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| OPCAT Submission No:9..... |
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30 January 2004

Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600
AUSTRALIA

RECEIVED
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BY: *Gillian Gould*

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

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Dear Secretary,

Amnesty International Australia (Amnesty International) is pleased to present its submission to the Joint Standing Committee on Treaties into the inquiry into the Optional Protocol to the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment.

Amnesty International recognises the importance of the Optional Protocol in addressing the need for strengthened measures at the international and national levels to combat torture and to improve conditions of detention. Australia is urged to sign and ratify the Optional Protocol as a matter of priority.

Please do not hesitate to contact us should you require any clarification or supplementary information to the submission. Further, a representative from Amnesty International Australia would be pleased to appear before the Committee to speak to the submission.

Yours sincerely,

Mara Moustafine
National Director
Amnesty International Australia



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Submission to the

Joint Standing Committee on Treaties

regarding the

**INQUIRY INTO THE OPTIONAL PROTOCOL TO THE
CONVENTION AGAINST TORTURE AND OTHER CRUEL,
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

30 January 2004

Submitted by

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The global defender of human rights

1. Introduction

Australia is commended for its commitment to the eradication of torture worldwide through its becoming a state party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Convention') in 1985¹. The Australian Government is urged to sign and ratify the Convention's Optional Protocol as a matter of priority.

The prohibition of torture is one of the most basic principles in international human rights and humanitarian law. The act of torture is an international crime and no exceptional circumstances of any kind may be used to justify the use of torture. The prohibition of torture is absolute². Governments that are party to the UN Convention against Torture have committed to preventing torture and cruel, inhuman or degrading treatment or punishment. However, the continued practice of torture reflects the need for more effective measures to work for its prevention at both the national and international level.

Amnesty International has long campaigned for the eradication of torture worldwide. The organisation is recognised internationally for its global campaigning to address torture-related issues including raising awareness of states' obligations, combating impunity, providing reparation to torture victims, improving prison and other institutional conditions and providing safeguards in custody.

Amnesty International is a worldwide voluntary, democratic and self-governing movement working for human rights with more than one and a half million members and supporters in over 150 countries and territories. Amnesty International is independent of any government and works towards the observance of all human rights as enshrined in the Universal Declaration of Human Rights and other internationally recognised standards.

Amnesty International Australia would seek to make a representation before the Committee to speak to this submission and may be contacted on phone (02) 9217 7638 (Mara Moustafine) or 02 9217 7642 (Brett Solomon); fax: (02) 9217 7663 or Locked Bag 23, Broadway, Sydney, NSW 2007.

¹ While signing on 10 December 1985, Australia ratified the UN Convention against Torture on 8 August 1989.

² See Article 2, UN Convention against Torture. International human rights instruments prohibiting torture include the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Convention against Torture. International humanitarian instruments prohibiting torture include all four Geneva Conventions and both Additional Protocols thereto.

2. The Prevalence of Torture

Amnesty International has documented and exposed the fact that torture continues to take place. The practice of torture is, in many countries, widespread and systematic – in spite of its absolute prohibition under international law. During 1997-2000, Amnesty International reported on the practise of torture in more than 150 countries, in which widespread and/or systematic torture was reported in over 70 of the 150 countries. In over 80 countries, people reportedly died as a result of torture³. Amnesty International's Annual Report 2003 documented the practise of torture or ill-treatment by security forces, police or other state authorities in 106 countries in 2002⁴.

Amnesty International's Asia-Pacific campaign focused on the prevalence of torture within the region⁵. In accordance with Australia's leading role in the Asia-Pacific region and its history of promoting human rights standards in this region, Australia is urged to sign and ratify the Optional Protocol; thereby, demonstrating its unquestioned commitment to the eradication of torture in our region.

Amnesty International has not reported systemic torture being perpetrated in Australia. This does not detract from the fact that it is important for Australia to be in full compliance with international standards establishing an international and national framework for the effective prevention of torture and cruel, inhuman or degrading treatment or punishment.

Whether or not incidents of torture or cruel, inhuman or degrading treatment or punishment take place in a country should not adversely affect a state's decision to sign the Optional Protocol. It is important that there exists an institutional framework which can prevent the occurrence of torture, and respond to any incidents should they take place – at the national and international level.

3. The Prevention of Torture

The purpose of the Optional Protocol is to assist state parties to implement their existing obligations under the Convention against Torture:

- to prevent torture and other cruel, inhuman or degrading treatment or punishment; and,
- to enforce existing rights and obligations.⁶

³ *The Pain Merchants: Security equipment and its use in torture and other ill-treatment*, December 2003 Amnesty International (AI Index: ACT 40/008/2003)

⁴ *Amnesty International Annual Report 2003* (AI Index: POL 10/001/2003)

⁵ See <http://www.amnesty.org.au>

⁶ See UN Convention against Torture, Articles 2 and 16

The Optional Protocol does not create new substantive rights for victims of torture.

