to indicate the actual state of affairs—what mechanisms have been set in place to deal with the alleged problem or how it has been handled in the state's justice system—yet all of that has been completely omitted from the committee's dealing with the whole situation. The committee's conclusions and recommendations have reflected only the allegations that were made and not the response of the state party that has provided detailed information about the situation in the country. That balance is what Australia and others seek to address. Of course, where NGOs raise

substantive concerns and the government is not able to address them, then that would be a reason for the committee to have considerable concern about human rights in that country. But, where issues are raised by NGOs and the state in question provides substantive and substantiated material that addresses those concerns, that ought to be given appropriate weight by the committees.

Mr WILKIE—I am curious. Where is the government at at the moment in advancing the optional protocol? Is any action being taken to look at signing and ratifying it, if some of the difficulties can be overcome?

Ms Leon—It is a matter that is still under discussion within the bureaucracy. I do not think I could say at this stage exactly how far along we might be in that process.

Mr WILKIE—There is no time frame?

Ms Leon—Not at this stage.

Ms Millar—We cannot comment at this stage.

Mr WILKIE—One of the reasons I ask is that the optional protocol was adopted in 2002, but a couple of years down the track it only has 23 signatures and only three countries have actually ratified it. Is there a time limit on how long these things have to go through the process and be enforced, or can this go on forever?

Dr French—No. Unless expressly provided for in the instrument, which is not the case here, effectively there is an unlimited time period.

Mr WILKIE—So there is no real pressure to actually come up with a successful outcome?

Dr French—Not from an international legal perspective.

Ms Leon—I should say also that it is not unusual for states to have to take some years to address the domestic implications of a new international obligation. Every state, like Australia, would have internal mechanisms that it would need to go through to ensure that its domestic processes were consistent with a new obligation that it was going to undertake, and that would often involve a range of agencies. There would be consultation within government and sometimes changes to domestic procedures would be needed before a state could become a party. So it is not unusual for there to be a lapse of some time after a new instrument is adopted before the states sign it.

Mr WILKIE—The committee has noticed this over the years.

Senator KIRK—As I understand it, under the convention at present states are prohibited from returning a person to another state where they would be at risk of torture. How is that monitored presently under Commonwealth law?

Ms Leon—The Department of Immigration and Multicultural and Indigenous Affairs has the substantive responsibility for that, so they would be best placed to provide you with the details

of how that is done. But if I can attempt to summarise on their behalf—and, again, with the proviso that I would stand to be corrected if my evidence turns out not to be completely consistent with immigration department practice—essentially Australia implements its obligations under the refugees convention by ensuring people have access to a system for making protection claims. So in most cases a person who thought they might be tortured on return to their country would be making a claim for protection related to the refugees convention. As you know, there is an extensive domestic procedure for that. The second route is that, where a person does not fall within the refugee convention obligations but there might be other humanitarian reasons why the person ought not to be returned, which would include cases where the person was fearing some type of treatment such as torture but might not fall within the convention reasons for torture, then there is a mechanism to have that assessed separately from the protection visa process. Where that is found to be the case, the person can be issued with a protection visa on humanitarian grounds.

Senator KIRK—I understand that. But in the event that there is no protection visa or refugee status granted and a person is returned to the country where they claim they would be at risk of torture, is there any monitoring of whether or not that person is in fact subjected to torture upon their return?

Ms Leon—Not that I am aware of, but it would be something that would need to be asked of the Department of Immigration and Multicultural and Indigenous Affairs. I imagine that there would be some diplomatic difficulties about anything of that sort being undertaken.

Senator KIRK—I guess I am just trying to work out whether or not Australia is currently complying with the terms of the convention.

Ms Leon—Australia has a very comprehensive judicial and administrative scheme for reviewing any claims that a person might be returned to a country where they would face torture, persecution or any of those other forms of treatment. I think the government would say that it has confidence that it has such an extensive range of layers of review of those cases that it is most unlikely that a person could have those concerns and not have them thoroughly addressed within the Australian legal system.

Senator KIRK—So there have not been any claims made that Australia is not complying with this aspect of the convention?

Ms Millar—No. On that matter I add that there are individual cases where our embassies overseas have been asked to monitor welfare in respect of particular cases, but it is not something we do routinely and it is not an obligation that we have. But, where allegations have been brought to our attention, there have been several cases where we have gone to our diplomatic missions overseas and asked them to look into it.

Senator KIRK—If we were to become a signatory to the optional protocol, would there be more extensive obligations on Australia to monitor such things?

Ms Leon—I doubt it, because the protocol is really about visits to places of detention to ensure that people are not being tortured in those places of detention. I do not think the protocol adds anything to the obligations under the convention about return.

Senator KIRK—But isn't there an obligation to set up some sort of national institution to oversee compliance with the convention?

Ms Leon—As Ms Leigh set out, we do have the Human Rights and Equal Opportunity Commission, which has the national responsibility for ensuring that Commonwealth acts and practices are consistent with human rights. Any act of detention relating to someone being detained in order to be returned to another country would be a Commonwealth act. I do not believe—although I cannot say that we have had to look at this question before—that there is anything in the protocol that would add to the obligations in relation to return. The obligations in the protocol are about visiting places of detention to ensure that people are not being tortured therein rather than to ensure that they are not tortured in another country if they are sent back.

Mr MARTYN EVANS—Given that we have signed the primary treaty, why can't the Commonwealth use that as a head of power to extend the remit of the Commonwealth's law to use our institution of HREOC or some version of that to investigate state based complaints in its institutions about issues of torture and so on, if they were to arise—not that I am saying they would. As a former member of state parliament, I know our institutions in the states are entirely above board. Why aren't we able to use our treaty power under the Commonwealth? Having signed the primary instrument, why can't we use that to extend our remit of organisations like HREOC?

Ms Leon—As a matter of constitutional power, the Commonwealth could implement all of its human rights treaty obligations by Commonwealth law, but the practice of the Australian government over many years now throughout all of these human rights instruments has been to implement them by a combination of state and federal laws, depending on the areas in question. So the government has not by and large simply taken over entire areas of state jurisdiction in order to implement human rights treaties. For instance, the International Covenant on Civil and Political Rights, which covers a very broad range of human rights, is not implemented only by Commonwealth law; it is implemented by a range of state and federal laws depending on the subject of each article of the covenant.

The same approach has been taken to the obligations under the torture convention. For instance, the head obligation to prohibit acts of torture is implemented almost comprehensively by state and territory criminal law, and the government would not see any point in enacting a whole fresh Commonwealth law to prohibit acts that are already criminal offences under state and territory law. So the government identified where there were any gaps in criminal jurisdiction and enacted the Commonwealth Crimes (Torture) Act to provide just for those areas of gaps. For instance, the universal jurisdiction provisions of the convention require it to be an offence under national law when a person has committed torture anywhere else in the world and is later found in Australia. That would not have been covered by existing state and territory law, so the Commonwealth identified that gap and filled it with Commonwealth law. Although the constitutional power might exist to do so, the practice has generally been for the Commonwealth not to just take over state and territory areas of responsibility but to only legislate where there is a need for the Commonwealth to do so.

Senator TCHEN—There were 104 states at the UN General Assembly that voted for this optional protocol in 2002. Subsequently, 23 states have signed up. Can we assume that all 23 states who voted for it were amongst the 104?

Ms Millar—Presumably, but we can give you that exact voting list, if you like.

Senator TCHEN—In that case, could you tell the committee which of the 104 states voted for it and which of the 35 states in the United Nations Economic and Social Council and which of the 29 states of the Commission on Human Rights voted for this protocol? I am curious to see which of those 29, 35 and 104 have not yet signed off on it.

Ms Millar—We can give you those details; we can submit them to you today.

Senator TCHEN—Thank you. This is probably conjecture but do you think that if the UN has progressed further on this reform of treaty bodies proposed by Australia some states will come to the realisation that it is better to have the reform go through before they sign up to any of those protocols?

Ms Millar—It is impossible to say.

Mr WILKIE—You mentioned earlier, when we were talking about meetings in 2001 and 2002, that it was hard to say what was going on—obviously because you were not involved in those discussions. I would have thought that the people who made the decision not to attend would have kept some record as to why they felt that there would not be any progress and what the difficulties were at the time. Is it possible to get some information about that? You would think that there would be records.

Ms Millar—We will certainly see what we can find for you. We do not have a great deal—obviously, we had a look before coming here—but if there is anything else that we can find and that we can make available, we will be happy to do so.

CHAIR—On behalf of the committee I would like to thank you for appearing to give evidence this morning. The secretariat will forward a copy of the proof transcript of evidence for your review as soon as it is available.

[11.21 a.m.]

BIESKE, Ms Nicole, Member, National Legal Team, Amnesty International

GREENWELL, Mr John Henry, Member, Government Liaison Group, Amnesty International

CHAIR—I welcome the witnesses. I remind witnesses that today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses it would be helpful if they would raise this issue now. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Do you wish to make some introductory remarks before we proceed to questions?

Ms Bieske—Yes, we do. Thank you very much for inviting us to appear this morning, and thanks to Senator Mason for summarising before what the NGOs are going to be presenting today. As you may be aware, the prohibition of torture is one of the most basic principles in international human rights and humanitarian law. The act of torture in an international crime and no exceptional circumstances of any kind may be used to justify the use of torture. The prohibition of torture is absolute, and governments that are party to the UN convention against torture, as Australia is, have committed to preventing torture and cruel, inhuman or degrading treatment or punishment. The problem is that the continued practice of torture reflects the need for more effective measures to work for its prevention, both at the national and international level. Amnesty International has, as we detailed in our submission, reported on the use of torture in more than 150 countries, and we have further reported that widespread or systematic torture has occurred in over 70 of the 150 countries. In over 80 countries, people reportedly died as a result of torture between 1997 and 2000. That indicates the current level of the problem and, from our position, indicates why further steps need to be taken.

