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Submission to the Joint Standing Committee on Treaties' Inquiry into the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Introduction

1. This submission is made by the Human Rights and Equal Opportunity Commission (the "Commission") in response to the terms of reference issued by the Joint Standing Committee on Treaties inquiry into the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ("Optional Protocol").¹
2. The Commission views the Optional Protocol as a positive development and in this submission the Commission has sought to:
 - provide the Committee with an overview of the Optional Protocol and its objectives, including the role and functions of the independent national and international bodies proposed under the Optional Protocol;
 - bring to the Committee's attention the manner in which the Optional Protocol assists Australia in meeting its existing international human rights obligations, in particular its obligations under the *Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment* ("Convention");² and
 - bring to the Committee's attention the ways in which the monitoring regime proposed by the Optional Protocol addresses some of the limitations of existing international and domestic mechanisms for the protection of persons in detention against torture and other cruel, inhuman or degrading treatment or punishment.

Functions of the Commission

3. The Commission administers the *Human Rights and Equal Opportunity*

¹ Opened for signature on 4 February 2003, 42 ILM 26 (2003). There are currently 23 signatories to the Optional Protocol, including the United Kingdom, New Zealand, Denmark, Finland, Norway, Sweden, Italy, Malta and Austria.

² Opened for signature 10 December 1984, [1989] ATS 1989 21, (entered into force in Australia 7 September 1989).

Commission Act 1986 (Cth) (the “Act”). Under the Act, the Commission is responsible for, protecting and promoting human rights, including through, inter alia, promoting an understanding and acceptance of human rights in Australia. The definition of ‘human rights’ for the purposes of the Act is discussed in Appendix A.

Overview of the Optional Protocol and its objectives

Introduction

4. Australia is a party to the Convention. Amongst other things, the Convention requires each State Party to:

- take effective legislative, administrative, judicial or other measures to prevent acts of torture³ in any territory under its jurisdiction;⁴ and
- undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.⁵

5. The Convention makes particular reference to the position of persons deprived of their liberty. Each party to the Convention is obliged to:

- ensure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;⁶

³ Torture” is defined in article 1 of the Convention in the following terms: “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”.

⁴ See art 2 of the Convention.

⁵ See art 16(1) of the Convention. As with the definition of torture, such acts must be committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

⁶ See art 10(1) of the Convention.

- include the prohibition against torture and other cruel, inhuman or degrading treatment or punishment in the rules or instructions issued in regard to the duties and functions of any such person involved in the custody, interrogation or treatment of detained persons;⁷
 - keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.⁸
6. The Optional Protocol seeks to build upon those obligations, by developing preventative measures which are designed to reinforce the protections the Convention confers upon persons deprived of their liberty. This is made clear in the preamble to the Optional Protocol, which states that:
- further measures are considered necessary to achieve the purposes of the Convention and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment; and
 - the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention.

7. The latter observation is in fact the central objective of the Optional Protocol, which is set out in article 1 in the following terms:

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

⁷ See art 10(2) of the Convention.

⁸ See art 11 of the Convention.

8. That focus on prevention is consistent with the proposal for the Optional Protocol put forward at the World Conference on Human Rights held in 1997. At that conference states agreed that, “efforts to eradicate torture should, first and foremost, be concentrated on prevention” and called for the “early adoption of an optional protocol to the Convention which is intended to establish a preventative system of regular visits to places of detention”.⁹
9. In the remainder of this section, we have set out a brief overview of the roles and functions of those independent national and international bodies.

Part IV of the Optional Protocol – National Preventative Mechanism

10. Part IV of the Optional Protocol requires that States Parties set up, designate or maintain at least one domestic body (“National Body”) empowered to, at a minimum:
 - (a) regularly examine the treatment of persons deprived of their liberty in places of detention with the view to strengthening (if necessary), their protection against torture and other cruel, inhuman or degrading treatment or punishment;¹⁰
 - (b) make recommendations to the relevant authorities regarding the improvement of the treatment and/ or conditions of persons deprived of their liberty and prevention of torture and other cruel, inhuman or degrading treatment or punishment;¹¹ and
 - (c) submit proposals and observations concerning existing or draft legislation.¹²
11. In order to enable the National Body to exercise its functions, States Parties must ensure that the National Body has:

- (a) access to all information concerning the number and treatment of

⁹ See Question of a Draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, HRC Res, UN Doc E/CN.4/RES/1997/24.

