
The Parliament of the Commonwealth of Australia

Report 58

**Optional Protocol to the Convention against Torture and Other
Cruel, Inhuman or Degrading Treatment or Punishment**

March 2004
Canberra

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Foreword

Australia abhors torture and other cruel, inhuman and degrading treatment or punishment. Within Australia there are a range of protections to proscribe and prevent torture including Commonwealth, State and Territory legislation as well as the Human Rights and Equal Opportunity Commission (HREOC), ombudsmen and our system of parliamentary democracy. The Convention against Torture (the Convention) entered into force for Australia on 7 September 1989.

The issue for the Committee was to consider whether Australia should sign the Optional Protocol to the Convention. The Optional Protocol will principally involve the establishment of a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee on Prevention) and independent national preventative mechanisms. In making its recommendation, a majority of the Committee found the following arguments persuasive.

Firstly, the issue of whether to sign the Optional Protocol needs to be examined in the context of the Australian Government's approach to the UN treaty committee system. Australia remains concerned that the UN committees are not focussing on the most pressing of human rights violations. The subcommittee, when established, will be able to conduct visits to State Party facilities, regardless of whether there are substantive concerns regarding allegations of torture. This is incompatible with the approach of Australia which is only to allow committee visits when there is a compelling reason to do so and to focus resources in the areas of greatest need.

Secondly, there is no suggestion that the independent national preventative mechanisms are inadequate in Australia. Commonwealth, State and Territory Governments all conduct education and training programs and have mechanisms to prevent torture. Although the Convention is not scheduled under the HREOC

Act, there are a range of other human rights instruments which are and which proscribe and prevent torture.

Thirdly, there are also some procedural and substantive concerns with regard to the Optional Protocol. The procedural concerns are that the Optional Protocol was developed without widespread consensus and was not considered in detail by the Working Group which was established to consider the draft text. The substantive concerns relate to the need for UN treaty bodies to operate effectively with committees focussing on the areas of greatest human rights violations. As it stands the Optional Protocol will allow visits to any Member State, regardless of whether there are concerns regarding allegations of torture.

Several of the submissions which supported Australia signing the Optional Protocol argued that it would send a message or set an example on human rights. This is not a compelling reason by itself. Australia is already regarded as a leader in human rights standards. The issue for the Committee was to consider whether we should sign the Optional Protocol despite our concerns about the functioning of the UN treaty committee system.

A majority of the Committee has decided that there is no immediate need for Australia to sign and ratify the Optional Protocol at this time. If, over time, the Subcommittee on Prevention demonstrates that it has focussed its resources on the worst human rights violations in the world, then the Australian decision could be revisited. However while Australia continues to work for reform of the UN treaty committee system, Australia should not sign the Optional Protocol.

I would like to thank the Committee Secretariat for their work in the conduct of this inquiry and the Inquiry Secretary, Jennifer Cochran. I would also like to thank all members of the Committee for their consideration of this reference from the Senate.

Dr Andrew Southcott MP
Chair



Membership of the Committee

Chair Dr Andrew Southcott MP

Deputy Chair Mr Kim Wilkie MP

Members Hon Dick Adams MP

Mr Kerry Bartlett MP

Mr Steven Ciobo MP

Mr Martyn Evans MP

Mr Greg Hunt MP

Mr Peter King MP

Hon Bruce Scott MP

Senator Andrew Bartlett

Senator Linda Kirk

Senator Gavin Marshall

Senator Brett Mason

Senator Santo Santoro

Senator Ursula Stephens

Senator Tsebin Tchen

Committee Secretariat

| | |
|--------------------------------|------------------|
| Secretary | Gillian Gould |
| Inquiry Secretary | Jennifer Cochran |
| Administrative Officers | Frances Wilson |
| | Kristine Sidley |



Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the Committee by
 - (i) either House of the Parliament, or
 - (ii) a Minister; and
- c) such other matters as may be referred to the Committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of abbreviations

| | |
|--------|--|
| AGs | Attorney-General's Department |
| DFAT | Department of Foreign Affairs and Trade |
| DIMIA | Department of Immigration and Multicultural and Indigenous Affairs |
| CPT | European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment |
| CRC | Convention on the Rights of the Child |
| ECPT | European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment |
| FASSTT | The Forum of Australian Services for Survivors of Torture and Trauma |
| HREOC | Human Rights and Equal Opportunity Commission |
| ICCPR | International Covenant on Civil and Political Rights |
| UN | United Nations |



Recommendation

Issues arising from the Committee's inquiry

Recommendation 1

The Committee recommends against the Commonwealth Government taking binding treaty action with respect to the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at this time.

Introduction

Purpose of Report

- 1.1 On 26 November 2003 the Senate resolved that the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol) be referred to the Joint Standing Committee on Treaties (the Committee) for inquiry and report by 23 March 2004.¹ This report contains the findings and conclusions of the Committee's inquiry.

Conduct of inquiry

- 1.2 The Committee's review of the Optional Protocol was advertised in the *Australian* newspaper on 10 December 2003, inviting members of the public to make written submissions for the Committee's consideration.² Information concerning the inquiry was also made available on the Committee's website at <http://www.aph.gov.au/house/committee/jsct/OPCAT/index.htm>
- 1.3 Letters inviting comment were sent to all State Premiers, Chief Ministers and Presiding Officers, relevant Commonwealth, State and

1 *Senate Journals*, 26 November 2003, p. 17886 and *House of Representatives Votes and Proceedings*, 27 November 2003, p. 1337.

2 House of Representatives, 'What's happening at your House?' *Australian*, 10 December 2003, p. 2.

Territory government departments and authorities, peak bodies, and individuals who have expressed an interest in being kept informed of the activities of the Committee.

- 1.4 During the inquiry, the Committee received 20 submissions and five exhibits. A joint submission was received from three Commonwealth departments: the Attorney-General's Department, the Department of Immigration and Multicultural and Indigenous Affairs, and the Department of Foreign Affairs and Trade. A list of submissions and their authors is at Appendix A, and a description of exhibits is at Appendix C.
- 1.5 The Committee held one public hearing on 9 February 2004, at which evidence was taken from the Attorney-General's Department and the Department of Foreign Affairs and Trade, Amnesty International Australia, Associate Professor Michael Levy, and the Human Rights and Equal Opportunity Commission. A list of witnesses who gave evidence at the public hearing is at Appendix B, and a transcript of evidence can be obtained from the Committee Secretariat or accessed through the Committee's internet site at <http://www.aph.gov.au/house/committee/jsct/index.htm>. The public hearing was advertised in the *Australian* on 4 February 2004.³

Scope and structure of Report

- 1.6 Chapter Two describes the significant functions of the substantive *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention) and the Optional Protocol.
- 1.7 At the time of the referral by the Senate, Australia had neither signed, ratified nor acceded to the Optional Protocol. Consequently, most submissions received by the Committee focused on the relative advantages and disadvantages relating to Australia becoming a State Party to the Optional Protocol, and Australia's current mechanisms to prevent the occurrence of torture and other cruel, inhuman or degrading treatment or punishment under domestic law and international human rights mechanisms. Chapter Three canvasses the

³ House of Representatives, 'What's happening at your House?' *Australian*, 4 February 2004, p. 2.

various issues raised during the Committee's inquiry and lists the Committee's findings.