What does the optional protocol do? From what we have just seen, I think you are all fairly familiar with the process. But it is new and important, because it seeks to prevent torture rather than to respond after the event. It does not create new substantive rights for victims of torture, but it is a very important preventive mechanism. It is also very important to note that the recommendations that come out of the subcommittee will be confidential unless the state party requests that they be made public or the state party itself makes part of the report public. This confidentiality is designed to assist with the preventative element. It is designed to facilitate dialogue between the state parties and the subcommittee on prevention. It is not aiming to reprimand states but rather to assist them to prevent torture from occurring.

The fundamental question that we are here to address, I suppose, is why Australia in particular should sign. We would maintain that the first reason this is important is that it is essential that we reaffirm, as a country, our commitment that torture is abhorrent and is rejected under international law. It is not in any way seen as an admission that we are torturing anybody if we do sign. Countries that do not perpetrate criminal acts such as these often sign treaties. Look at

the International Criminal Court set up by the Rome Statute and the states parties to that. Those states, including ourselves, do not perpetrate crimes against humanity—genocide, for instance, or others. So, by signing, we are not saying that we torture. We are saying that we recommit ourselves to acknowledge the problems of torture internationally, and we recommit ourselves to make the statement that this practice is abhorrent and is rejected under international law.

As a country, we have a very proud history of upholding international human rights instruments and engaging with the United Nations. As has already been pointed out this morning, we feel as an organisation that Australia, as chair of the Commission on Human Rights this year, has a particular obligation to lead the way in international human rights standards. We would also like to emphasise that, by becoming party to this optional protocol, Australia will be contributing to the progressive development of an international legal framework for the prevention of torture. Noting that there is already a legal framework but that it has not sufficiently contributed to the eradication of torture, we need to now focus on the prevention. We would also like to emphasise that Australia's leading role in the Asia-Pacific is an important reason for us to sign, to demonstrate our unquestioned commitment to the eradication of torture in our region and to lead the other countries in our region in that respect. That is basically the extent of the opening comments that we would like to make, and we welcome questions.

CHAIR—Thank you very much. I am sure all members and senators would endorse your comments on the abhorrence that we have for torture. The optional protocol sounds pretty good, but really is there a need for Australia to have visits from the subcommittee? Secondly, are there not already adequate preventative mechanisms in place in Australia under our domestic institutions?

Ms Bieske—To address the second question first, in relation to the existence of adequate mechanisms: we are not in any way alleging that torture occurs in Australia at the moment. We are saying that torture is, as we have emphasised, an international problem. We would emphasise that torture does debase all of humanity when torture occurs, wherever that torture happens. We would hope that Australia would take a leading role in establishing this kind of an instrument to try and combat concerns of torture. We have had mechanisms in place internationally, including the convention against torture, to try and deal with the problem of torture but, as we have shown in the statistics that I referred to, it is still an ongoing problem, and that is why it is important that we now work on prevention rather than working just retroactively after we have become aware of torture occurring.

CHAIR—What is Amnesty International's view of Australia's work in China to help prevention of torture there?

Ms Bieske—I will pass that on to John, who is more knowledgeable on China.

Mr Greenwell—We think the human rights technical cooperation program is a very good program. It has not addressed the issue of torture as such—I think I am correct in saying that—but it has contributed to police training and prison officer training. If you are getting to the question of the bilateral dialogue—and here our information on that is confidential, and under Chatham House rules we cannot reveal it—we do not think Australia's position has been successful at all. We think it has been, if anything, quite unsuccessful. As I say, I am a bit restricted; all I can point out is that the Committee against Torture, which met with China in

2000, made a number of recommendations. I do not think any of them have been implemented. I will stand corrected if one or two have been, but substantially they have not been implemented. The criminal evidence bill, which would have involved a prohibition of evidence obtained by torture being admissible—which is fundamental to any progress in China—has been around for so many years that all I can say is that I suppose eventually it will be enacted. I do not think Australia's efforts in that area have been satisfactory, but we are really touching on the fundamental question of whether the bilateral dialogue policy on human rights is a sound policy or has been successful. But that is moving a little outside of your area.

CHAIR—I want to make sure I am quite clear on this. You are not saying that there is any need in Australia for us to sign this optional protocol; you are saying that it would be a good signal if we did.

Mr Greenwell—Yes. It is absolutely important that countries like Australia take the lead. That is what other countries have done in the past. I think Australia joined the genocide convention. Mr Menzies said at the time that, while we did not have any problem with genocide, it was right that we should adhere to this convention. As with all the human rights conventions, it is very rare that Australia has been open to any challenge as to its personal performance. But if countries like Australia do not take a lead then clearly we will not get others to join. The other factor to keep in mind is that you are building on what I call an insipient value regarding torture. Over 100 countries engage in it, as the Amnesty reports make clear, but very few countries admit that they engage in torture and even fewer defend it. One of the virtues of these kinds of conventions is that there is a slow build-up of moral pressure on countries to adhere to it.

Senator KIRK—What is your opinion on the existing mechanism under Australian law for complaints about torture, particularly HREOC and the way that it functions? Ms Leigh from the Attorney-General's Department set out how that operates. What is Amnesty's view about the adequacy of that mechanism?

Ms Bieske—I would like to tie my response to that question into the national mechanisms part that the optional protocol establishes. Amnesty as an organisation does not have a particular comment as to whether HREOC functions effectively. It has at times acted with Amnesty in, for instance, particular High Court cases, and it provides an excellent avenue for people to pursue concerns they may have for the adequacy of addressing those issues. The national mechanism that is called for within this optional protocol does say that we can adopt existing mechanisms. As was quite extensively discussed, we have different mechanisms at the state and federal levels so it would not necessarily have to involve establishing a new mechanism. We can use the mechanisms that already exist; we can use them together, particularly under our federal system and the challenges that that presents at the moment. But it would certainly be important to have a focus on torture and ill treatment and concerns that may arise in that respect and then develop a focus in those areas.

Senator KIRK—From what you are saying, if we were to adopt the optional protocol, there would not necessarily be any need even to change the mechanisms that are in place—they are adequate to satisfy the terms of the convention at present. Is that right?

Ms Bieske—I believe that article 17 of the convention allows for a state party to designate an independent national preventive mechanism and a federal system, such as we have, to have a

decentralised unit—in other words, units in the different states—that can work together to report appropriately and to handle appropriate complaints and concerns.

CHAIR—Regarding the UN human rights committees, the Australian government has said that it will agree to visits by committees only where there is a substantive reason for them to do so. What is wrong with that?

Ms Bieske—I suspect that part of the reason that comment was made was in response to some public comments that were made by the United Nations which expressed some concerns about what had been going on within Australia on different fronts—they were not on just one particular area. The important thing to note in relation to this instrument is that it is confidential. It allows for the creation of a dialogue—it is not reprimanding but it is assisting states to develop. We would say and hope that all countries acknowledge that they can always improve; there is always a possibility to improve. If you look at the European Committee for the Prevention of Torture, which basically functions in exactly the way that this kind of instrument would, you will see that it has been to countries within Europe and has found—to differing degrees—ways in which those countries can improve. We should not wait until the worst human rights violations occur to say, 'Okay, now you can come'; we should be monitoring and improving at all points. That is why we would think it is important to continue to engage with and work with the United Nations.

CHAIR—But, given that there will be limited resources for the subcommittee which is proposed under the optional protocol, shouldn't they be going to areas of greatest need?

Ms Bieske—The subcommittee will be set up to deal with all of the parties that have ratified. As was pointed out, if we are talking about limited resources, the number of state parties to the convention against torture at the moment makes it very difficult for the Committee against Torture to be particularly thorough, detailed and able to assess everybody at the same time. There is a situation now where we do have very limited resources. In effect, this will be increasing some resources because we will have another subcommittee set up which will be able to go out to assist in preventing torture from occurring. As documented in the Amnesty reports, there are countries that are perpetrators of torture, and significant concern has been expressed about those countries. Of course we would like to work with and assist those countries, but, as I said, we believe that all countries are able to improve and should be working on improving the standards.

CHAIR—Where do you think Australia should improve?

Ms Bieske—Specifically?

CHAIR—Yes.

Ms Bieske—That is not something that we are able to comment on at the moment, unfortunately, because we have not been able to do reports on the detention centres in particular, which is what this is dealing with. But it will be an issue that people on the committee with particular expertise in this area will undoubtedly be able to make some suggestions on and assist with.

CHAIR—The Human Rights and Equal Opportunity Commission is not enough?

Ms Bieske—We think that it is important that we continue to work with the United Nations. The United Nations, in the way the subcommittee would be set up, would have both a national mechanism and a UN mechanism. The UN mechanism would include the international experts in these areas—for instance, we have special rapporteurs who are experts in the area. It is important that we have those kinds of people who have particular expertise contributing in our situation.

CHAIR—Why do you think so few countries have signed the optional protocol and only three have ratified?