¹⁰ See art 19(a) of the Optional Protocol.

¹¹ See art 19(b) of the Optional Protocol.

¹² See art 19(c) of the Optional Protocol.

persons deprived of their liberty in places of detention under the jurisdiction and control of the State;¹³

- (b) access to all places of detention under the jurisdiction and control of the State;¹⁴
- (c) the opportunity to have private interviews with the persons deprived of their liberty without witnesses as well as with any other person the National Body believes may have relevant information;¹⁵
- (d) the liberty to choose the places they want to visit and the persons they interview;¹⁶ and
- (e) the right to have contacts with the independent international subcommittee created by Part III of the Optional Protocol (“International Body” – see discussion below) and to send information to the International Body and meet with it.¹⁷

12. The National Body is required to comply with the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (the “Paris Principles”)¹⁸ which provide minimum standards for the establishment, competence, responsibilities and composition, including independence, of national human rights institutions.

Part III of the Optional Protocol – International subcommittee on Prevention

13. Part III of the Optional Protocol provides for the establishment of the International Body, the functions of which complement those of the National Body.¹⁹ The International Body will, inter alia:

- conduct regular visits of the places of detention of States Parties (on a rotational basis),²⁰ making recommendations to States Parties

¹³ See arts 20(a) and 20(b) of the Optional Protocol.

¹⁴ See art 20(c) of the Optional Protocol.

¹⁵ See art 20(d) of the Optional Protocol.

¹⁶ See art 20(e) of the Optional Protocol.

¹⁷ See art 20(f) of the Optional Protocol.

¹⁸ See art 18(4) of the Optional Protocol; The Paris Principles were adopted by UN GA res UN Doc A/RES/48/134 of 20 December 1993.

¹⁹ See art 11 of the Optional Protocol.

²⁰ See art 13 of the Optional Protocol.

concerning the protection of persons detained therein;²¹

- where necessary, advise and assist the States Parties as to the establishment of the National Body and its ongoing ability to prevent torture and other cruel, inhuman or degrading treatment or punishment;²² and
- maintain direct (and if necessary, confidential) contact with the National Body, providing it with training or other technical assistance and advising and assisting it in the evaluation of the needs and means necessary to strengthen the protection of persons in detention against torture and other cruel, inhuman or degrading treatment or punishment.²³

14. As with the National Body, States Parties are required to provide the International Body with information about and access to all places of detention within its jurisdiction and control,²⁴ as well as an opportunity to have private interviews with detainees (or other persons).²⁵

The Optional Protocol would assist Australia in fulfilling a number of its international human rights law obligations

15. As a preliminary point, the Commission notes that the effects of the Optional Protocol are likely to extend beyond Australia's compliance with the Convention. It is also likely to assist in Australia's compliance with the *International Convention on Civil and Political Rights* ("ICCPR")²⁶ and the *Convention on the Rights of the Child* ("CRC").²⁷ Like the Convention, those instruments impose positive duties on States Parties to implement procedures to prevent torture and other cruel, inhuman or degrading treatment or punishment and to investigate allegations of torture and other cruel, inhuman or degrading treatment or punishment.

²¹ See art 11(a) of the Optional Protocol.

²² See arts 11(b)(i) and 11(b)(iv) of the Optional Protocol.

²³ See arts 11(b)(ii) and 11(b)(iii) of the Optional Protocol.

²⁴ See art 12 of the Optional Protocol.

²⁵ See art 14(d) of the Optional Protocol.

²⁶ Opened for signature 16 December 1966, [1980] ATS 23, (entered into force for Australia 13 November 1980).

²⁷ Opened for signature 20 November 1989, [1991] ATS 4, (entered into force for Australia 16 January 1991).