Convention against Torture, and Optional Protocol to the Convention against Torture

Background

- 2.1 The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention) is a substantive human rights instrument that establishes state obligations in relation to prohibitions on torture and other cruel and inhuman or degrading treatment or punishment. The *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol) is designed to be an enforcement and preventative mechanism to further achieve the purposes of the Convention.
- 2.2 Under article 1 of the Convention, 'torture' refers to
any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person

acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

- 2.3 The Joint Standing Committee on Treaties (the Committee) recognises the concept of ‘cruel, inhuman or degrading treatment or punishment’ as stated in the Attorney-General’s Department’s report, *Australia’s Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Australia understands that the acts or conduct encompassed by this expression entail some lesser degree of severity than those defined as ‘torture’, which nevertheless are inconsistent with the inherent dignity and rights of the person. Australia understands that the expression encompasses such acts as excessive punishments out of proportion to the crime committed, or treatment which grossly humiliates and debases a person.¹

- 2.4 The Attorney-General’s Department’s report further states that Australian domestic law is not constructed around the terms ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’, and therefore does not distinguish between the two types of conduct. Therefore, for the purposes of this report and in line with the Attorney-General’s Department’s report, the use of the term ‘torture’ encompasses both types of conduct.²

Convention against Torture

- 2.5 The Convention requires State Parties to take effective measures to prevent acts of torture in any territory under its jurisdiction.³ No exceptional circumstances such as war, internal political instability or any other public emergency, or an order from a superior officer or a public authority may be invoked as a justification for torture.⁴

1 Attorney-General’s Department, 1999, *Australia’s Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canberra, p. 3.

2 Attorney-General’s Department, 1999, *Australia’s Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canberra, p. 3.

3 Articles 2 and 16, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention).

4 Article 2, Convention.

- 2.6 The Convention requires that States, among other things, ensure that
- acts of torture are offences under domestic legislation, and to make these offences punishable by appropriate penalties⁵
 - education and information regarding the prohibition against torture are included in the training of those people involved in the treatment of people subject to arrest, detention or imprisonment⁶
 - interrogation rules, instructions, methods and practices, and custody arrangements are systematically reviewed⁷
 - competent authorities undertake a prompt and impartial investigation of any alleged act of torture⁸
 - in the State Parties legal system the victims of torture or their dependents have an enforceable right to fair and adequate compensation and rehabilitation⁹
 - statements made as a result of torture are not invoked as evidence in proceedings (except against a person accused of torture as evidence that the statement was made).¹⁰
- 2.7 Under article 8 of the Convention, State Parties are prohibited from returning a person to another State where there are substantial grounds for believing that the person would be at risk of torture. The State must also ensure that the ‘alleged perpetrator of torture present in any territory under their jurisdiction is prosecuted or extradited to another State for the purpose of prosecution’.¹¹
- 2.8 The Convention was adopted by the United Nations General Assembly on 10 December 1984 and entered into force generally on 26 June 1987.¹² As at 15 March 2004, there were 134 Parties to the

5 Article 4, Convention.

6 Article 10, Convention.

7 Article 11, Convention.

8 United Nations, ‘Combating Torture’, Fact Sheet No. 4 (Rev.1), p. 8. See article 12, Convention.

9 Article 14, Convention.

10 United Nations, ‘Combating Torture’, Fact Sheet No. 4 (Rev.1), p. 8. See article 15, Convention.

11 United Nations, ‘Combating Torture’, Fact Sheet No. 4 (Rev.1), p. 8.

12 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (15/3/04).

Convention.¹³ Australia ratified the Convention on 8 August 1989, and it entered into force for Australia on 7 September 1989.¹⁴

Committee against Torture

- 2.9 Article 17 of the Convention provides for the establishment of a Committee against Torture. Its main function is to ensure that the Convention is observed and implemented.
- 2.10 The Committee against Torture consists of 10 experts of ‘high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity’.¹⁵ It is prescribed that in the election of committee members consideration also be given to equitable geographic distribution and legal experience. As Jastine Barrett’s article (exhibit 5) states, ‘impartiality and integrity are vital for the committee members’ if they are to be effective in achieving their objectives.¹⁶
- 2.11 The Convention establishes four mechanisms through which the Committee against Torture performs its monitoring functions.¹⁷ Namely, the Committee against Torture shall consider State Party reports (article 19), undertake confidential inquiries (article 20), consider communications from individuals who claim to be victims of a violation of the Convention (article 22), and consider inter-State complaints (article 21). The Committee against Torture can only pursue the two latter mechanisms if the State Party recognises its ability to conduct confidential inquiries.
- 2.12 The Committee against Torture has a reporting mechanism to monitor implementation of the Convention and to supervise State compliance with such obligations. Article 24 requires that the Committee against Torture submit an annual report on its activities to the UN General Assembly and State Parties.

13 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (15/3/04).

14 Attorney-General’s Department, 1991, *Australia’s First Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canberra, p. 1.

15 Article 17, Convention.

16 *Exhibit*, Jastine Barrett, 2001, ‘The Prohibition of Torture under International Law: Part 1: The Institutional Organisation’ in *The International Journal of Human Rights*, Vol. 5, No. 1, (Spring 2001), Frank Cass, London, p. 7.

17 United Nations, ‘Combating Torture’, Fact Sheet No. 4 (Rev.1), p. 11.

Inquiry proceedings under article 20

- 2.13 Under article 20 of the Convention, the Committee against Torture is able to conduct investigations if it 'receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party'. In such cases the Committee against Torture shall invite the State Party to co-operate in the examination of the information, and inquiry process, which may include a visit to the territory of the State Party.
- 2.14 These proceedings are confidential. However following their completion, the Committee against Torture 'may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report' to the UN General Assembly and State Parties.¹⁸
- 2.15 Ms Renee Leon from the Attorney-General's Department advised the Committee that
- The procedure for contacting a state and seeking consent and wishing to visit is a confidential one... I think the view was probably taken in the drafting of the convention that bilateral dealings with the committee were merely 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.¹⁹
- 2.16 The competence conferred upon the Committee against Torture by this article is optional, hence at ratification or accession a State Party may declare that it does not recognise it.
- 2.17 The Attorney-General's Department and the Department of Foreign Affairs and Trade were unable to advise the Committee of the number of States that the Committee against Torture had visited since its inception, due to the confidential nature of its inquiries.²⁰

18 Article 20, the Convention.

19 Ms Renee Leon, *Transcript of Evidence*, 9 February 2004, p. 7.

20 See *Transcript of Evidence*, 9 February 2004, p. 7.

However, according to Jastine Barret's 2001 article, the Committee against Torture conducted one visit in 1990 (to Turkey).²¹

Optional Protocol to the Convention against Torture

- 2.18 As the Optional Protocol's preamble states, further measures were thought to be necessary to achieve the purposes of the Convention and to strengthen the protection of people deprived of their liberty against torture. Hence, the Optional Protocol seeks to build on the Convention's obligations by developing preventative measures designed to reinforce the protections conferred on people deprived of their liberty.
- 2.19 In accordance with article 1 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 where people are deprived of their liberty²² in order to prevent torture. The visits are intended to strengthen, when required, the protection of people deprived of their liberty against torture.²³
- 2.20 The functions of the Optional Protocol are to be carried out by two main mechanisms, namely the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (the Subcommittee on Prevention, or Subcommittee), and independent national preventative mechanisms.