Ms Bieske—I am really pleased that you asked that question. It came into force, as was pointed out, only at the end of December 2002. That is 12 months—that is really not very long in terms of an international convention. It is quite normal that it takes a period of time for countries to ratify; in fact, it is quite unusual that there are this many signatories already at this point. I was fortunate enough to be in New York at the time that some of these countries were signing, and it was a kind of avalanche: as more countries signed, more other countries then felt more pressure to sign. That was being discussed quite extensively around the United Nations at that time. So I would say that the reverse is true: it is impressive that we have 23 signatories already. It is also impressive that we have three ratifications, one of which is the United Kingdom. If we want to consider ourselves in that kind of company, I would think that that would be an excellent place for us to start. It is not unusual that it takes this long, but it does not have to always take this long.

Mr WILKIE—Are you aware of other countries sharing the same concern that Australia has regarding allowing people to look at centres on demand? I understand that one of the key objections that Australia has is that people can come here at any time to look at the detention facilities and that that is not acceptable.

Ms Bieske—I am personally not aware of that specific concern being expressed overtly in this context. We can hypothesise about what we read in the paper and conduct that is going on within other countries, but I am not aware of that being expressed overtly as a specific concern.

Mr WILKIE—It certainly has been by Australia.

Ms Bieske—That is correct.

Mr WILKIE—In fact, if you wanted to look at some information regarding that, you could look at the Legal and Constitutional Affairs Committee of the Senate—

Ms Bieske—Sorry, I meant in relation to other countries overtly expressing that concern. Australia started overtly expressing that concern in 2000, but I am not aware of other countries overtly expressing that concern.

Mr WILKIE—Thank you.

Mr CIOBO—Would there be an ability for the subcommittee to visit the detention centres and to have inspections inside those non-signatory, non-ratifying countries?

Ms Bieske—No. It only applies to countries that have actually ratified.

Mr CIOBO—Does Amnesty have a view about which countries would be of primary concern at this point?

Ms Bieske—We would not state that at the moment, because it is going to be up to the subcommittee to establish their program of work. We would support them in establishing that program.

Mr CIOBO—So Amnesty at this stage does not have countries that it is aware of that have a pattern of engaging in government sanctioned torture and those types of things and that are of concern to it over, for example, Australia or other Western democracies?

Ms Bieske—We certainly do have particular countries. As is detailed in our submission, 150 countries out of the members of the United Nations, for example, are documented as having patterns of torture, and it is something that we detail in our annual reports. But in terms of determining the program of work of the committee, we would leave that to the committee itself to do, as they say, by lot or randomly.

Mr CIOBO—I realise that. I am not asking you to speculate on what the subcommittee might do, rather just on Amnesty's position. Out of your 150 or so countries of concern, how many do you anticipate would sign up to this optional protocol?

Ms Bieske—I could not anticipate that. We would hope that they all would. It would be Amnesty's position that all these countries, and in fact all the countries of the United Nations, should sign up to this protocol. I cannot comment on the positions of other governments.

Mr CIOBO—If we were to assume that countries that were engaging in government sanctioned detention and torture were unlikely to sign, would you see this treaty as being of any benefit?

Ms Bieske—We would suggest that if countries, such as Australia, who have nothing to hide are not inclined to sign, it is an even greater concern in terms of leading the way for the countries that do, as you say, have something to hide. We need to set an example. We need to show by our conduct that we have nothing to hide and open it to other countries. As time goes on and as more countries ratify, there is a kind of snowballing process. It becomes significantly discussed at an international level and there is increasing pressure upon other countries to ratify. If nobody ever ratifies, then what puts the pressure on these countries to do it? We need to add our voice and establish this ratification process as strongly as we can.

CHAIR—So it is sort of holier than thou.

Ms Bieske—I would hope that we would not have that response. As I said before, we can always improve. But we certainly need to be setting the way, and that is something that the United Kingdom has done, for instance.

Mr CIOBO—Don't we already set the benchmark fairly high as a Western democracy in terms of both media scrutiny and internal domestic institutions and ensure that there are adequate safeguards? Why do we need another scrap of paper?

Mr Greenwell—We made the point earlier that we may not need this for the purposes of ensuring that torture does not take place in Australia. I do not say that that is solely the point; I agree there is always room for improvement. The object of the subcommittee for prevention is to engage in discussions with the government for the purposes of securing improvement. But looking at it in the abstract, Australia is not a country that is engaged in torture, and the legislation both at state and federal level is substantially adequate. We have institutions that enable complaints to be dealt with.

But that is not the whole point. The point is that torture is an international scourge and it is really a 20th century scourge that has been almost a reversion to barbarism. As with genocide, Australia has an obligation, given its values, to try and do something about the scourge. The only way to do so is through international bodies like this. Here we have an international attempt to reduce torture, given that the convention against torture itself is not satisfactory. It has not worked satisfactorily because of the absence of the monitoring mechanism. Therefore, we start off on the basis of what I have said—that Australia should join it. We would say that the fact that there are these bodies in Australia, such as the Human Rights and Equal Opportunity Commission and the Ombudsman, only makes it easier for Australia administratively and financially to join the convention and give effect to the protocol.

Mr CIOBO—One concern I have had in the past is that, because of the information asymmetry, you get countries such as Australia, the United States and other Western democracies that tend to, in my view, be at the pointy end of a lot of criticism over policies we have—for example, the mandatory detention policy that has been instituted in Australia by the ALP and supported by the coalition. Does this not simply become another tool for those who stand opposed to policies like that, who point the finger and try to apply international pressure—not where it is actually needed, in those countries that do not even bother signing up to an optional protocol like this—and become an opportunity to magnify what some might argue are small transgressions of the technical aspects of an optional protocol like this?

Ms Bieske—There are a few important things to note in response to that, one of which is that the subcommittee determines its own program of work. It is not influenced by lobbyists or other groups that you may be concerned about. The second thing is that the work the subcommittee does is confidential. It is provided to the state confidentially in a conciliatory way to assist, rather than to reprimand, as I said before. So the concern Australia has expressed before about various people expressing these views publicly and internationally is not something that is going to be affected here. It is going to be a proactive way of assisting countries to deal with concerns or problems that may exist. It is not something that is going to be influenced by lobby groups or used to publicly embarrass or humiliate countries at an international forum. So we would say that this process is quite different from the concerns you have.

Mr CIOBO—When you talk about a carrot and stick approach and you say that this is effectively the carrot approach, I am intrigued as to how we honestly expect to achieve anything through confidential reports going back to the government of the day. If the government in a nation state is in breach of the convention or the optional protocol, how, exactly, do we feel

about a report going back to that government stipulating, 'You are in breach but, look, here are some proactive steps, one through six, you can take that would make it a better place'?

Ms Bieske—When I was first learning about this issue, I asked the same question. The response is that there is a provision within the optional protocol for the report to be made public. If it is determined that a nation state fails to comply with articles 12 and 14 of the optional protocol, then the Committee on Torture—not the subcommittee—by majority, can determine that the report be made public. I would assume that that would be after ongoing negotiations, work, discussion and dialogue with the country concerned; it would not be after two months, but there is no time limit set down. So there is a stick, if you like, at a point, but it is not something that is going to be used initially. We certainly believe that the Australian government would engage in a dialogue appropriate to address those concerns.

Mr Greenwell—Can I add one comment to your concern that this could be a weapon for public criticism of Australia and countries like Australia? I think, really, in contrast to the present position, that it would be less likely, once this protocol is in operation. As Nicole said, you start off with the position that, initially, everything is confidential. It is only at a subsequent point that anything is made public, at a point where there is a complete failure of cooperation on the part of the state concerned. The position now, which I think gave rise to your concern, is that a special rapporteur could come out whose report is necessarily made public. It does not go through the kind of elongated process that would be applicable under the protocol. Equally, a United Nations committee can come out now and its report could be made public—hence the concern back in 2000, when the minister said that they would not invite UN committees out to Australia unless there was compelling reason to do so. But I think the protocol is in marked contrast to that.

CHAIR—Because of the confidentiality? The confidentiality is already there under the convention against torture as well.

Mr Greenwell—Yes.

Senator TCHEN—There is just one point I want to pursue, Ms Bieske. You mentioned this confidential conduct of the committee a number of times. I just read through the protocol and could not see any requirement that the committee's business must be confidential.

Ms Bieske—Yes, it is—

Senator TCHEN—Article 11(b)(ii) says:

Maintain direct, if necessary confidential ...

Ms Bieske—If I could direct you to article 16, that is where confidentiality is mentioned. It says:

... shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national mechanism.

Senator TCHEN—Where does it say it is confidential?

Ms Bieske—It says 'confidentially'. Article 16.1 reads:

... shall communicate its recommendations and observations confidentially to the State Party ...

Subsection 4 is what I was discussing before. If a state party refuses to cooperate, these are the steps that can be taken to make it public.

Senator TCHEN—Okay. Thank you.

Senator MASON—I have a couple of quick questions. Just to summarise, the Attorney-General's Department have mentioned procedural and substantive concerns with the optional protocol. The procedural issue in effect was that the text of the optional protocol had been developed by a means other than consensus. You briefly address this in your submission. But in a couple of sentences tell us why that should not prohibit us from adopting the optional protocol.

Ms Bieske—I noticed that one of the questions you asked was in relation to whether consensus was the norm. Consensus is not necessarily the norm. As you said, we did address that in our submission. The Convention on the Elimination of Racial Discrimination was adopted via vote. It is one of the most widely ratified conventions, with 169 state parties. The Convention on the Elimination of Discrimination Against Women was similar, with 175 state parties. Consensus is not something that is essential to human rights treaties. We would also say that in this situation it was not going to happen. Look at the countries that voted in company with Australia against the optional protocol: China, Cuba, Egypt—putting Japan to one side—Libya, Nigeria and the Sudan. They are not countries that are going to come to a reasonable consensus on torture.