16. The ICCPR requires Australia to ensure that no person within its territory or jurisdiction is subjected to torture or other cruel, inhuman or degrading treatment (article 7),²⁸ that all persons deprived of their liberty are treated with humanity and respect for the inherent dignity of the human person (article 10)²⁹ and to take all legislative, administrative and other measures to protect all persons from torture or cruel, inhuman or degrading treatment (article 2). The Standard Minimum Rules and Basic Principles elaborate the scope and content of Australia's obligations under, inter alia, article 10 of the ICCPR.³⁰ The Human Rights Committee has noted that, under article 10 of the ICCPR, States Parties are obliged to take 'concrete measures to monitor the effective application of the [Standard Minimum Rules] and establish an impartial system of supervision of penitentiary establishments'.

17. Under the CRC, Australia is required to protect children from torture and other cruel, inhuman and degrading treatment and punishment (article 37(a)), ensure that children deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person (article 37(c)) and take all appropriate legislative, administrative and other measures to implement those rights guaranteed by the CRC (article 4).

The Optional Protocol would overcome some of the limitations of the existing protection regime

Introduction

18. The Commission's primary rationale for supporting the Optional Protocol is that it will address certain limitations that exist in the current international and domestic regimes for the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. In developing this point, the Commission has briefly outlined below the features of those international and domestic regimes.

²⁸ In commenting on States Parties duty under article 7 of the ICCPR, the United Nations Human Rights Committee ("Human Rights Committee") has noted that, 'keeping interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment under systematic review is an effective means of preventing cases of torture and ill-treatment': Human Rights Committee, General Comment 20, [11].

²⁹ See Human Rights Committee, General Comment 21, [6].

³⁰ See Joseph S, Schultz J and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2000), [9.100] and [9.107].

Individual complaint-based mechanisms

19. The Convention provides that complaints of its breach can be made to the United Nations Committee against Torture (“Committee”).³¹ However, as has been noted by the Australian Government, this is an often protracted process.³² In addition, like all individual complaint mechanisms, that process focuses upon specific violations which have already occurred. Of course, the Committee’s findings in relation to individual complaints may assist in:

- identifying any broader systemic issues underlying those complaints; and
- preventing future violations of the Convention.

However, the primary focus of the process remains upon determining whether a particular individual(s) have had their Convention rights violated.

20. At a domestic level, the Commission has power to inquire into acts or practices which may be inconsistent with or contrary to the rights contained in certain international instruments.³³ However, those powers are subject to a number of presently relevant limitations.

21. First, the Convention has not been included in the Commission’s complaint handling jurisdiction. As such the Commission cannot directly investigate allegations that the provisions of the Convention have been breached. Nevertheless, the Commission is empowered to investigate complaints which arise under the ICCPR or CRC, which (as noted above) include provisions proscribing torture and cruel and inhuman treatment.³⁴

22. Second, as with the Committee’s individual complaint mechanism, the Commission’s individual complaint handling powers are focussed upon

³¹ See art 22 of the Convention.

³² See for instance, The Hon Alexander Downer MP, ‘Making a Real Difference to Human Rights’ (Speech delivered at the Castan Centre for Human Rights Law, 20 November 2000) at <http://www.dfat.gov.au/media/speeches/foreign/2000/index.html>>

³³ See s11(1)(f) and 20(1)(b) of the Act.

³⁴ See s11(1)(f) of the Act. As outlined in paragraphs 15 to 17 below, the ICCPR and CRC impose similar obligations on Australia imposed on it by the Convention.

violations of human rights which have already occurred. Note, however, that in its report of such an inquiry, the Commission may include recommendations for the prevention of the repetition of the relevant act or continuation of the practice.³⁵

23. Third, the Commission's human rights complaint handling function is limited to acts or practices done or engaged in:

- by or on behalf of the Commonwealth;
- wholly or partly within a "Territory" (note, however, that Territory is defined so as to exclude the Australian Capital Territory (ACT) and the Northern Territory(NT)); or
- under a Commonwealth or Territory enactment (again, the enactments of the ACT and the NT are specifically excluded).³⁶

That limitation largely excludes people detained in institutions run by the States, the ACT and the NT (unless a person is detained in such an institution on behalf of the Commonwealth or under a Commonwealth enactment – for example, people detained in State prisons under the *Migration Act 1958* (Cth)).³⁷ Of course, people detained in State and Territory jurisdictions may be entitled to make complaints in relation to their treatment and conditions of detention to bodies such as the Ombudsman, the Inspector General of Corrective Services or an Official Prison Visitor.³⁸ However, those bodies are not specifically empowered to investigate whether the provisions of the Convention or other human rights instruments have been breached.