21 *Exhibit*, Jastine Barrett, 2001, 'The Prohibition of Torture under International Law: Part 1: The Institutional Organisation' in *The International Journal of Human Rights*, Vol. 5, No. 1, (Spring 2001), Frank Cass, London, p. 13.

22 For the purposes of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol), pursuant to article 4, 'deprivation of liberty' means 'any form of detention or imprisonment, or the placement of a person in a public or private custodial setting', which they are 'not permitted to leave at will by order of a judicial, administrative or other authority' (eg. police and military holding cells, juvenile and immigration detention centres and closed psychiatric institutions). Under article 4 of the Optional Protocol, 'a place of detention' is any place under state jurisdiction and control, 'where people are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.

23 Article 4, Optional Protocol.

- 2.21 The text of the Optional Protocol was adopted at the United Nations General Assembly on 18 December 2002.²⁴ The vote was 127 in favour to 4 against, with 42 abstentions, including Australia.²⁵
- 2.22 The Optional Protocol is not yet in force generally, as only three instruments of ratification or accession, of the required 20, have been deposited with the UN Secretary-General. Of the three instruments Albania has acceded, and Malta and the United Kingdom have ratified the Optional Protocol. As at 15 March 2004, there were 23 signatories to the Optional Protocol (see also section on entry into force).²⁶

Subcommittee on Prevention

- 2.23 The Subcommittee on Prevention, established under article 2 of the Optional Protocol, is to consist of 10 members chosen for their 'high moral character, having proven professional experience in the field of the administration of justice' (in particular criminal law, prison or police administration) or other fields relevant to the treatment of persons deprived of their liberty.²⁷
- 2.24 The Subcommittee is to conduct regular visits to State Party facilities, regardless of whether there are substantive concerns regarding allegations of torture, to assist the State Party in realising its obligations under the Convention. During a visit, the Subcommittee on Prevention will assess the conditions of places of detention and the treatment of those people deprived of their liberty, and make recommendations and observations concerning their protection.²⁸
- 2.25 State Parties will be notified of the Subcommittee on Prevention's programme of regular visits so they may then make the necessary practical arrangements for the visit to be conducted.²⁹ Pursuant to article 12, State Parties must cooperate with and receive visits by the

24 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty16.asp> (15/3/04).

25 Department of Foreign Affairs and Trade, *Exhibit*, p. 6.

26 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty16.asp> (15/3/04).

27 Article 5, Optional Protocol.

28 Article 11, Optional Protocol.

29 Article 13, Optional Protocol.

Subcommittee. Further, State Parties must allow unrestricted access to information relating to the number of people deprived of their liberty, their treatment and conditions of detention, and the places of detention and their location.³⁰ The Subcommittee must also be allowed to conduct private interviews with persons deprived of their liberty, in places of their choosing, and with the people it wants to interview.³¹

- 2.26 A State Party can only object to a visit to a particular place of detention on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited, that temporarily prevent a visit.³²
- 2.27 The reporting mechanisms on the work of the Subcommittee are prescribed in article 16 of the Optional Protocol. Following a visit to a State Party, the Subcommittee's recommendations shall be communicated to the State Party in confidence and, if relevant, to the national preventative mechanisms. The Subcommittee on Prevention will publish a report, together with comments by the State Party, whenever requested to do so by the latter. The Subcommittee on Prevention will present a public annual report on its activities to the Committee against Torture. Notably, if a State Party refuses to cooperate with the Subcommittee, or take steps to improve the situation in light of the Subcommittee's recommendations, the Committee against Torture may decide to make a public statement on the matter or to publish the report of the Subcommittee.

National preventative mechanisms

- 2.28 Articles 3 and 17 of the Optional Protocol require State Parties to establish one or more independent national preventative mechanisms for the prevention of torture at the domestic level. In doing so, State Parties must ensure that
- the national preventative mechanisms are independent
 - the experts involved have the required capabilities and professional knowledge, gender balance and adequate representation of ethnic and minority groups in the State
 - the national preventative mechanisms have the necessary resources to perform their functions
-

30 Article 14, Optional Protocol.

31 Article 14, Optional Protocol.

32 Article 14, Optional Protocol.

- consideration is given to the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).³³
- 2.29 Pursuant to article 19, the national preventative mechanisms must also conduct regular visits to places of detention and make recommendations to the State Party to improve the treatment and conditions of people deprived of their liberty with the view to protect them from the occurrence of torture. State Parties must facilitate the visits by national preventative mechanisms providing similar rights of access to information, people deprived of their liberty and places of detention as those given to the Subcommittee on Prevention.³⁴
- 2.30 Article 22 prescribes that the State Party is to examine the national preventative mechanisms recommendations and enter into a dialogue on possible implementation measures.
- 2.31 The national preventative mechanisms can also submit proposals and observations concerning existing or draft legislation.³⁵
- 2.32 The method of reporting for national preventative mechanisms, pursuant to article 23, requires State Parties to publish and disseminate the annual reports of the national preventative mechanisms.

Costs

- 2.33 Article 25 details the financial provisions of the Subcommittee on Prevention. Specifically, the expenditure incurred and the provision of staff and facilities shall be borne by the UN.
- 2.34 Pursuant to article 26 a Special Fund will be established to help finance the implementation of the Subcommittee's recommendations, and the national preventative mechanism's education programmes. State Parties therefore, would be required to financially support most of the functions of the national preventative mechanisms.

33 Article 18, Optional Protocol. See also Human Rights and Equal Opportunity Commission, *Submission*, p. 5.

34 Article 20, Optional Protocol.

35 Article 19, Optional Protocol.

Entry into force

- 2.35 The Optional Protocol was available for signature by State Parties to the Convention on 4 February 2003.³⁶ Instruments of ratification and accession are to be deposited with the UN Secretary-General.³⁷
- 2.36 Under article 28, the Optional Protocol will enter into force 30 days after the deposit of the 20th instrument of ratification or accession. The Optional Protocol will subsequently enter into force for each ratifying State Party, 30 days after the date of deposit of its own instrument of ratification or accession.
- 2.37 At the time of the Committee's inquiry there were 23 signatories and three parties to the Optional Protocol, as listed in Table 1.
- 2.38 Unlike the Convention, no reservations can be made to the Optional Protocol.³⁸

Postponing implementation

- 2.39 As prescribed in article 24, upon ratification, State Parties may make a declaration postponing the implementation of their obligations under the Mandate of the Subcommittee on Prevention (Part III) or the National Preventative Mechanisms (Part IV) of the Optional Protocol for up to three years. Parties can take action to seek extension of this initial period for an additional two years.