Senator MASON—It is big mix, isn't it? It is an eclectic mix, that group.

Ms Bieske—If you look at the Amnesty International report, all of those countries have been documented as being torturers, except Japan and of course Australia.

Senator MASON—Mr Ciobo outlined very well the particular substantive concern of conservative governments: do-gooders coming into this country, where we already have adequate institutional, media and legal protections. In summary, what you are arguing as the answer to that is that we should ratify because it will make a symbolic statement, which is very important—it is not just symbolic, it starts the ball rolling; if we do not ratify it why would the others? Secondly, you argue that the confidentiality provisions prevent in effect minor transgressions being blown out of proportion.

Ms Bieske—Yes.

Senator MASON—That is just to summarise. I have a philosophical question for Mr Greenwell. I read a while ago that Professor Alan Dershowitz—whom you would have heard of as a Jewish public intellectual and professor at Harvard Law School—said that you could morally justify torture on utilitarian grounds. He spoke in the context of the war on terror. He said that if you caught someone and you thought they might know when the bomb was going to go off it may well be justifiable morally to torture them. Dershowitz, as you know, has been a civil rights activist all his public life. But he said that. What do you think? Is it all right to ask a philosophical question?

CHAIR—You can ask what you like.

Ms Bieske—Can I intervene? I was fortunate enough when I was in New York to see Alan Dershowitz speak on his theory at a torture conference. The position of Amnesty is that torture is never justified.

Senator MASON—Ever?

Ms Bieske—Ever. The ticking bomb situation does not happen. Israel used that, for instance, for years and years to justify their torture of Palestinians on the off-chance that any one person might happen to have information. How do you know? How soon is the ticking bomb going to go off? How quickly does that have to occur? The utilitarian situation functions in an academic world but it does not function in reality. It is not something that is actually going to be plausible. We would say that torture cannot be justified.

Senator MASON—Coming from Amnesty, that is excellent. Mr Greenwell, do you have anything to add?

Mr Greenwell—Yes. I agree with that. There are some benchmarks that humanity and civilisation achieve, and you have just got to adhere to the rule as an absolute or otherwise there is a tendency for it to collapse. Once you allow any kind of relativity in the notion of the condemnation of torture, you have opened a wedge.

Mr CIOBO—May I ask a couple more questions?

CHAIR—Yes, Steven.

Mr CIOBO—You made mention that the subcommittee would be free from influence from lobbyists and specific agendas. On what basis do you say that?

Ms Bieske—The optional protocol does not make any provision for that kind of interaction or the possibility of that interaction to occur.

Mr CIOBO—But the absence of that does not necessarily guarantee independence.

Ms Bieske—That is true; you are quite right. But the situation is that these people are independent experts; they are not government delegates. They are independent experts with expertise—as experts have—in particular areas, and in this case on the issue of torture and ill-treatment.

Mr CIOBO—Like the US Supreme Court!

Ms Bieske—I believe these people would not be easily influenced. They are coming out as experts and their reputation will be on the line at the end of the day, so it is a job that they want to make sure that they perform appropriately and professionally.

Mr CIOBO—But would you concede that all the justices of the US Supreme Court are legal experts?

Ms Bieske—I do not understand the relevance of that.

Mr CIOBO—My point is that a very definite philosophical bias can be brought to a position, depending upon the person selected to a position like that.

Ms Bieske—Everybody has their own independent perspective, of course.

Mr CIOBO—Thank you.

Senator TCHEN—According to the records, 29 member states of the UN Commission on Human Rights voted in favour to adopt this optional protocol. I have two questions: firstly, do you know which of those 29 states have not yet signed up, presuming the 23 which have signed up all belong to that group?

Ms Bieske—I can read a list to you.

Senator TCHEN—Secondly, are any of those 29 states which voted for this protocol on Amnesty International's list of 'states of concern'?

Ms Bieske—I would need to confirm that by cross-checking all of those states with our annual report, which I am happy to do.

Senator TCHEN—There is no rush.

Ms Bieske—If you want the states that have not yet ratified, I can read out a list of those states now.

Senator TCHEN—How many are there?

Ms Bieske—I cannot tell you off the top of my head, but as I went through the list I could tell you.

Senator TCHEN—Could you provide the committee with that number?

Ms Bieske—Certainly.

CHAIR—Ms Bieske, you can table that and we can accept it as a supplementary to your submission.

Ms Bieske—Yes.

Senator TCHEN—We about to lose our quorum. The deputy chair is leaving.

CHAIR—On behalf of the committee, I would like to thank you for appearing to give evidence this morning. The secretariat will forward a copy of the proof transcript of evidence for your review as soon as it is available. Is it the wish of the committee that we accept as an exhibit in the committee's records *Australia's second and third report under the convention against*

torture and other cruel, inhuman or degrading treatment or punishment? Moved by Mr Ciobo and seconded by Senator Mason.

Proceedings suspended from 11.58 a.m. to 4.00 p.m.

LEVY, Associate Professor Michael Herbert, Director, Centre for Health Research in Criminal Justice, Corrections Health Service

CHAIR—Welcome. I should remind you that today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present any problem or issue for you, it would be helpful if you would raise it now. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Prof. Levy—If I may.

CHAIR—Certainly. Please proceed.

Prof. Levy—On rereading my submission, I note that there is a point of clarification. I direct you to the last paragraph of the first page, where I refer to my visit to Hungary. It implies that the mission was to a range of detention facilities, including mental asylums in migrant detention centres; in fact, it was not. There is a press release by the Council of Europe which actually stipulates where we did go. I would submit that as supportive documentation.

CHAIR—Thank you very much. Will the committee take that as an exhibit?

Mr WILKIE—So moved.

Senator STEPHENS—Seconded.

CHAIR—Moved by Mr Wilkie and seconded Senator Stephens, the committee accepts that press release as an exhibit to the inquiry.

Prof. Levy—I will make some opening remarks. Australia ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1989 and I understand that it has been invited to ratify the optional protocol. The optional protocol acknowledges the commitment that Australia has made under the convention, but it also highlights a conviction that further measures are necessary to achieve the purposes of the convention and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment and that this could be achieved through strengthened non-judicial means of a preventive nature based on regular visits to places of detention. It was under that extant protocol by the Council of Europe that I was invited to join a mission to Hungary in May and June of last year as a medical expert, my purpose being to assist the mission in its examination of medical records. We visited a number of centres in metropolitan Budapest: two police stations, a remand prison and two other prisons.

The process followed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is based strictly on the protocol and it is absolutely rigorous in its implementation of the protocol. As stated in my submission, one issue did arise

which was closer to my professional sensitivities—that being public health—but not being part of the protocol that could not be part of the report back to government. While the report has now been accepted by the committee for the prevention of torture and given to the government of Hungary, the government has at this stage not given permission for the report to be made public and I am therefore not at liberty to disclose the details, because one of the guiding principles of the process is confidentiality.

I think it is worth stressing because, in preparing for my presentation today, I found an article in the *Sydney Morning Herald* on 6 June 2002 with the heading 'Worst I've seen'. Those were the words of a UN asylum inspector as he talked about his report on the Woomera detention centre. Such a report would never be made by the committee for the prevention of torture. The whole ethos of the process is one of prevention and guidance and independent non-judicial review by experts in the field. While perhaps other agencies within the United Nations do seek publicity and advocacy at a more strident level, I would judge the CPT as being very conservative in their approach and absolutely committed to the process of the guidance of government through trust, confidentiality and expertise, to the point that many countries seek the guidance of the CPT and invite them to visit. I would say that the vast majority of the CPT's visits are at the countries' instigation. I think I mentioned in my submission that I would not be privy to which countries had requested CPT assistance, but that certainly does appear in some of the publications that the CPT puts out.

CHAIR—Thank you. Do you think that if Australia signed and ratified the optional protocol it would change the way we currently operate? Do you believe there are already mechanisms in place to prevent the sorts of things that are talked about in the optional protocol?

Prof. Levy—Whether your question relates to the way that correctional systems are conducted within Australia or to what the intent of the protocol is, it actually invites Australia to buy into a regional dialogue with other countries and, on a point of equality, to invite those countries to review our systems. I think Australia could learn a lot from a review of its correctional systems. I work in the New South Wales system as a public health physician. I have some experience with other jurisdictions. It is not perfect. You simply have to look at the data from an impartial agency like the Australian Bureau of Statistics, which puts out an annual review on prisoners in Australia. We note that the rates of incarceration have increased by five per cent in the last year and that the disproportionate incarceration of Aboriginal citizens continues to increase disproportionately years after the Royal Commission into Aboriginal Deaths in Custody, the single most important finding of which was that, while Aborigines do die disproportionately in prison, they do so because they are incarcerated disproportionately. We continue to incarcerate them disproportionately, and it increases disproportionately, and we seem to be unable to grapple with a solution to that.

So perhaps if we and our neighbours in the region were to sign on, we would gain some insights. I can only believe that we would be a better society for it. I have no doubt that current practices in Australia could be applied, with some adaptation or, certainly, in a collegial way, to countries like New Guinea and the small islands in the Pacific and in South-East Asia. But some of our neighbouring countries are not even signatories to the convention—notably, Singapore—and that concerns me, because Australian citizens are incarcerated in those prisons. Thailand is another country where Australian citizens are incarcerated, and I am not sure what its status is with the convention.