³⁵ See s29 of the Act. Such a report must be tabled in Parliament (see s46 of the Act). Note that, under s29, the Commission may only make recommendations, not binding orders.

³⁶ See the definitions of "act", "practice", "enactment" and "territory" in s3 of the Act and the function conferred by s11(1)(f) of the Act.

³⁷ This is a significant limitation given that the majority of prisoners in Australia for example are detained in States institutions or pursuant to State law. In the September quarter 2003, on average, only 684 of the 22,735 prisoners in Australia were Federal prisoners: See ABS 4512.0 Corrective Services, Australia.

³⁸ For example, in NSW prisoners are entitled to make a complaint to the goal Governor, NSW Minister for Corrective Services, an Official Prison Visitor, the NSW or Commonwealth Ombudsman, the NSW Health Care Complaints Commission (in relation to complaints about health treatment in prison) or the Inspector-General of Corrective Services. A similar regime exists in the other States and Territories.

24. Fourth, the Commission has no power to compel entry into places of detention.³⁹

Power of the Committee to address broader matters

25. States Parties to the Convention are required to report to the Committee every four years, (unless otherwise requested by the Committee), on the measures taken by them to implement their obligations under the Convention.⁴⁰ The Committee reviews states' reports,⁴¹ making general comments, conclusions and recommendations to the state concerned in relation to its implementation of the Convention.⁴² In so doing, the Committee may indicate to the state concerned whether, on the basis of their report, it appears that they have not discharged some (or all) of their obligations under the Convention and may, if appropriate, appoint one or more rapporteurs to follow up with a state's compliance with the Committee's conclusions and recommendations.⁴³ If a state's report discloses information which contains well-founded allegations that a state party systematically practices torture, the Committee has the power to invite that State Party to examine the allegation and provide explanations of the allegation.⁴⁴ The Committee uses the reporting process to not only address past allegations of human rights violations but also as an opportunity make recommendations with a view to preventing future

³⁹ Though it is noted that the Commission has the power under s21(1) of the Act to require a person it believes is capable of giving information or producing documents relevant to a matter under inquiry, to give that information to the Commission at such a place and time as specified by the Commission.

⁴⁰ See article 19(1) of the Convention. Australia has provided two reports to the Committee, its initial report on 27 August 1991 (UN Doc CAT/C/9/Add.8) and second periodic report on 19 October 1999 (UN Doc CAT/C/25/Add.11). Australia's third periodic report is due on 6 November 2004. See United Nations High Commissioner for Human Rights, Reporting Status Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Australia at <<http://www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet>>

⁴¹ Representatives of the State Party are invited "to attend the meeting when their reports are considered." Representatives are allowed and expected to answer any additional questions which may be put to them by the Committee and to "clarify, if needed, certain aspects of the reports already submitted". Under art 19(2) the Committee may also designate a confidential inquiry, with which representatives of the concerned state are invited to attend. See United Nations High Commissioner for Human Rights, Fact Sheet No.17, *The Committee Against Torture* at <[http://www.unhchr.ch/html/menu6/2/fs17.htm\(2000\)](http://www.unhchr.ch/html/menu6/2/fs17.htm(2000))>.

⁴² See arts 19(3) and 19(4) of the Convention and r68(1) of the Rules of Procedure of the Committee against Torture, r68(1), UN Doc CAT/C/3/Rev.4.

⁴³ See r68(1) of the Rules of Procedure of the Committee against Torture, UN Doc CAT/C/3/Rev.4.

⁴⁴ See art 20 of the Convention and r69 of the Rules of Procedure of the Committee against Torture, UN Doc CAT/C/3/Rev.4.

violations of the Convention.⁴⁵

26. The powers and functions of the Committee to review and make recommendations in relation to states' reports enables the Committee to identify and directly raise with States Parties (and its representatives) broader systemic issues which may give rise to human rights violations.