Amendment

- 2.40 Any State Party may propose an amendment to the Optional Protocol and file it with the UN Secretary-General who will then take the prescribed actions set out in article 34.
- 2.41 Amendments would enter into force once accepted by a two-thirds majority of State Parties to the Optional Protocol in accordance with their respective constitutional processes.

Denunciation

- 2.42 A State Party may denounce the Optional Protocol at any time by written notification addressed to the UN Secretary-General.

36 United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty16.asp> (15/3/04).

37 Article 27, Optional Protocol.

38 Article 30, Optional Protocol.

Denunciation would take effect one year after the date of receipt of notification by the UN Secretary-General.³⁹

Table 1 Status of ratification of Optional Protocol

| Participant | Signature | Ratification, Accession (a), Succession (d) |
|---|-------------------|--|
| Albania | - | 1 October 2003 (a) |
| Argentina | 30 April 2003 | |
| Austria | 25 September 2003 | |
| Brazil | 13 October 2003 | |
| Costa Rica | 4 February 2003 | |
| Croatia | 23 September 2003 | |
| Denmark | 26 June 2003 | |
| Finland | 23 September 2003 | |
| Guatemala | 25 September 2003 | |
| Iceland | 24 September 2003 | |
| Italy | 20 August 2003 | |
| Madagascar | 24 September 2003 | |
| Mali | 19 January 2004* | |
| Malta | 24 September 2003 | 24 September 2003 |
| Mexico | 23 September 2003 | |
| New Zealand | 23 September 2003 | |
| Norway | 24 September 2003 | |
| Romania | 24 September 2003 | |
| Senegal | 4 February 2003 | |
| Serbia and Montenegro | 25 September 2003 | |
| Sierra Leone | 26 September 2003 | |
| Sweden | 26 June 2003 | |
| United Kingdom of Great Britain and Northern Ireland | 26 June 2003 | 10 December 2003* |
| Uruguay | 12 January 2004* | |

Source United Nations, *Multilateral treaties deposited with the Secretary-General*
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/ChapterIV/treaty16.asp> (15/3/04).

**Source* Attorney-General's Department, the Department of Immigration and Multicultural and Indigenous Affairs, and the Department of Foreign Affairs and Trade, *Submission, Attachment B*.

39 Article 33, Optional Protocol.

Issues arising from the Committee's inquiry

- 3.1 The Joint Standing Committee on Treaties (the Committee) affirms Australia's continued abhorrence of acts of torture and other cruel, inhuman or degrading treatment or punishment. The Committee recognises the importance of substantive international mechanisms such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention), the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC) in proscribing violations of human rights.
- 3.2 During the course of the Committee's inquiry a number of views were raised in relation to Australia's position towards ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol) and the relative advantages and disadvantages of becoming a State Party to the Optional Protocol. During its deliberations the Committee considered, among other things
- the adequacy of existing mechanisms in Australia in relation to the prohibition of torture
 - the experience of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)
 - the adequacy of UN resources
 - the reporting procedure under the Convention and Optional Protocol

- Australia's leadership role in relation to human rights
- the Government's substantial and procedural concerns regarding the Optional Protocol.

3.3 These issues are briefly canvassed in this Chapter.

Adequacy of existing mechanisms

3.4 The Committee recognises that the Convention is a substantive human rights instrument with 134 State Parties. The Committee also observes that Australia complies with all of its obligations under the Convention.

3.5 The Attorney-General's Department has the responsibility to report to the Committee against Torture on Australia's implementation of the Convention. Detailed analyses of Australia's legal status and practice in relation to the Convention are comprehensively presented in Australia's First Report under the Convention (the First Report) (1991), and *Australia's Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1999).

3.6 Ms Renée Leon, from the Attorney-General's Department, informed the Committee that the practice of the Commonwealth Government in relation to 'human rights instruments has been to implement them by a combination of state and federal laws', depending on the relevant area.¹ Ms Leon advised it has also been practice 'to only legislate where there is a need for the Commonwealth to do so'.² At the Committee's public hearing on 9 February 2004, Ms Leon stated that

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 criminal law.³

3.7 The Commonwealth *Crimes (Torture) Act 1988* was enacted in order to bring Australia into full compliance with the Convention and incorporates the definition of torture (in article 1 of the Convention).

1 Mr Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 16.

2 Mr Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 16.

3 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 16.

- 3.8 The Committee was advised by Ms Leon that 'Australia has extensive mechanisms in place for ensuring that torture is not committed' and that there has never been a case of alleged torture communicated to the Committee against Torture in relation to Australia.⁴ The Committee against Torture has therefore not sought permission to make a visit to Australia.⁵
- 3.9 Also, Amnesty International Australia 'has not reported systemic torture being perpetrated in Australia'.⁶
- 3.10 In relation to the Human Rights and Equal Opportunity Commission (HREOC), the Commission informed the Committee that it cannot investigate allegations that relate directly to the Convention as it is not included in the Commission's complaint handling jurisdiction.⁷ HREOC also advised that its complaint handling functions are limited to 'violations of human rights which have already occurred', and acts 'done or engaged in by or on behalf of the Commonwealth; wholly or partly within a "Territory"', or under Commonwealth or Territory enactment.⁸
- 3.11 However, the Committee understands that under the Convention the Commonwealth and State and Territory governments conduct education and training programs, and have a range of adequate mechanisms which involve preventative elements in relation to torture. The Committee also noted that while the Convention is not scheduled under the *Human Rights and Equal Opportunity Act*, the ICCPR and CRC include provisions proscribing and preventing torture, as identified in HREOC's submission.⁹
- 3.12 As identified in the First Report, in addition to the protections afforded by Commonwealth, State and Territory legislation, human rights are protected by Australia's democratic system of government, an independent judiciary and free press, Royal Commissions and

4 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 10.

5 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, pp. 2 and 5.

6 Amnesty International Australia, *Submission*, p. 3.

7 Ms Rocky Clifford, *Transcript of Evidence*, 9 February 2004, p. 42.

8 Human Rights and Equal Opportunity Commission (HREOC), *Submission*, pp. 8. HREOC's submission notes that 'Territory' is defined so as to exclude the ACT and NT.

9 HREOC, *Submission*, pp. 6-7.

other official inquiries set up for specific purposes, parliamentary committees, ombudsmen, and non-government organisations.¹⁰

Australian Capital Territory

3.13 The ACT Government submission to the inquiry states that

The ACT Government strongly supports Australian signature and ratification of the Optional Protocol. Australian adherence to this important human rights instrument would be an important contribution to international action to prevent torture and other gross violations of human rights.¹¹

3.14 The Committee was advised however that the *Human Rights Bill 2003*, introduced into the Legislative Assembly on 18 November 2003¹², is intended 'to promote the protection of human rights in the ACT consistent with the International Covenant on Civil and Political Rights'.¹³ In addition, the Committee was informed that the ACT Government is developing legislation for the operation and management of the new ACT prison and that

Development of prison legislation will take place within the framework of the *Human Rights Bill 2003* and international standards that apply to the protection of prisoners. Provision for an independent official visitor will be part of the Government's consideration when developing the statutory framework for the facility.¹⁴

Western Australia

3.15 The WA Government submission informed the Committee that

10 Attorney-General's Department (AGs), 1991, *Australia's First Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canberra, p. 4.