CHAIR—You mentioned also that the office of inspector-general in New South Wales has recently been disbanded. Who conducts prison inspections now in New South Wales?

Prof. Levy—There is no body. I believe part of the responsibility moved to the Ombudsman's office, but I am not aware that there is an inspectorial service. It is notable that the optional protocol, while it talks about a system of inspection, is not actually an inspectorial system; it is an administrative review, it is consultative and it is an opportunity to influence best practice from a human rights perspective. Bodies like the Independent Commission Against Corruption in New South Wales could assume an inspectorial role. The Ombudsman has that.

This is another process. The use of the word 'inspection' probably leads to some confusion because it is certainly not in the spirit. It talks about a system of regular visits undertaken by independent international and national bodies to places of detention. Overwhelmingly, that is what it is—an exchange of best practice. I cannot think of a specific circumstance but, having gone to Hungary, at least there was the potential for me to pick up some issue of best practice and try to apply it here. I did not see such an event, but the potential may exist. I think a visit to New Zealand prisons would perhaps highlight a different way of dealing with indigenous populations and their incarceration—there is another approach.

Mr WILKIE—I think what you are saying really goes to the core of the issue. From what I have seen, the government believes that a situation is being imposed where there is a standing invitation for international committees to come and have a look at our facilities. I would like to put that in perspective by quoting Ms Leigh, who was the First Assistant Secretary, Civil Justice Division, of the Attorney-General's Department from evidence she gave to the Senate Legal and Constitutional Legislation Committee on 6 May 2003. Senator Ludwig asked:

> If the Australian government abhors torture, what is its real objection to signing the protocol?

In response to that question, Ms Leigh said:

> It is to do with the invitation to visit being a standing invitation. The government has made quite clear that it will agree to visits by such committees only where there is a compelling reason to do so, and the government will decide on a case-by-case basis whether it is willing to agree to such visits. It is therefore not willing to bind itself to a protocol that constitutes a standing invitation and that would not provide an opportunity for the government to make a decision on a case-by-case basis.

Do you think that is a fair statement, or have they got it wrong, from your perspective?

Prof. Levy—I think part of the answer is the headline that I showed. This would not be possible to even contemplate if we engaged in the process which the CPT in Europe follows. I presume this was a process in which the government was forced, to some extent. Looking at the experiences over 20 years of prison systems in the United Kingdom, Netherlands, Turkey, Ireland, Scandinavian countries, Mediterranean Spain and Portugal, they are vastly different prison systems—some very violent, some very brutal. Across the board, the benefits—for example, the abrogation of the death penalty by Turkey and the substantial changes to the prison system in England—were all achieved through a process of consultation, guidance and advice. It was always anchored to instruments of human rights, but it is far from reality to say that it is a process of unfettered access.

The protocol itself guides signatories through the different stages of ratification. It can be postponed by up to five years, I believe. There is time for government to come to grips with the commitment. I am not saying, 'Embark on it now and face your commitment in five years,' but it is not an absolute commitment today. And who are the counterparts that are going to do these inspections? The regional committee has not yet lined itself up. New Zealand has already signed up but has not yet ratified it, so clearly New Zealand is a potential signatory. I do not think that it is so fearful, because by engaging in an ordered and proven process we avoid this kind of grandstanding, which ultimately achieves nothing and embarrasses everybody. I do not know that it improved the lot of the people at Woomera. It alienated a lot of people and perhaps added some confusion to this current discussion, when in fact we are talking about a completely different process.

Mr WILKIE—I feel as though we engage in a bit of unnecessary UN bashing from time to time and that is why I am wondering whether we are saying, 'We don't like the idea of the standing invitation as a country,' while in reality we are not being forced to actually have people here; we are just making ourselves available for inspections through negotiation.

Prof. Levy—And we sit on whatever the committee is that mandates these visits. Once Australia has signed up and ratified, Australia is on the committee; it is guiding the process. At the moment, we have to give ad hoc unfettered access in an unstructured manner. That is certainly an imperfect process. I would be advocating supporting the 20 years experience that Europe is prepared to offer. I say Europe because it is the European CPT which is the most advanced.

CHAIR—Is the optional protocol based on the ECPT?

Prof. Levy—I believe so. The European CPT is an adaptation of the optional protocol. It has taken the optional protocol. That was my understanding.

CHAIR—The optional protocol is really something that is about one or two years old and the ECPT is something that has been going for 20 years.

Prof. Levy—Yes. I think it was 1987, the European convention.

CHAIR—I suppose that was something more than the convention against torture at the time, which has been around since about the mid-eighties or thereabouts.

Prof. Levy—Yes.

CHAIR—When you were part of the mission in Hungary, what did you see as the positive and negative aspects of the ECPT?

Prof. Levy—The positive aspects were first of all that they had access. It was the third visit that the CPT had made to Hungary. Each was an incremental development on the previous one, taking the recommendations of the previous visit and moving on that, so it was an iterative process where it was absolutely clear to government that recommendations would be acted on. On the issue of unfettered access, in this particular case they only had six days warning, and from that point on there was a process, both at CPT level and at government level, which made it

happen. So there was a lot of protocol involved. The mission had unfettered access to records and they made recommendations fearlessly to government, but confidentiality and the protocols around that and the protections of the confidentiality of the issues that were raised were adhered to absolutely rigorously.

Senator MASON—Professor, you conclude that Australia has no enforceable standards of custodial care. I suppose that summarises your argument. What do you mean by that? I assume there are legal protections for prisoners in this country. Under common law and legislation there would be prison standards and so forth. Aren't they protections? In addition, aren't there UN standards for protecting prisoners as well—a UN convention?

Prof. Levy—The UN minimum standards have been adapted by Australian correctional ministers. It is a voluntary code. My understanding is that correctional systems across Australia report to federal government on only three or four so-called key indicators. They monitor how many hours a person is locked in a cell, and they monitor incidents of injury of prisoners and of injury of prison officers by prisoners. I made the point that they do not monitor injury allegedly caused by prison officers to prisoners. It is a start, but there is much more to being in custody or having responsibility for the care of people in detention.

On the complexities of providing health care, you could make a case that you are providing standard health care to all prisoners, but taking one example, such as the provision of hepatitis B vaccine, it varies from state to state. In some states prisoners get it free, in other states they cannot access it, and in other states they get it if they pay for it. Something of that precision is not going to be codified by the minimum standards, and perhaps government is not going to be interested in that level of precision. But the fact is that there is this variety of care. I come back to the governance structures of health services because that is my area, and it varies from state to state. Is it good, is it bad? We do not know. We have not got a benchmark.

Senator MASON—We do not know, so it is not transparent and the reporting mechanisms are insufficient. But, Professor, you would not say that there is any evidence of torture in custodial institutions, would you?

Prof. Levy—The definition is broad, and—

Senator MASON—I ask because we had evidence from Amnesty International and other evidence this morning, and I do not think anyone actually said that torture is a problem in this nation. They said in a sense that we should ratify the treaty because of basically symbolic reasons. But you are saying there is potentially—

Prof. Levy—I think it is more than that. I think we can improve the game. As an example, the treatment that Mr Rivkin has been taken through over the last few days and weeks is, I think, degrading. It was not part of his punishment—

Senator MASON—Who is degrading whom, Professor?

Prof. Levy—The press has the power, and I think that some of the statements that have been made would be seen as degrading to him and go way beyond the punishment that the court imposed on him. Whether that is torture—I just throw that in as an example. We do have to be

cautious. Particularly if the definition is broad, inevitably over time there will be examples that will come to mind.

Senator MASON—Fair enough. I just wonder how much public sympathy there is for Mr Rivkin. Nonetheless, that is not the issue, is it?

CHAIR—In article 1 the purpose of the optional protocol is to prevent 'torture and other cruel, inhuman or degrading treatment or punishment'. How wide does that definition go?

Prof. Levy—I do not know if I can answer that.

CHAIR—No, that is not for you to answer, sorry.

Prof. Levy—It is a point of interpretation which the courts will look at in time.

CHAIR—Certainly.

Mr WILKIE—I think there is a definition here.

CHAIR—I will find that.

Mr ADAMS—Regarding ratifying this convention and the issue of torture or inhuman and degrading treatment or punishment, Senator Mason was talking about the implications for Australia if we sign this. I take it there are some issues in relation to where one prisoner may treat another prisoner badly in Australia. If somebody in authority saw that happen, that would be a pretty bad thing, wouldn't it? That would be taken as being inhuman or degrading treatment.

Prof. Levy—Inmate against inmate?

Mr ADAMS—Yes.

Prof. Levy—There could be circumstances where that is the case, but I am sure that issues around duty of care mean it is the custodial authority's responsibility to protect inmates from other inmates. There are issues of assault between inmates which sometimes are outright degrading. It is a question of whether that would be the issue for the committee for the prevention of torture or whether they would take a systematic approach and say that it is the system's responsibility to protect.

Mr ADAMS—The policy is in place and the law is in place and it is up to the country to deal with it. Your mission in Hungary sounded very interesting. You report that there were major issues there—I am sorry, I was slightly late. Did you give an indication of that?

Prof. Levy—No, and nor can I because of the issues of confidentiality. I can report that the report has been accepted by the CPT and that the CPT would now go to the Hungarian government and say, 'Are you prepared to make it public?' In the past—the two previous visits—the reports have been public documents. So, in time, I would anticipate that that report

will become public. But the critical point, which is worth repeating, is that the issue of confidentiality is kept so central to the process of visiting.