Amnesty International strongly endorses the Optional Protocol Preamble for its recognition that more needs to be done to achieve the fundamental purpose of the Convention against Torture; that is, to prevent persons deprived of their liberty being subjected to torture or ill-treatment.

Amnesty International draws specific attention to the Declaration, made by the 1993 World Conference on Human Rights, that efforts to eradicate torture should first and foremost be concentrated on prevention. The World Conference on Human Rights called for the early adoption of the Optional Protocol in order to establish a system of regular visits to places of detention and thereby focus on the prevention of torture.

4. Preventative mechanisms under the OPCAT

The Optional Protocol establishes two kinds of preventative mechanisms or bodies:

- i) a sub-committee to the UN Committee against Torture; and,
- ii) national preventative mechanisms.

The Optional Protocol provides that both the Sub-Committee and the national mechanism will conduct visits to places of detention in those countries that have ratified or acceded to the Optional Protocol in order to prevent torture and other cruel, inhuman or degrading treatment or punishment (Article 1).

4.1 The Sub-Committee on Prevention

A key focus of the Optional Protocol is the creation of an international mechanism, the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Sub-Committee on Prevention"), to visit places of detention. The Sub-Committee is placed under the existing UN Committee against Torture, the treaty body established to monitor and receive reports on states' implementation and compliance with the Convention. Amnesty International supports the creation of the Sub-Committee on Prevention and its mandate, as outlined in Parts II and III of the Protocol.

4.1.1 Consent of State Parties

The Sub-Committee on Prevention does not require the consent of state parties before visiting places of detention, however state parties will receive prior notification. Amnesty International submits that if consent of state parties were required, this would undermine the protection the Sub-Committee on Prevention can afford victims of, or at risk of, torture. Amnesty International notes that it would undermine the effectiveness and purpose itself of the Optional Protocol.

This is especially the case in places where torture is widespread or persistently practised.

Amnesty International further submits that any concerns about any potential for misuse of the power to visit without consent can be allayed by the notification and confidentiality provisions within the Optional Protocol and the composition of the Sub-Committee (see 4.1.3).

If missions or visits take place only with express prior permission, there is a risk that only "model" installations which have been specifically prepared for a visit will be seen. Visits to such model installations cannot give an assurance that long term securely entrenched procedures to prevent torture are being implemented. The Sub-Committee must see the true conditions within places of detention if it is to make effective recommendations to prevent torture and other cruel, inhuman or degrading treatment or punishment.

The overwhelming adoption of the Optional Protocol at the United Nations General Assembly in December 2002 is evident of the widespread recognition of the need to strengthen measures to prevent torture and ill-treatment through empowering the Sub-Committee to make non-consensual visits to places of detention to ensure prevention of torture.

Without this mandate of the Sub-Committee, the importance and impact of the Optional Protocol would be undermined. States that received adverse reports might use any power of non-consent to prevent future visits. If consent of state parties were required before visits to places of detention, this would undermine the power, impartiality and effectiveness of the Sub-Committee and work against the fundamental aim of preventing torture and improving conditions of detention. It would also restrict open and frank dialogue between the Sub-Committee and state parties.

4.1.2 Notification Provision and Confidentiality

The Sub-Committee on Prevention must notify the state party in advance of the proposed program of visits pursuant to Article 13. A state party will always have advanced warning of any visit by the Sub-Committee.

It is also noted that the principle of confidentiality underpins the Optional Protocol. The recommendations of the Sub-Committee will be confidential unless requested by the state party or if the state party makes part of the report public. The confidentiality is designed to facilitate dialogue between state parties and the Sub-Committee on Prevention.

4.1.3 Composition of the Sub-Committee

The Sub-Committee on Prevention will consist of 10 international experts (increasing to 25 experts on the 50th ratification) who are elected by State Parties (Articles 5-7). The experts must be persons of high moral character with proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty (Article 5.2).

The Sub-Committee's visits will be conducted by at least two of its members who may be accompanied, if needed, by additional experts. However, a state party may oppose the inclusion of a specific expert in the visit, whereupon the Sub-Committee on Prevention shall propose another expert (Article 13.3). The members will be international experts acting as independent professionals. They will not be government representatives. Amnesty International believes that this will ensure their professionalism and the effective performance of their work.

4.2 National Preventive Mechanisms

State parties to the Optional Protocol are required to set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and ill-treatment ('national preventive mechanism') in accordance with part IV of the Optional Protocol. Amnesty International welcomes such a measure.