11 ACT Government, *Submission*, p. 1.

12 The *Human Rights Bill 2003* was subsequently passed in the ACT Legislative Assembly on 2 March 2004, see ACT Legislative Assembly, *Minutes of Proceedings*, 2 March 2004, p. 11343.

13 ACT Government, *Submission*, p. 2.

14 ACT Government, *Submission*, p. 3.

Consultation with relevant State Government departments and agencies confirms broad support for the provisions of the Optional Protocol.¹⁵

3.16 The submission draws the Committee's attention to the Office of the Inspector of Custodial Services established under the *Prisons Act 1981*. The Office was established

to bring independent external scrutiny to the standards and operational practices relating to custodial services within the State, including adult prisons (public and private), court custody and prisoner transportation. The Inspector's jurisdiction has recently been extended to juvenile detention centres by *The Inspector of Custodial Services Act 2003*.¹⁶

3.17 The WA Government advised that the Inspector reports 'directly to the Parliament on the findings of inspections and recommendations for change'.¹⁷

3.18 The submission from Professor Richard Harding (Inspector of Custodial Services) outlines the work of the Office of the Inspector of Custodial Services. Professor Harding states that prison 'inspection has enhanced custodial services'¹⁸ and that the 'Western Australian model is the most robust in the English-speaking world'.¹⁹

3.19 The WA Government advised the Committee that the Office of the Inspector of Custodial Services would satisfy the requirements in 'Part IV of the Optional Protocol, in relation to Western Australia's preventative mechanisms'.²⁰

3.20 The Committee was also informed that the WA Police Service is confident that 'current practices are sufficient to prevent cruel, inhuman or degrading treatment or punishment of individuals in police custody'.²¹

15 WA Government, *Submission*, p. 1.

16 WA Government, *Submission*, p. 1.

17 WA Government, *Submission*, p. 2.

18 Prof Richard Harding, *Submission*, p. 5.

19 Prof Richard Harding, *Submission*, p. 4.

20 WA Government, *Submission*, p. 1.

21 WA Government, *Submission*, p. 2.

European Committee for the Prevention of Torture (CPT)

- 3.21 Professor Harding and Professor Michael Levy, Director of the Centre for Health Research in Criminal Justice, Corrections Health Service, drew the Committee's attention to the work of the CPT. The Committee recognises the successes of the CPT, and that it can be 'considered a prototype for other regional systems or the universal human rights regime'.²²
- 3.22 The CPT was developed from the draft text of the Optional Protocol, prepared by the Swiss Committee against Torture and the International Commission of Jurists, submitted to the UN Commission on Human Rights in March 1980 by Costa Rica.²³ As little progress was made on the draft at the UN, the Council of Europe worked towards developing a European system.
- 3.23 The *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT) was adopted, and opened for signature on 26 November 1987 and entered into force in 1 February 1989.²⁴ Currently 45 Member States of the Council of Europe have ratified or acceded to it.²⁵
- 3.24 The Committee was interested to learn that as of 1 March 2002, the Committee of Ministers of the Council of Europe can invite any non-member State to accede to the ECPT.²⁶
- 3.25 The CPT conducts visits to places of detention to examine the treatment of persons deprived of their liberty, and where necessary
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22 *Exhibit*, Jastine Barrett, 2001, 'The Prohibition of Torture under International Law: Part 1: The Institutional Organisation' in *The International Journal of Human Rights*, Vol. 5, No. 1, (Spring 2001), Frank Cass, London, p. 28.

23 Council of Europe, 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Historical background and main features of the Convention', <http://www.cpt.coe.int/en/documents/historical-background.htm> (15/3/04).

24 Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT), <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=1&DF=&CL=ENG> (15/3/04).

25 Council of Europe, 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=1&DF=&CL=ENG> (15/3/04).

26 Protocol 1, ECPT.

make recommendations to States.²⁷ Similar to the provisions of the Optional Protocol, the CPT has unlimited access to places of detention and information necessary for the CPT to carry out its functions, and operates under the principles of cooperation and confidentiality.

3.26 Since the CPT undertook its first inspection in May 1990, it has conducted a total of 173 visits (111 periodic visits and 62 ad hoc visits) and visited each of the 45 Member States.²⁸ The CPT has published 122 reports.²⁹

3.27 In his submission, Professor Harding acknowledged that 'As with all accountability systems, there is difficulty in measuring the precise extent of compliance'.³⁰ Professor Harding also draws attention to Morgan and Evans, *Combating torture in Europe* where it states that

the links between the recommendations of the CPT and the final outcomes are generally shrouded in some mystery... In the final analysis, the truth is that there are too many imponderables to be able to make a definitive assessment of the impact of the CPT. What is certain is that many CPT recommendations concerning conditions of detention have been implemented and that these have undoubtedly had beneficial effects... Equally clearly, many recommendations have not been implemented.³¹

3.28 Professor Harding reflects that

A fundamental tenet of accountability systems of this kind is that improvement is more commonly achieved by way of gradual accretions rather than radical change.³²

3.29 The Committee was interested to learn about some of Professor Levy's experiences as part of a mission of the CPT to Hungary between May and June 2003, whilst respecting the confidential aspects of the Mission. Professor Levy observed that the 'Mission was of the highest professional order' and that 'No activities were undertaken unless they were strictly within the terms of reference of

27 Articles 1 and 10, ECPT.

28 Council of Europe, 'About the CPT', www.cpt.coe.int/en/about.htm (15/3/04).

29 Council of Europe, 'About the CPT', www.cpt.coe.int/en/about.htm (15/3/04).

30 Prof Richard Harding, *Submission*, p. 3.

31 Morgan and Evans, 2001, *Combating torture in Europe*, see Prof Richard Harding, *Submission*, p. 3.

32 Prof Richard Harding, *Submission*, p. 3.

the mission'.³³ Professor Levy also commented on some of the successes of the CPT, such as the abolition of the death penalty in all countries.³⁴ At the Committee's public hearing he stated that

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.³⁵

3.30 Professor Levy also commented that

Australia has a number of citizens in overseas prisons. While the minority would be in European prisons, they are beneficiaries of a level of protection not offered to other Australian prisoners overseas, nor to Australian prisoners at home.³⁶

3.31 The Committee observes that 13 signatories to the Optional Protocol have ratified the ECPT. While the Committee recognises that the operation of these bodies could complement and enhance the other, it is concerned about the potential for duplication of visits and reporting activities and differing standards under the Optional Protocol and the ECPT.

3.32 The Committee also considers that international preventative mechanisms would potentially be more effective on a regional level than on a global level, and therefore has reservations as to whether the work of the CPT can be effectively translated to a global experience in the form of the Optional Protocol.