Mr ADAMS—I thank you for that and I appreciate that you cannot give us a breakdown on your visit as yet. Let me ask a general question. Do you see it as a very positive thing if Australia were to ratify this convention?

Prof. Levy—I do.

Mr ADAMS—It would be a positive thing for the world, do you think—for instance, from the point of view of another country that may sign up to it?

Prof. Levy—Absolutely. It all helps. It reinforces our commitment to human rights instruments, and we have a number that we are signatories to. I think that we have an important part to play in our region. We regrettably do have Australian citizens incarcerated overseas, and this is a way that we can influence their custodial protection. I am inside on the health side, not on the custodial side, but I actually would welcome review.

Mr ADAMS—It just creates a benchmark for us to make our judgments on, doesn't it?

Prof. Levy—Absolutely.

Mr ADAMS—Even on the health side.

Prof. Levy—Very much so. Health has become an integral part of the mission process, the visits. A mission in fact does not proceed unless there is a doctor on the mission. Within the mission itself, there was an absolute division between the medical records, which only I and my translator were allowed to look at. The other people in the mission looked at custodial records and discussed issues with prison guards and prisoners. They were absolutely rigorous; they would not breach that barrier.

Mr ADAMS—For a healthy prison and a prison that is filthy and full of disease—those issues are overlapping to some degree, aren't they?

Prof. Levy—Absolutely. They were particular issues that were raised on inspections at the British prisons. Very general issues of general hygiene were within the mandate of the Committee for the Prevention of Torture on degrading human treatment. To be housed in accommodation which was physically filthy was seen as being within their mandate.

Mr WILKIE—I used to be a prison officer. I spent 4½ years in the prison service in Western Australia, so I appreciate the importance of having a very transparent system, because it protects not just the people who are incarcerated but also those doing the incarcerating. So I think it is very important. What sort of message do you think Australia is sending to the world when we voted against the text of the optional protocol in 2002, we abstained from the vote when it came before the UN in December 2002 and we have not really progressed in any way, shape or form towards ratification or signing? In fact, we did not attend the last two workshops to try to come up with some agreement. What sort of message do you think that is sending to the rest of the world and to our region?

Prof. Levy—That Australia is not a player.

Mr WILKIE—Even though we chair the committee that actually deals with this.

Prof. Levy—I think it is very important, and it is noted.

Mr ADAMS—That Australia isn't interested? Is that the message, do you think?

Prof. Levy—I think so.

CHAIR—Are you aware that Australia is also a cosponsor on the motion against torture by Denmark at the United Nations General Assembly?

Prof. Levy—No, I am not.

CHAIR—It is an annual motion. We also raise issues of torture in our bilateral human rights dialogues with China, Vietnam and Iran.

Prof. Levy—And Myanmar too, I believe.

Senator TCHEN—You said that Australia's position has been noted. Noted by whom?

Prof. Levy—I have been on professional, not political, fora, and I have been challenged as an Australian. It is out there. I do not know at what level. I do not operate at the political level. I have had one insight into this process, and I must say that the Council of Europe was absolutely rigorous in not raising that issue. It was absolutely not an issue.

Senator TCHEN—The reason I asked that question is that the argument is used that, if Australia does or does not adopt a particular position, it will be noted as an example for the rest of the world. It has never been explained to me who the rest of the world are. Are these the people whom our behaviour or position will actually influence, or are these people who will take it as an excuse for their own behaviours? For example, if they are people who are taking it as an excuse, whether or not Australia signs this particular protocol will not have an impact on their continuing behaviour. Only those people on whom Australia would have a positive, effective influence would actually be affected by whether or not Australia signed the protocol. Those people who are just using us as an excuse just lose an excuse; it is not going to affect their behaviour. My question to you is: in your assessment, are those people who are taking it as an issue that Australia has not signed actually important players in advancing human treatment of other humans or are they actually the laggards?

Prof. Levy—I do not know. I have a sense that they are the second lot, but I cannot base that on hard data. I am sorry.

Mr ADAMS—Do you think it would be positive, if Australia signed it, for the people who, say, are working in Turkey to improve the standards of the jails there and the conditions of the imprisoned, and in other countries where there are people working to improve prisoners' lots for straight humanitarian reasons?

Prof. Levy—There is that. The countries that you mention are countries where we do have potential influence—and not solely. China, Thailand and Singapore readily come to mind. But the prison system in Japan, for instance, is not highly regarded on the scale of humanity, on a world scale. We could potentially have influence with Japan, but I seem to recall that Japan, similarly to Australia, rejected the text.

Mr ADAMS—Did you answer my question positively?

Prof. Levy—I think we can influence, yes. I am convinced that we can.

Mr ADAMS—And it would be positive for people who were working within Turkey?

Prof. Levy—Yes. Sorry, I did miss that. Yes, it would be very supportive.

Mr ADAMS—Thank you.

Senator TCHEN—Would those influences that Australia might impose on these people be just as effective or perhaps more effective if they were through a bilateral dialogue rather than through an international forum?

Prof. Levy—It is possible. As an example, I know that Australia is working with the International Committee of the Red Cross in Myanmar, specifically around the prisons issue. Clearly, that is working. While we are using the ICRC, it is our bilateral relations with Myanmar which give us that interest. A lot of the work of the ICRC in Myanmar is around prisons, so that kind of links in to what you say. There are many approaches and they are definitely not mutually exclusive.

Senator TCHEN—Thank you for your example of Myanmar. I am thinking more of Australia's dialogue on human rights with China, Vietnam and Iran. None of those countries actually participate in international discussions but they are prepared to hold discussions with Australia on a bilateral basis.

Prof. Levy—Yes.

CHAIR—Thank you. Any further questions?

Mr WILKIE—I suppose it is a case of Australia leading by example if we are trying to influence other people in the region to lift their game. As I said before, particularly in light of Australia's appointment as chair of the UN Commission on Human Rights, it is very important that we actually lead the way. Do you think that we need to lead by example?

Prof. Levy—Yes.

CHAIR—On behalf of the committee, I would like to thank you for appearing to give evidence this afternoon. The secretariat will forward a copy of the proof transcript of evidence for your review as soon as it is available.

Prof. Levy—Thank you.

[4.44 p.m.]

CLIFFORD, Ms Rocky, Director of Complaint Handling, Human Rights and Equal Opportunity Commission

HEMINGWAY, Ms Joanna, Legal Officer, Human Rights and Equal Opportunity Commission

LENEHAN, Mr Craig, Acting Director, Legal Section, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. I should remind the witnesses that today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses it would be helpful if they would raise this issue now. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Lenehan—I would like to read a statement on behalf of the commission as our introductory remarks, if that is acceptable.

CHAIR—Thank you. Please proceed.

Mr Lenehan—The commission would like to thank the committee for the opportunity to appear before it in this inquiry. The commission apologises for the fact that by reason of the short notice given for the hearing and its prior commitments it is not possible to have a member of the commission appear here today. It will be apparent from the commission's written submission that the commission supports Australia signing and ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The commission has sought to draw to the committee's attention the manner in which the domestic and international monitoring mechanisms provided for in the optional protocol would complement and reinforce the domestic and international mechanisms currently available to people in detention in Australian institutions.

Very broadly, Australia's ratification of the optional protocol would, once the protocol came into force, firstly require Australia to allow regular visits to places of detention by a new international monitoring committee—and the name of that body is the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment—and secondly require Australia to create or designate a domestic body or bodies with powers to examine the treatment of Australian detainees in the context of Australia's obligations under the convention against torture. Like the international subcommittee, the domestic body would conduct regular visits to places of detention.

Amongst other things, the commission has suggested that those additional monitoring mechanisms would, first, provide for the regular and systemic review of conditions and treatment of persons detained in Australia; second, result in a greater focus on the prevention of future violations of the convention rather than the exposure of past violations; third, draw to the attention of the Australian government at an early stage any broader systemic issues which may give rise to violations of the convention against torture; and, fourth, work with the Australian government in a constructive fashion to resolve any such issues.

On the last point, the commission notes that the procedure to be followed by the newly created international subcommittee on prevention is different in kind to that generally followed by existing United Nations treaty based bodies. Rather than issuing publicly available views on past violations, the new subcommittee makes recommendations to states which remain confidential, save for certain exceptions. As such, the subcommittee seeks to achieve results through discreet and constructive dialogue with government rather than through public exposure.

The commission has also noted that the optional protocol stands to assist Australia to comply with certain of its obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. In the commission's view, the additional mechanisms created by the optional protocol are likely to result in fewer complaints being taken to the commission and to United Nations committees. Not only are such complaints potentially embarrassing if they are made out; they also result in government agencies using time and resources to prepare submissions and other documents.

Finally, the submission originally provided by the commission to the committee contained an error in paragraph 14, where it was erroneously suggested that the states that are parties to the optional protocol were not required to provide the international subcommittee with an opportunity to have private interviews with detainees. That was plainly incorrect, as such an obligation is imposed by subparagraph (d) of article 14 of the optional protocol. The commission is grateful to the committee for accepting an amended submission correcting that error and apologises for any confusion that it may have caused.

CHAIR—Thank you very much. In the optional protocol, as I understand it, there is a system of subcommittee visits and prevention mechanisms that can be put in place. In your submission you say that there are some gaps in HREOC's coverage, in that you do not have jurisdiction over the state, ACT or Northern Territory institutions.