27. However the powers and functions of the Committee in this regard are limited. First, States Parties are only required to report to the Committee every four years. The irregularity of reporting is compounded by the fact that states are generally late in providing their reports to the Committee.⁴⁶ Second, the Committee usually only holds two regular sessions per year in which it can consider states' reports.⁴⁷ Hence there is often a considerable backlog and delay in the Committee's consideration of states' reports.⁴⁸ Finally, the Committee has no power to compel States Parties to report or cooperate with it in its consideration of any report.⁴⁹ These limitations curtail the effectiveness of the mechanism.

Power of the Commission to address broader matters

28. Like the Committee, the Commission's statutory powers and functions extend beyond consideration of individual complaints of human rights violations.⁵⁰ Those powers enable the Commission to conduct broader

⁴⁵ The Committee considers the report under the following headings: positive aspects; factors and difficulties, subjects of concern and recommendations. See United Nations High Commissioner for Human Rights, Fact Sheet No.4, *Methods of Combating Torture* at <<http://www.unhchr.ch/html/menu6/2/fs4.htm>(2000)>.

⁴⁶ For example, Australia's second periodic report was approximately 5 years overdue. See United Nations High Commissioner for Human Rights, Reporting Status Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Australia's reporting round 2 at <<http://www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet>>

⁴⁷ See United Nations High Commissioner for Human Rights, Fact Sheet No.4, *Methods of Combating Torture* at <<http://www.unhchr.ch/html/menu6/2/fs4.htm>(2000)>.

⁴⁸ For instance, Australia's second periodic report (submitted 19 October 1999) was not considered by the Committee until November 2000. See UN Docs CAT/C/SR.444, CAT/C/SR.447 and CAT/C/SR.451.

⁴⁹ In the event that States Parties do not report to the Committee as required by art 19 of the Convention, the UN Secretary-General notifies the Committee who transmits a reminder to the state concerned. If after that reminder the state concerned does not submit its report as required under art 19 the Committee may communicate the non-submission to the General Assembly and, if appropriate, notify the state concerned and the Secretary-General that it nonetheless intends to examine the measures taken by it to protect or give effect to the rights recognised in the Convention. See r65 of the Rules of Procedure of the Committee against Torture, r68(1), UN Doc CAT/C/3/Rev.4.

⁵⁰ See for example ss11(1)(f), 11(1)(g), 11(1)(h) and 11(1)(k) of the Act. Note that the Act specifically provides that the Commission can conduct an 11(1)(f) inquiry on its own motion –

ranging inquiries into systemic issues which do or which may give rise to human rights violations. For example, the Commission conducted an inquiry into the human rights issues associated with mandatory immigration detention provisions of the *Migration Act 1958* (Cth) (reported in *Those who've come across the seas*⁵¹) and is currently conducting an inquiry into the immigration detention of children.

29. However a number of significant limitations exist in relation to an inquiry conducted using those functions and powers. For example, the Commission will have no power to compel the production of information or documents for the purposes of such an inquiry unless the inquiry relates to the acts or practices of the Commonwealth or a "Territory" (again, the term Territory is defined so as to exclude the ACT and the NT).⁵² Hence, even though some of the Commission's broader functions and powers extend to matters within the jurisdiction of the States, the ACT and the NT,⁵³ the Commission will rely wholly on the material which is voluntarily provided to it when inquiring into such matters. Moreover, as with the Commission's complaint handling power, the Commission has no power to compel entry into places of detention (be they State or Federal).⁵⁴ Of course, the Commission works to achieve a cooperative relationship with Government at all levels and generally receives such cooperation. Nevertheless, the absence of such compulsory powers does potentially stand to frustrate such an inquiry.

30. Moreover, as with the Commission's individual complaint handling function, such inquiries will not directly focus upon the obligations imposed by the Convention, which is not within the Commission's statutory remit.

The Optional Protocol

31. Australia's ratification of the Optional Protocol would complement and reinforce the domestic and international mechanisms available to people in detention within Australian institutions and address many of the limitations

see s20(1)(c).

⁵¹ HREOC (1998).

⁵² See ss21 and 11(1)(f) of the Act and the definitions of "act", "practice", "enactment" and "territory" in s3 of the Act.

⁵³ See ss11(1)(g), 11(1)(h) and 11(1)(k) of the Act.