United Nations resources

3.33 The Forum of Australia Services for Survivors of Torture and Trauma (FASSTT) submission indicated that the cost of establishing the Subcommittee on Prevention and its operation over a two-year period is estimated at 'approximately \$US two million dollars, which is less

33 Assoc Prof Michael Levy, *Submission*, p. 1.

34 Assoc Prof Michael Levy, *Submission*, p. 2.

35 Assoc Prof Michael Levy, *Transcript of Evidence*, p. 31.

36 Assoc Prof Michael Levy, *Submission*, p. 2.

than 0.1% of the UN regular budget'.³⁷ Nevertheless, the Committee is concerned that significant UN resources would be expended in the operation of the Optional Protocol.

3.34 The Committee believes that the number of State Parties to the Optional Protocol would directly influence the operating costs of the Subcommittee. Specifically, the greater the number of State Parties, the greater the amount of travel and resources that would be required to maintain the effectiveness of the system of regular visits to places where people are deprived of their liberty in each state.

3.35 Ms Carolyn Millar from the Department of Foreign Affairs and Trade (DFAT) stated 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.³⁸

3.36 The Committee shares this concern as UN treaty bodies are generally considered to be under-resourced. The Committee is particularly concerned that the costs associated with the functioning of the Subcommittee on Prevention could potentially divert funds away from other UN human rights programs.

3.37 In relation to the Convention, Ms Nicole Bieske from Amnesty International Australia acknowledged that

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. 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.³⁹

3.38 However, the Committee notes that 127 states voted for the Optional Protocol at the UN General Assembly. The Committee is therefore

37 Forum of Australia Services for Survivors of Torture and Trauma (FASSTT), *Submission*, p. 2.

38 Ms Carolyn Millar, *Transcript of Evidence*, 9 February 2004, p. 11.

39 Ms Nicole Bieske, *Transcript of Evidence*, 9 February 2004, p. 21.

uneasy about the potential effectiveness and burden on UN resources if a majority of these states go on to ratify the Optional Protocol.

3.39 Further, the FASSTT and HREOC argued that

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.⁴⁰

3.40 HREOC also reasoned that the Optional Protocol 'is likely to result in less complaints being taken to the Commission and United Nations Committees'.⁴¹

3.41 The Committee recognises that potential significant resources would be involved in the operation of the Optional Protocol and questions whether it is appropriate for Australia to become a party to another instrument that establishes further monitoring by treaty bodies when there are already concerns regarding existing mechanisms.

Reporting procedure under the Convention and Optional Protocol

3.42 The Committee recognises that a very important feature of the Convention is the reporting process of the Committee against Torture. This procedure addresses allegations of acts of torture, and notably provides an opportunity for the Committee against Torture to make recommendations and observations in relation to State Party reports with the view to prevent future violations of the Convention.

3.43 HREOC's submission acknowledges the significance of the reporting procedure and drew the Committee's attention to the limitations of the effectiveness of the procedure.⁴² Specifically, HREOC raised concerns over the reporting period for a State Party being once every four years, the Committee against Torture report consideration sessions occurring twice a year, and that the Committee against

40 Mr Craig Lenehan, *Transcript of Evidence*, 9 February 2004, p. 39.

41 HREOC, *Submission*, p. 13.

42 HREOC, *Submission*, pp. 10-11.

Torture cannot compel a State Party 'to report or cooperate with it in its consideration of any report'.⁴³

- 3.44 The Committee recognises these concerns and questions the ability of the Optional Protocol to completely address HREOC's concerns. The Committee is doubtful that visit and reporting frequency would improve under the Optional Protocol. The Committee also notes that as with the Convention, the Subcommittee or national preventative mechanisms are similarly limited by the non-binding nature of their recommendations.

Leadership role of Australia

- 3.45 The Committee recognises that Australia is regarded as a leader in human rights standards. For example, the joint departmental submission by three Commonwealth departments highlights Australia's work at the multilateral level in co-sponsoring the annual resolution on torture tabled by Denmark at the UN Commission on Human Rights and at the Third Committee of the UN General Assembly.⁴⁴ At the bilateral level, the submission highlights Australia's human rights dialogues with China, Vietnam and Iran.⁴⁵
- 3.46 The Committee received a significant number of submissions supporting Australia becoming a State Party to the Optional Protocol, drawing attention to Australia's leadership role, amongst other concerns. The Law Society of NSW argued that ratification would
- continue to strengthen Australia's stance on human rights and send a clear message to the international community that Australia remains a leading nation in the advancement of human rights.⁴⁶
- 3.47 The Refugee Council of Australia also stated that
- It is an appropriate act of leadership from the Chair of the United Nations Human Rights Commission⁴⁷

43 HREOC, *Submission*, p. 11.

44 AGs, Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), and Department of Foreign Affairs and Trade (DFAT), *Submission*, p.1.

45 AGs, DIMIA and DFAT, *Submission*, p.1.

46 Law Society of New South Wales, *Submission*, p. 1.

47 Refugee Council of Australia, *Submission*, p. 1.

- 3.48 In addition, a number of submissions advocated the importance of maintaining Australia's leadership in the region.⁴⁸ For example, the Christian World Service Commission of the National Council of Churches believes that Australia
- signing the Protocol would set a strong example for regional states and give credibility to Australia's regional human rights dialogue.⁴⁹
- 3.49 The Justice and International Mission Unit of the Synod of Victoria and Tasmania of the Uniting Church in Australia also claimed that by not becoming a party to the Optional Protocol Australia 'could be perceived as a reluctance to co-operate with partner nations in the eradication and prevention of a crime universally condemned'.⁵⁰
- 3.50 The Committee believes in the importance of maintaining Australia's reputation as a leader in human rights standards, and the advancement of human rights mechanisms through reform at the UN. However the Committee believes that Australia strongly demonstrates its commitment to the protection of people deprived of liberty against torture by being a Party to the Convention, and other substantial international instruments such as the ICCPR and CRC.

Australian Government's reservations concerning the Optional Protocol

- 3.51 The Committee observed that on a number of occasions during and after the drafting of the text of the Optional Protocol, the Australian Government expressed concern in relation to procedural and substantive aspects of the treaty action.⁵¹

48 See for example FASSTT, *Submission*, p. 2; Refugee Council of Australia, *Submission*, p. 2; Australian Lawyers for Human Rights, *Submission*, p. 6; Human Rights Committee of NSW Young Lawyers, *Submission*, p. 5; and United Nations Association of Australia, *Submission*, p. 2.