Mr Lenehan—We do, Chair; that is correct.

CHAIR—You do have jurisdiction or you do not?

Mr Lenehan—We do have gaps in our jurisdiction—

CHAIR—You have gaps.

Mr Lenehan—which we have sought to identify in the written submission.

CHAIR—At present, it would be possible for the Commonwealth to legislate for HREOC to have overview of prisoners in state government prisons and so on, wouldn't it?

Mr Lenehan—It is probably not my place to give the committee advice on constitutional issues but the committee would be aware of the external affairs power.

CHAIR—Certainly. So it could be done under the convention against torture, which we are a signatory to, and so on. At the moment, within the state and territory government jurisdictions how are human rights protected within their state run institutions?

Mr Lenehan—The point that the commission has tried to make in its submission is that there is no body which has the convention against torture within its remit that has jurisdiction over people detained in those prisons.

CHAIR—Okay. If Australia were to sign and then ratify the optional protocol, we would be required to create a national body. It is really up to us. It could be HREOC, but with us having to ensure that they have jurisdiction over the state and territory prisons. Is that a correct understanding of the situation?

Mr Lenehan—The optional protocol specifically provides that it can be one body or more than one body. So it could be the commission. It could be a number of bodies. In terms of the possibility of the commission being the national mechanism, you will have noticed that in our submission we specifically avoided expressing a view on the desirability of that option.

CHAIR—I did see that. So for the state governments could a state government ombudsman look at the CAT and the optional protocol and make sure that there are prevention mechanisms in place?

Mr ADAMS—Some state governments have human rights and equal opportunity commissions, too, don't they?

Senator TCHEN—Tentatively equal opportunities.

Mr WILKIE—Some will have prison visitor systems in place where they go and inspect prisons.

Ms Clifford—Perhaps I can clarify that a bit. The antidiscrimination agencies are very much constricted to the grounds of discrimination over things like race, sex, disability and sexual preference—those sorts of issues. They do not have the broader human rights jurisdiction that the Human Rights and Equal Opportunity Commission has in terms of monitoring compliance with the international covenants that may be scheduled to the Human Rights and Equal Opportunity Commission Act. They have a much more limited role. It tends to be that the state ombudsman's office may take on that role in the sense that we are thinking of, rather than the antidiscrimination agencies. But they are agencies that could in the future possibly undertake that role.

CHAIR—In your submission you said that the optional protocol is likely to assist our compliance with a number of our international human rights law obligations. Are we compliant at present?

Ms Clifford—The commission operates a number of international conventions which have been brought into domestic law, such as the Convention on the Elimination of Discrimination Against Women, domestically the Sex Discrimination Act. The Racial Discrimination Act and the Disability Discrimination Act are based on various declarations and there is possibly soon to be some international convention on the latter one. The other international instruments which the Human Rights and Equal Opportunity Commission has some jurisdiction over are those scheduled to the Human Rights and Equal Opportunity Commission Act. The main ones are the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. They would be the most common broader human rights instruments that the commission considers complaints under.

CHAIR—Can I clarify that? The convention against torture is not specifically codified in the Human Rights and Equal Opportunity Commission Act but you do have the responsibility.

Ms Clifford—No. The convention against torture is not one of the international instruments that have been scheduled or declared under the HREOC Act. However, article 7 and article 10 of the ICCPR have reflective terms against torture and cruel, inhuman and degrading treatment. Article 10 supports being treated with humanity and respect for the inherent dignity of the human person.

Mr Lenehan—I might clarify one point arising from our discussion about ombudsman and state based bodies. Ms Hemingway reminds me that one requirement under the optional protocol is that the national enforcement mechanisms must comply with what are referred to as the Paris principles on national human rights institutions. So, subject to that additional requirement, those state based bodies could be one means of living up to the obligations under the protocol were Australian to sign and ratify.

Mr ADAMS—What was the Paris initiative?

Mr Lenehan—Very broadly speaking, the Paris principles relate to the independence of national human rights institutions.

Mr ADAMS—State government bodies would fit that, I would think.

Mr Lenehan—There is no reason why they could not; it is simply an additional requirement.

Mr CIOBO—Can you can cite any examples where you believe Australia's current domestic institutions or the media and political processes have caused the kinds of abuse that you might see a subcommittee like this stem the practice of?

Ms Clifford—The commission already reports on any act or practice that might be inconsistent with a human right, particularly under the ICCPR or the CRC. The commission has to date reported, I think, 27 of those matters. They have mostly sprung from immigration detention environments but, as in relation to prisons we have much more limited jurisdiction, we do not have any coverage over the state's prisons. We do have some coverage over people who may be incarcerated by the states but that is under Commonwealth law. There have been no reports on those matters but we have had reports in relation to acts that may be inconsistent with the ICCPR and the CRC.

Mr CIOBO—Were those 27 matters complaints or findings?

Ms Clifford—They start off as complaints in writing to the commission. The commission inquires into them, investigates them, makes site visits as required, interviews detainees and gives the department, as the respondent to the matter—because the cases under HREOC are limited to acts and practices of the Commonwealth, or someone who is acting as an agent of the Commonwealth—an opportunity to respond to them. The commission then makes tentative views and provides them to the respondent to allow further response to those views. Then the commission, having considered all of that information, decides whether to report on such matters. They are the matters I am talking about that are tabled in parliament.

Mr CIOBO—In what way would the subcommittee augment your work in respect of, for example, mandatory detention at our immigration detention facilities?

Ms Clifford—I would presume they are saying that they would have access to those people who fit under the definition of being detained.

Mr CIOBO—How would that be a wider casting of the net, so to speak, than the role that you currently serve?

Ms Clifford—I think it is suggesting that the commission's current role is inquiring into acts and practices that are generally matters that have already occurred, rather than the preventive nature of the optional protocol. That would be the main advantage of that over the commission's current role. The commission does have some broader inquiry powers. The human rights commissioner undertakes visits in terms of a general overview. So I think they would fit more as a complementary arrangement, rather than anything that would cause tension between the two.

Mr CIOBO—Is it standard practice for HREOC to make recommendations about procedures and practices to prevent, or to perhaps safeguard against, possible breaches which are similar to past breaches?

Ms Clifford—In all those reports I have mentioned, which have been tabled, the commission makes a number of recommendations. Inclusive of those recommendations are ones to prevent repeated actions.

Mr CIOBO—You say it is forward looking and not retrospective in terms of their brief but I am still wondering, given your role, what extra powers the subcommittee would have, or what extra role the subcommittee would play, to make sure that, as a democracy, Australia is not in breach.

Ms Clifford—In some ways the commission is a reactive body to information that is put through it. With regard to the issue of prevention, I cannot say what the subcommittee will do, but I presume they will do things like have regular reviews of the particular protocols that agencies have, which would be a much more time-consuming role than what the commission may be able to undertake at the present time. As a monitoring role, that would be complementary to the current role of the commission. I suppose they would be looking at protocols and the training of staff in a more preventative way rather than in response to a particular complaint that has been lodged with the commission.

Mr CIOBO—The basis of my question is that, if you start at the point of saying that Australia has fairly good safeguards already and that we are a world leader in terms of setting standards and benchmarks in this regard, the establishment of a group like this might be seen as superfluous for a country like Australia, although I can certainly see its advantages for other countries. That is why I think it is important that we nut out why it would be of benefit to Australia, because that is a separate argument to one that stipulates that it is of benefit for Australia to lead by example in the international community. I am just trying to establish whether there are any actual benefits for Australia in a domestic sense or whether they are purely a feelgood exercise.

Mr Lenehan—One point of distinction between the commission and the two mechanisms proposed under the protocol is that there is no requirement upon the Australian government to allow the commission to inspect any particular place of detention, whereas, with both the committee and the national body established under the protocol, that requirement does apply. As the commission has pointed out in the submission, it attempts to work cooperatively with government to the maximum extent possible, and that has facilitated a fairly free access to places of detention. However, that is a limitation that may arise at some point.

Mr WILKIE—I will ask the same question that I asked the previous witness: given that Australia now chairs the UN Commission on Human Rights and therefore has an obligation to pursue a leading role in this sort of field, what sort of message are we sending to the rest of the world community by not participating in workshops to sort out the protocol, by voting against it in the UN and—even though you are suggesting we should—by not proceeding in any way shape or form as a country towards ratification? Someone has said that maybe we already have a reasonably good system in place; that we probably do not need to do it if we are just showing the world that we should pursue this sort of course—it is not really helping Australia. I am of the view that that is really saying that we should be above the law, which does not really wash with me. What sort of message do you think we are sending the world by not participating in this protocol?

Ms Clifford—I do not know if I can answer for the rest of the world.

Mr WILKIE—No, I am asking what you think the message is that we are sending the world.

Ms Clifford—Australia is, rightly, a leader in human rights. The commission recognises that. I think having a leadership role is an important role for us to take. I think that is a good message to get across.

Mr WILKIE—But by not going through with the protocol and not pursuing ratification, what sort of message is that sending, given that we should be taking a leadership role?

Ms Clifford—That would just be my own personal opinion. I have not got the views of what the commission would say in relation to that, so I probably cannot go any further on that.

Mr ADAMS—I think the world is listening.

Mr WILKIE—I don't—some people are.