⁵⁴ Though it is noted that the Commission has the power under s21(1) of the Act to require a person it believes is capable of giving information or producing documents relevant to a matter under inquiry, to give that information to the Commission at such a place and time as specified by the Commission.

discussed above. In particular, such ratification would:

- result in a greater focus upon the prevention of violations of the Convention;
- draw to the attention of states (at an early stage before they become the subject of an individual complaint) any broader systemic issues which may give rise to human rights violations;
- require Australia to create or designate a domestic body with powers that extend to all persons detained in Australia,⁵⁵ and
- provide mechanisms for the regular and systematic review of the conditions and treatment of persons detained in Australia.

32. In the Commission's view, that approach is likely to result in less complaints being taken to the Commission and United Nations Committees. Not only are such complaints potentially embarrassing, they also result in government agencies using time and resources in preparing submissions and other documents.

Non-binding nature of recommendations

33. The Commission observes that a further limitation of the existing international and domestic mechanisms aimed at protecting persons against violations of the Convention is the non-binding nature of those mechanisms. However the Commission notes that the mechanisms proposed by the Optional Protocol will be similarly limited, the recommendations of either the National or International Body also being non-binding on the parties.

Implementation of the Optional Protocol

⁵⁵ The Commission notes that Australia is internationally responsible for acts of a component state within its federal structure under the Convention. See Burgers J and Danelius H, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), p131 and Concluding observations of the Committee against Torture: Australia (21 November 2000), A/56/44, [53].

34. The Commission notes that, were Australia to ratify the Optional Protocol, the obligations imposed by it would not automatically become part of Australian domestic law. They would only become part of Australian law if implemented by legislation.⁵⁶ That might be achieved through various legislative schemes (involving Commonwealth and possibly State legislation). The Commission also notes that, under the Optional Protocol, States Parties may make a declaration postponing the implementation of Parts III (provisions relation to the International Body) and IV (provisions relating to the National Body) of the Optional Protocol for up to three years.⁵⁷

Potential role of the Commission

35. In this submission the Commission does not propose to provide the Committee with its view as to the nature or identity of the National Body that should be established or designated were Australia to ratify the Optional Protocol.⁵⁸ Although one obvious option would be to designate the Commission as the National Body, further consideration and consultation would be required as to whether the functions to be exercised by the National Body are compatible with the Commission's existing functions. In addition, consideration would need to be given to the additional resources that would be necessary for the Commission to undertake those functions.

Conclusion

36. The Commission views the Optional Protocol as a positive development and supports its ratification and implementation by Australia. The Optional Protocol would enhance and strengthen current domestic and international mechanisms aimed at preventing torture and other cruel, inhuman or degrading treatment or punishment of persons deprived of their liberty. It would also assist Australia in fulfilling its obligations under the Convention, the ICCPR and the CRC.

⁵⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 273 per Mason CJ and Deane J; Gaudron J concurring). For further explanation of this point see, Charlesworth H, Chiam M, Hovell, D and Williams G "Deep Anxieties: Australia and the International Order" (2003) 25 *Sydney Law Review* 423 at pp447 – 450.

⁵⁷ See art 24(1) of the Optional Protocol.

⁵⁸ See arts 3 and 17 of the Optional Protocol.

37. Ratification and implementation of the Optional Protocol by Australia would signal to the international community Australia's continued commitment to the eradication of torture and other cruel, inhuman treatment or degrading punishment and contribute to building international consensus about the unacceptability of such actions.

Appendix A – ‘Human Rights’ under the Human Rights and Equal Opportunity Commission Act 1986 (Cth)

For the purposes of the Act, ‘human rights’ are defined in the international human rights instruments which are scheduled or declared under the Act. These instruments are:

- (a) International Covenant on Civil and Political Rights (“ICCPR”);
- (b) International Labour Organisation Discrimination (Employment) Convention ILO 111;
- (c) Convention on the Rights of the Child (“CRC”);
- (d) Declaration of the Rights of the Child;
- (e) Declaration on the Rights of Disabled Persons;
- (f) Declaration on the Rights of Mentally Retarded Persons; and
- (g) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

The two instruments of relevance to this submission are the ICCPR and the CRC.

Australia also has obligations under the Convention against Torture and Other Cruel, Inhuman Treatment or Degrading Punishment (“Convention”) which is not scheduled to the Act but is of direct relevance to this inquiry.