49 Christian World Service Commission of the National Council of Churches, *Submission*, p. 3.

50 Justice and International Mission Unit of the Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 3.

51 See for example: Statement by Mr Crispin Conroy on behalf of the Australian Delegation to the 52nd Session of the Commission on Human Rights, Item 8, 4 April 1996; 'Explanation of Vote' in AGs, DIMIA and DFAT, *Submission*, Attachment A; and Senate

Procedural concerns

- 3.52 The Committee explored the Government's concerns raised in relation to the way in which the text of the draft Optional Protocol was adopted by the UN Commission on Human Rights.
- 3.53 The joint submission by the Commonwealth departments indicated that a draft text of the Optional Protocol was submitted by Costa Rica to the Commission on Human Rights in its 47th session in 1980. In 1992 the Commission on Human Rights then established a Working Group to develop the draft text. There were 10 annual negotiation sessions, with the last meeting occurring in 2002.⁵²
- 3.54 Australia was represented on the Commission on Human Rights Working Group and attended the first eight sessions (being absent at the January 2001 and 2002 sessions).⁵³ The Committee observes that the Government took a pragmatic approach to the Working Group and decided not to attend the last two negotiation sessions, due to there being 'little likelihood of useful progress at those meetings'⁵⁴ and further that
- Australia wanted to send a positive message that we wished to focus our energies and limited resources only on productive exercises. This was in line with our overall approach to engagement with the UN Treaty Body System, which the Government believes is in need of reform to make it more efficient.⁵⁵
- 3.55 According to the joint departmental submission at the tenth meeting of the Working Group in 2002, the Chair of the Working Group (Mrs Elizabeth Odio Benito, Vice-President, Costa Rica⁵⁶) independently prepared and tabled a draft text of the Optional Protocol. The submission further recounts that the Working Group did not consider the draft Optional Protocol in detail or reach consensus on the text. The joint departmental submission states that this 'is desirable for

Legal and Constitutional Legislation Committee, Estimate Hearing, *Transcript of Evidence*, 26 May 2003.

52 AGs, DIMIA and DFAT, *Submission*, p. 2.

53 AGs, DIMIA and DFAT, *Submission*, p. 2.

54 AGs, DIMIA and DFAT, *Submission*, p. 2.

55 AGs, *Answer to Question No. 6* for Senate Legal and Constitutional Legislation Committee, Estimate Hearing, 3 November 2003.

56 DFAT, *Exhibit*, p. 1.

human rights instruments to ensure broad support for the standards elaborated'.⁵⁷

3.56 However, Amnesty International Australia

maintains that consensus is not and cannot be an absolute requirement. It does not follow that because a Convention or Protocol is adopted by vote it will not receive broad support.⁵⁸

3.57 The Commission on Human Rights subsequently adopted the draft text with a vote of 29 in favour to 10 against, with 14 abstentions.⁵⁹

3.58 The Committee was informed that at the UN Economic and Social Council, Australia supported a proposal by the United States to resubmit the draft Optional Protocol to the Working Group for further consideration, and that this was not successful.⁶⁰ Australia subsequently made its concerns regarding the draft known, and voted against the draft Optional Protocol in the UN Economic and Social Council in mid-2002.⁶¹

3.59 Australia then abstained from the vote on the Optional Protocol in the Third Committee of the UN General Assembly in November 2002, and made an Explanation of Vote to indicate the Government's concerns.⁶² The Explanation of Vote concluded by indicating that

Australia is unable to support the particular mechanism proposed in the Protocol because of these procedural and substantive concerns. However, we remain strongly committed to seeking more appropriate international mechanisms to eradicate torture.⁶³

3.60 Based on the evidence presented to the inquiry, the Committee shares the Government's concern in relation to the development of the draft text of the Optional Protocol by the Commission on Human Rights. The Committee also advocates the adoption of UN human rights mechanisms by consensus, ensuring their broad support and

57 AGs, DIMIA and DFAT, *Submission*, p. 2.

58 Amnesty International Australia, *Submission*, p. 7.

59 Australia was not a member of the Commission on Human Rights at that time. AGs, DIMIA and DFAT, *Submission*, p. 2.

60 AGs, DIMIA and DFAT, *Submission*, p. 2.

61 AGs, *Answer to Question No. 7* for Senate Legal and Constitutional Legislation Committee, Estimate Hearing, 26 May 2003, p. 1.

62 See AGs, DIMIA and DFAT, *Submission*, Attachment A.

63 AGs, DIMIA and DFAT, *Submission*, Attachment A.

ratification. However the Committee acknowledges that this is not always possible and, as noted in the Refugee Council of Australia's submission, a number of international treaties have been adopted without 'widespread acceptance', such as the Convention on the Elimination of Racial Discrimination.⁶⁴

Substantive concerns

3.61 The Government's substantive concerns regarding the Optional Protocol stem from its continued concern with the UN treaty bodies not operating effectively, and the subsequent need for reform.

3.62 As the Secretary of the Attorney-General's Department, Mr Robert Cornall, indicated to the Senate Legal and Constitutional Legislation Committee on 26 May 2003

This is a process issue. It is an issue that goes to the process by which the United Nations interacts with Australia. It does not go to the underlying principle of the convention.⁶⁵

3.63 Ms Leon told the Committee that the Government has expressed concern 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.⁶⁶

3.64 Following a review of Australia's interaction with the UN treaty committee system, the Government announced in August 2000 that it would 'adopt a more robust and strategic approach given its concerns with the functioning and effectiveness of the UN treaty committee system'.⁶⁷ The joint departmental submission states the review's key findings. They were

64 Refugee Council of Australia, *Submission*, p. 4. See also for example Amnesty International Australia, *Submission* p. 7.

65 Mr Robert Cornall, *Transcript of Evidence – Senate Legal and Constitutional Legislation Committee*, 26 May 2003, p. 32.

66 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 4.

67 AGs, *Answer to Question No. 7 for Senate Legal and Constitutional Legislation Committee*, Estimate Hearing, 26 May 2003, p. 1.

- to ensure adequate recognition of the primary role of democratically elected governments as it is governments which take on human rights obligations and are responsible for fulfilling them, and the subordinate role of non government organisations in this respect
- to ensure that committees and individual members work within their mandates
- to reduce duplication and improve coordination between committees, and
- to address the inadequate secretariat resources to support the committees' work.⁶⁸

3.65 The Committee was interested to hear about the reception of these issues and the progress of discussion at the UN. Ms Millar observed that

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 still needs to be done.⁶⁹

3.66 The Committee noted that the Government identified an important aspect of the treaty body reform initiative to the Senate Legal and Constitutional Legislation Committee. Ms Leigh explained that

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.⁷⁰

3.67 The joint departmental submission explains that this should ensure that UN 'committee resources are directed to areas of greatest need'.⁷¹

68 AGs, DIMIA and DFAT, *Submission*, p. 2.

69 Ms Caroline Millar, *Transcript of Evidence*, 9 February 2004, p. 12.

70 Ms Kathy Leigh, *Transcript of Evidence – Senate Legal and Constitutional Legislation Committee*, 26 May 2003, p. 32.

71 AGs, DIMIA and DFAT, *Submission*, p. 3.

But on the broader question Ms Leon advised that 'The government does not have any concern about being subject to UN scrutiny'.⁷²

3.68 Professor Harding stated

It is well understood that there is value both in alerting Governments well in advance to a pending inspection so that they may be given an opportunity to address issues that they consider may cause the Committee concern, and also in conducting inspections with a minimal amount of notice so as to maximise the opportunity to identify problems of which the Government may be unaware or would prefer not to be identified.⁷³

3.69 The Committee notes that Ms Kathy Leigh advised the Senate Legal and Constitutional Legislation Committee that 'At this stage the government does not intend to become a party to the protocol'.⁷⁴

3.70 However, the Minister for Foreign Affairs responded to a question on notice on 1 December 2003, to advise that 'The government has not yet made a formal decision on signing the Protocol'.⁷⁵ In addition, the joint departmental submission to the Committee indicates that

The Australian Government has not made a decision about whether it will ratify the Optional Protocol.⁷⁶

3.71 Ms Leon also affirmed the Government's current position at the Committee's public hearing, indicating that the matter of ratification

is still under discussion within the bureaucracy. I do not think I could say at this stage how far along we might be in that process.⁷⁷

72 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 4.