Mr ADAMS—I think there are a lot of people in the world listening that are trying to do things that would be beneficial. Do you see anything negative for Australia if it does ratify this convention? The convention is against torture and other cruel, inhuman and degrading treatment or punishment. I think most Australians would think that that was probably a pretty decent thing for Australia as a country to be opposed to, and that it should support a convention along those lines. From the commission's perspective, is there anything negative for Australia by signing this?

Ms Clifford—I think the commission is already clear in its submission that it supports the protocol and, therefore, it would support the government signing and ratifying the protocol. Again, all I can say is that I think it is important that we have the extra complementary role of the optional protocol and that Australia continue to take a leading human rights role, particularly in the region, which the Human Rights and Equal Opportunity Commission and the government intend to engage and do engage. Again, I think it is that leadership role.

Senator TCHEN—You said the commission supports Australia signing the optional protocol. Perhaps you did not say it in such strong words, but you certainly indicated the commission leans towards supporting it. In answer to an earlier question by the chair, Mr Lenehan also said that the commission—quite correctly, I think—steers very carefully away from defining a potential role for the commission, although I noticed that in your submission you also went to some trouble to identify other considerations and additional funding resources that would be required for the commission should the commission adopt such a role. When the chair raised the issue about the Commonwealth legislating to cover those gaps in the commission's power covering the state activities, you said that you are not in a position to comment on the political implication of it. Is that correct? That was my impression.

Mr Lenehan—I think what I might have said was that it would probably be inappropriate for me to comment on the legal niceties of what might be inferred there.

Senator TCHEN—Nevertheless, if Australia signs the optional protocol, then Australia would be obliged to set up a national body as prescribed in the protocol.

Mr Lenehan—One or more bodies.

Senator TCHEN—But it would be one or more bodies that are capable of doing what is required.

Mr Lenehan—Yes, and there is obviously a variety of legislative mechanisms by which that might be done. That may involve state legislation, Commonwealth legislation or both.

Senator TCHEN—If that body or those bodies were set up, would that substantially, or in any way, improve Australia's domestic human rights considerations?

Mr Lenehan—I am not sure that I can add an awful lot apart from what is contained in the submission, where the commission has attempted to identify the limitations that exist in the existing mechanisms. The commission would see this as a means of at least partially addressing those limitations.

Senator TCHEN—I appreciate that. What I am trying to get at is whether the commission, having identified those limitations, is of a view that those limitations are limitations that substantively affect Australia's human rights treatment. Do those limitations matter?

Mr Lenehan—The commission in supporting the optional protocol obviously is of the view—

Senator TCHEN—I appreciate that, but I said that the commission has the view that there are certain limits to its power which it obviously believes should be removed. My question is: does the commission believe that those limitations are real limitations to the commission's functions?

Mr Lenehan—The commission has tried to identify some gaps in the existing mechanisms, and the commission sees this as a proactive mechanism which looks to identify and address violations before they take place.

Senator TCHEN—I appreciate that, but are those real gaps or not? Do they have any real impacts?

Ms Clifford—I think the practical implication that the commission does not have any right of entry is quite a significant gap in its legislation. Currently we are operating under general cooperation with the departments that are concerned about the matters that are raised. That may not always be the case. We would hope that it is, but I think that the fact that it lacks the right of entry is a significant gap in HREOC's legislation. The optional protocol would seem to overcome that. It would not only overcome the access issue but take it a step forward and be a preventative measure as well. I think that the lack of right of entry for the commission per se is a significant gap.

Senator TCHEN—But you have no real evidence that those gaps are actually preventing the upholding of human rights in Australia.

Ms Clifford—No. As I said, the practical application is the cooperation of the relevant department, and we have been receiving that. To rely on that is to rely on the goodwill of the relevant party to the matter.

CHAIR—Has access ever been declined?

Ms Clifford—No. Generally the commission have been able to access the detention centres as required. We usually give fairly reasonable notice. Sometimes the department of immigration may say, 'This is not the most suitable day. What about this day?' and we agree that we would be happy to come on that particular day. Access has not been declined.

Senator TCHEN—In response to the various questions from the members of the committee, you have indicated—if I understand you correctly—that Australia signing the optional protocol would not mean any substantive changes within Australia, domestically, but it may have a regional impact and it might influence other countries in the region.

Mr Lenehan—I think we have been fairly clear in saying the opposite—we do think it has substantive and significant domestic implications, if you like.

Senator TCHEN—But you just told me that it those gaps that you identified actually have no practical impact.

Ms Clifford—That is on how the commission may do its work. But in relation to the preventative measures—and I think the submission goes to those—will there be fewer complaints about an act that has already happened? Presumably, education as a key tool to prevent particular actions would take effect. We are suggesting that there would be fewer complaints to us, to the CAT itself and to the ICCPR. I think it is possible that if the preventative measures are fully effective then they would—as I think most people would hope about prevention measures in any area—prevent the furthering of complaints to the human rights commission and to the UN Human Rights Committee.

Mr Lenehan—Senator, that may be the answer to your question. Australia undoubtedly has a very good human rights record, but no state is perfect. It will be clear from what we have said about complaints which have been upheld by the commission, two complaints which have recently been upheld by the Human Rights Committee and concerns which have been expressed by the Committee against Torture that there are issues for Australia to address. The commission considers that the mechanisms under the optional protocol would be ways of addressing those issues.

Mr CIOBO—But they do not exist outside of the report that you have done already, do they? It is not as if you are prevented from making recommendations that this subcommittee would be able to as a consequence of investigations into retrospective acts.

Mr Lenehan—That is correct, but in terms of our individual complaint handling process our focus is on violations which have already occurred. We can, as we have said in the submission, make recommendations for the prevention of future acts but we are certainly not in that complaint handling process in there inspecting places of detention with a view to preventing future violations.

Mr CIOBO—Are there examples that you are aware of where HREOC is aware of a process or a procedure that you believe may be in breach but has not been at the core or the penumbra of a complaint and you have been unable to pursue?

Ms Clifford—I am not sure of the question.

Mr CIOBO—Are there procedures or processes in place that you are aware of that have not been at the core of or ancillary to a complaint that has been made and therefore HREOC has been unable to pursue it? Indeed, could that situation even arise?

Ms Clifford—The commission is able to inquire into the general matters that are brought before it, but I do not think I am quite clear on—

Mr CIOBO—What I am saying is, say you thought there was a process that was in breach—

Ms Clifford—Right.

Mr CIOBO—but it had not been the cause of a complaint or ancillary to a complaint. Are you in a position to investigate it and make recommendations with regard to it?

Mr Lenehan—Yes, we are. We have own motion inquiry powers in some circumstances.

Mr CIOBO—How does this do anything to further matters?

Mr Lenehan—What we do not have is a process whereby the commission goes in on a regular basis and has a look around and says, 'These are the matters of concern.' We depend upon finding out about matters that may be of concern and then using those powers. It is reactive rather than proactive.

Mr CIOBO—There is lack of a power to basically do routine inspection, so to speak, to determine whether there may or may not be a problem. To put it in layman's terms, you have to wait for the wheels to start to squeak before you can put some grease on.

Ms Clifford—Yes, we deal with it once the wheels have come off, in a broader sense. That is exactly the issue in that at the moment it is just by cooperation that we may have visits but, unless we have a particular complaint that we are looking into, we have no compellability powers for documents either. We have no right of entry under those generally. It is really on the goodwill of the department.

Mr CIOBO—I understand that point. It is important to note too that, to take the analogy painfully a little bit further, Australia in relative terms only ever has squeaks. I think the wheels fall off in other parts of the world.

Senator TCHEN—I have one further question. Your submission highlights the fact that the United Kingdom and 22 other countries have become signatories to this optional protocol. Previous witnesses cited regularly the United Kingdom, New Zealand, Denmark, Finland, Norway, Sweden, Italy, Austria and Malta as examples of the 23 countries which have signed up. I note that there are three countries which have actually ratified it, including Malta and the United Kingdom, and also Albania. No-one seems to want to cite Albania, for some reason. Is there any particular reason why the commission was not interested in Albania? It is the first one on the list.

Mr Lenehan—I think we, like the other witnesses before you, have just given selective examples.

Senator TCHEN—I was wondering why everyone skipped past Albania, or Madagascar, Mali, Romania and Sierra Leone. That is just an observation.

Mr Lenehan—Just to be of assistance, Chair, I noted that in your questioning of the last witness some discussion was had as to whether the ECPT begat the optional protocol or whether it was the other way round. It is our understanding that the ECPT actually sprang out of the original proposal for the optional protocol back in 1986 but that the optional protocol has taken longer to get off the ground, if you like.

CHAIR—It was my understanding from evidence from Attorney-General's and DFAT that the working group only began on the optional protocol in about 1992.

Mr Lenehan—The information we have is that there was a Costa Rican proposal which was first submitted to the Commission on Human Rights in 1980. That information, I should candidly admit, comes from this journal—the *International Journal of Human Rights*. We would be happy to make a copy of the relevant article available to the committee, if that assists.

CHAIR—I would appreciate that. Thank you very much. On behalf of the committee, I would like to thank you for appearing to give evidence this afternoon. The secretariat will forward a copy of the proof transcript of evidence for your review as soon as it is available.

Mr Lenehan—We thank the committee.

CHAIR—It is resolved that information from the Department of Foreign Affairs and Trade received today, 9 February, be received as evidence and incorporated into the committee's records as exhibit No. 4.

Resolved (on motion by **Mr Wilkie**, seconded by **Senator Tchen**):

That the committee authorises publication, including publication on the electronic parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 5.21 p.m.