The Optional Protocol does not prescribe a particular form of national preventive mechanism. As a party to the Optional Protocol, Australia would have the flexibility to choose the type of mechanism that best suits Australia's needs⁷. Models of preventive mechanisms could include human rights commissions; ombudsmen; parliamentary committees; non-governmental organisations; or combination of such mechanisms. The Optional Protocol also allows for federal states, such as Australia, to utilise decentralised mechanisms so long as they each conform to the Optional Protocol (Article 17).

An international mechanism will assist national mechanisms in the prevention of torture and the improvement of conditions of detention by providing support to the national mechanisms, pursuant to the Optional Protocol, and by creating a deterrent effect. A system of visits by international experts, complemented by a regular system of visits by national bodies, is a necessary step forward in the prevention of torture.

⁷ For a detailed discussion of national preventive mechanisms, see the Association for the Prevention of Torture's *Implementation of the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment: National Visiting Mechanisms* at <http://www.apt.ch>

Amnesty International believes an international Sub-Committee is a necessary preventive mechanism. National mechanisms, while also necessary, are not sufficient by themselves to ensure the prevention of torture. In some countries, for example, national preventive mechanisms may be denied access to places of detention by their national governments. In others, such mechanisms may be ineffective because the government engages in torture systematically.

5. Australia's Position

Australia has not supported the Optional Protocol in the international arena. However, in its stated opposition to the Optional Protocol before the UN Economic and Social Council (ECOSOC), and earlier before the UN Commission on Human Rights, Australia did not question the prevalence of torture worldwide. Nor did it argue that the existing Committee under the Convention against Torture was adequate to deal with all instances of torture and to prevent the occurrence of torture. Nor did Australia suggest there was not a need for additional measures to prevent torture or to improve conditions of detention around the world. Australia did not make criticisms of the provisions of the draft Optional Protocol.

Instead, Australia essentially opposed the adoption of the Optional Protocol on procedural grounds. The Australian representative in his statement to ECOSOC stated that 'human rights treaties should be adopted by consensus to ensure universality'. Australia was joined by only seven other Member States that opposed the Optional Protocol: China, Cuba, Egypt, Japan, Libya, Nigeria and the Sudan.

Amnesty International 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. For instance, the Convention on the Elimination of Racial Discrimination was adopted by vote and is one of the most widely ratified conventions with 169 parties. The same is true of the Convention on the Elimination of Discrimination against Women with 175 parties. Australia is a state party to both Conventions.

Amnesty International submits that any reluctance by Australia to sign the Optional Protocol could be open to misinterpretation. Australia may be viewed as having 'something to hide'; appearing to be unsupportive of human rights mechanisms that will protect people under its jurisdiction from grave human rights violations. Such perceptions could have consequences for Australia's standing at the regional and international level and may arguably be interpreted by some states that Australia tolerates torture or ill-treatment in certain situations or circumstances.

In 2003, the UN Commission on Human Rights passed a resolution (2003/32) encouraging states parties to the Convention against Torture to sign and ratify

the Optional Protocol. Amnesty International submits that in view of its appointment to Chair of the UN Commission on Human Rights this year, Australia has a responsibility to take a leadership role on this issue.

6. Conclusions and Recommendations

The Secretary General of the United Nations, Mr Kofi Annan, said in his statement to commemorate the UN International Day in Support of Victims of Torture on 26 June 2003 that:

'The Protocol will create new possibilities for dialogue with and among national authorities to ensure that the right to be protected from torture is translated into reality. I call upon all States that have not yet done so to ratify the Convention and its Optional Protocol as a concrete step in the struggle to prevent torture in our world....let us harness our moral outrage at this practice and commit ourselves to concrete steps to end it once and for all. We owe this to the victims of torture. And we owe it to our common humanity⁸.

As at 28 January 2004, the Optional Protocol has had 23 signatories and 3 ratifications⁹. The Protocol will enter into force after the 20th ratification or accession.

It is Amnesty International's view that concerns regarding sovereignty issues have been addressed by the notification and confidentiality provisions within the Optional Protocol and the provisions in the make-up of the Sub-Committee. The development of national prevention mechanisms is necessary but should not be seen as an adequate alternative to international scrutiny.

Amnesty International calls on Australia to demonstrate its commitment to the eradication of torture and ill-treatment by signing and ratifying the Optional Protocol as soon as possible. In doing so, Australia would send a clear signal to its neighbours in the Asia Pacific and beyond that it stands committed to working for a world without torture.

/end

⁸ At <http://www.apt.ch/europe/june26/unhchr.htm>

⁹ See <http://www.apt.ch>. Signatories: Argentina, Austria, Brazil, Costa Rica, Croatia, Denmark, Finland, Guatemala, Iceland, Italy, Madagascar, Mali, Malta, Mexico, New Zealand, Norway, Romania, Senegal, Serbia and Montenegro, Sierra Leone, Sweden, United Kingdom, Uruguay. Ratifications: Albania (accession), Malta and the United Kingdom