73 Prof Richard Harding, *Submission*, p. 2.

74 Ms Kathy Leigh, *Transcript of Evidence – Senate Legal and Constitutional Legislation Committee*, 26 May 2003, p. 32.

75 *House of Representatives Votes and Proceedings*, 1 December 2003, p. 23416.

76 AGs, DIMIA and DFAT, *Submission*, p. 2.

77 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 14. See also Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 10.

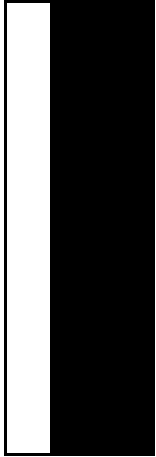
Conclusion

3.72 In light of the evidence the Committee is not convinced that there is an immediate need for Australia to ratify the Optional Protocol. The Committee believes that as a State Party to the Convention, Australia has already demonstrated its commitment to proscribing and preventing torture. The Committee therefore does not support that binding treaty action be taken at this time.

Recommendation 1

The Committee recommends against the Commonwealth Government taking binding treaty action with respect to the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at this time.

Dr Andrew Southcott
Committee Chair



Dissenting Report—Mr Kim Wilkie MP, Senator Linda Kirk, Senator Gavin Marshall, Senator Ursula Stephens, Hon Dick Adams MP, Mr Martyn Evans MP and Senator Andrew Bartlett

The following Committee members: Mr Kim Wilkie MP, Senator Linda Kirk, Senator Gavin Marshall, Senator Ursula Stephens, Hon Dick Adams MP, Mr Martyn Evans MP and Senator Andrew Bartlett, agree with most of the findings of the Committee’s report on the inquiry into the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol), but believe that certain sections of the report and the recommendation do not reflect the views of all Committee members.

The dissenting Committee members note the strong support in the evidence for Australia’s ratification of the Optional Protocol. Specifically, 17 of the 20 submissions received support Australia’s ratification. The dissenting Committee members were persuaded by arguments raised in those submissions, namely

- maintaining Australia’s leadership in human rights standards
- comments on the Australian Government’s reservations in relation to the Optional Protocol.

Australia's leadership in human rights standards

The dissenting Committee members strongly support the views expressed in the evidence, as set out in the report, that Australia's ratification of the Optional Protocol is an important act of leadership, and significant step in maintaining Australia's good human rights standards.

The dissenting Committee members support Ms Nicole Bieske's statement that Australia should

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.¹

The dissenting Committee members believe that Australia is already in substantial compliance with the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and therefore has nothing to fear from becoming a State Party. Further, in light of Australia's recent appointment as Chair of the UN Human Rights Commission, the dissenting members believe that Australia should ratify the Optional Protocol.

Comments on the Australian Government's reservations in relation to the Optional Protocol

Procedural concerns

The dissenting Committee members are critical that Australia was not represented at the UN Working Group to develop the text of the Optional Protocol in 2001 and 2002. Further, the dissenting members are critical of the Government's reasoning that the UN Working Group did not warrant the focus of Australia's 'limited resources' and was not seen as a 'productive' exercise.

Substantive concerns

The dissenting Committee members do not support the Government's substantive concerns in relation to the Optional Protocol.

1 Ms Nicole Bieske, *Transcript of Evidence*, 9 February 2004, p. 23.

The dissenting members support the evidence presented to the Committee that ratification of the Optional Protocol is likely to result in fewer complaints being taken to HREOC and the UN, and that it would enhance and strengthen existing international mechanisms.

Conclusion

For the reasons outlined above, the dissenting Committee members believe that, based on the evidence presented to the Committee, it is in Australia's national interest to continue to work with the UN and ratify the Optional Protocol. Therefore the dissenting Committee members recommend that Australia take appropriate binding treaty action.

Recommendation

The dissenting Committee members support the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and recommend that binding treaty action be taken.



Appendix B – Witnesses

Monday, 9 February 2004 – Canberra

Attorney-General's Department

Ms Kathy Leigh, First Assistant Secretary, Civil Justice Division

Ms Renée Leon, First Assistant Secretary, Office of International Law

Department of Foreign Affairs and Trade

Ms Caroline Millar, Ambassador for People Smuggling Issues, First Assistant Secretary, International Organisations and Legal Division

Dr Greg French, Assistant Secretary, Legal Branch, International Organisations and Legal Division

Mr Gerard McGuire, Director, Human Rights and Indigenous Issues Section

Mr Alan Fewster, Executive Director, Treaties Secretariat, Legal Branch

Amnesty International Australia

Ms Nicole Bieske, Member, National Legal Team

Mr John Greenwell, Member, Government Liaison Group

Private Citizen

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

Human Rights and Equal Opportunity Commission

Mr Craig Lenehan, Acting Director, Legal Section

Ms Rocky Clifford, Director of Complaint Handling

Ms Joanna Hemingway, Legal Officer



Appendix C – Exhibits

- 1 Attorney-General's Department, 1999, *Australia's Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, September 1991 - June 1997, Attorney-General's Department, Canberra.
- 2 *Appendix 1*. Voting stages establishing an Optional Protocol in the United Nations. Provided by Amnesty International Australia.
- 3 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, *News Flash: Council of Europe Anti-Torture Committee visits Hungary*, www.cpt.coe.int/documents/hun/2003-06-12-eng.htm (4/7/03). Provided by Associate Professor Michael Levy, Director, Centre for Health Research in Criminal Justice, Corrections Health Service.
- 4 *Convention Against Torture – Optional Protocol*. Chair of the Working Group and Voting Patterns of Signatories to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. Provided by the Department of Foreign Affairs and Trade.
- 5 Barrett, Jastine, 2001, 'The Prohibition of Torture under International Law: Part 1: The Institutional Organisation' in *The International Journal of Human Rights*, Vol. 5, No. 1, (Spring 2001), Frank Cass, London, pp. 1-36.

Black, David, 2001, 'Human Rights in Foreign Policy: Lessons for South Africa from Canadian Experience?' in *The International Journal of Human Rights*, Vol. 5, No. 2, (Summer 2001), Frank Cass, London, pp. 1-29.

Provided by the Human Rights and Equal Opportunity Commission.