

**Documents tabled on 3 December 2008:**

**National Interest Analysis [2008] ATNIA 31**

**with attachment on consultation**

**The Optional Protocol to the United Nations Convention on the Rights of Persons with  
Disabilities  
New York, 13 December 2006**

**[2008] ATNIF 21**

# NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

## SUMMARY PAGE

### **Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities New York, 13 December 2006**

**[2008] ATNIF 21**

#### **Nature and timing of proposed treaty action**

1. Australia signed the United Nations Convention on the Rights of Persons with Disabilities (the Convention) when it opened for signature on 30 March 2007. The Convention entered into force generally on 3 May 2008—the 30<sup>th</sup> day after the deposit of the 20<sup>th</sup> instrument of ratification of the Convention. Australia ratified the Convention on 17 July 2008 and it entered into force for Australia on 16 August 2008.
2. The Optional Protocol to the Convention on the Rights of Persons with Disabilities (the Optional Protocol) entered into force on 3 May 2008 – the 30<sup>th</sup> day after the deposit of the 10<sup>th</sup> instrument of ratification. Australia has not signed the Optional Protocol. It is now proposed that Australia consent to be bound by the Optional Protocol by lodging an instrument of accession. Australia is permitted to accede to the Optional Protocol under Article 11 because it has signed and ratified the Convention.
3. If Australia chooses to lodge an instrument of accession to the Optional Protocol, the Optional Protocol will enter into force for Australia on the 30<sup>th</sup> day after the deposit of the instrument (Article 13(2)).

#### **Overview and national interest summary**

4. The Optional Protocol allows the Committee on the Rights of Persons with Disabilities (the Disability Committee)<sup>1</sup> to receive and consider written communications from individuals and groups of individuals alleging violation of the Convention by a State Party. Complaints to the Disability Committee may be made about any rights guaranteed under the Convention, but only after all domestic remedies have been exhausted, and only in relation to events occurring after the Optional Protocol enters into force for the relevant State Party. The Optional Protocol also empowers the Disability Committee to conduct inquiries into complaints of grave or systemic breaches of the Convention, where there is reliable information to support such allegations. If necessary, and with the consent of the State Party, investigations may include a country visit. The Disability Committee can issue views on whether a violation of the Convention has occurred and make recommendations about how the violation may be addressed. The observations and recommendations made by the Disability Committee are not legally binding on State Parties.
5. Accession to the Optional Protocol will give people with disability an opportunity to contest the implementation and application of the human rights set out under the Convention. This would render Australia more accountable for its Convention obligations and further promote disability rights within Australia. Accession to the Optional Protocol will also present Australia as an international leader committed to protecting the rights for people with disability.

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<sup>1</sup> Article 34 of the Convention on the Rights of Persons with Disabilities establishes the Disability Committee.

## **Reasons for Australia to take the proposed treaty actions**

6. Accession to the Optional Protocol will enable Australians to make a complaint to a specialised committee with expertise in disability issues once all domestic options have been exhausted. It will render the Australian Government more accountable by empowering an expert committee to consider the complaints of individuals or groups of individuals alleging a violation of the Convention. The Disability Committee is authorised to make recommendations about how violations may be remedied. Accession to the Optional Protocol will also demonstrate the Australian Government's confidence that the level of protection it affords to people with a disability meets internationally required standards.

7. The Australian Government has identified active membership of the United Nations as one of the three pillars underpinning its approach to foreign policy. Accession to the Optional Protocol will highlight the Government's commitment to the United Nations, as the primary organisation through which global challenges, such as the protection of human rights, are addressed.

8. No legislative or policy changes will be required for Australia to become a party to the Optional Protocol. People with a disability who consider that Australia is not meeting its international human rights obligations are already entitled to lodge communications with the United Nations Human Rights Committee (HR Committee) which monitors States Parties' compliance with the International Covenant on Civil and Political Rights. The HR Committee deals with general human rights concerns. Access to the Disability Committee would enable the complainant's communication to be considered by international experts focused exclusively on disability issues and the rights guaranteed specifically by the Convention.

9. The Disability Committee is a body of 12 independent experts that monitor implementation of the Convention by States Parties. It is established by Article 34 of the Convention. The Disability Committee will hold its inaugural session in 2009. While the exact procedures and practices of the Committee are yet to be finalised, it is expected that the Committee will adopt the practices and procedures used by other established human rights committees. The Disability Committee is expected to hold two or three sessions per year. During its sessions, it will consider State Party reports and issue concluding observations that communicate its concerns and recommendations to State Parties on their reports. Professor Ronald McCallum AO, an Australian citizen, has recently been elected to the Disability Committee for a two-year term from 1 January 2009.

10. Article 2 states that a communication from an individual or group of individuals will only be accepted by the Committee after remedies within the State Party have been exhausted. The fact that Australia already has several effective domestic avenues through which complaints of disability discrimination<sup>2</sup> may be resolved, renders it unlikely that a large numbers of complaints will be brought before the Committee. Australia's complaint mechanisms are open to groups as well as individuals.

11. Australia is party to three other treaties that provide for similar individual complaints mechanisms, namely, the First Optional Protocol to the International Covenant on Civil and Political Rights (First OP to the ICCPR), the Convention Against Torture and Other Forms of

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<sup>2</sup> Australia's domestic avenues for treatment or complaint resolution include conciliation by the Australian Human Rights Commission, actions available through equivalent State and Territory bodies, legal actions in State, Territory and Commonwealth courts and various processes involving review by Ombudsman offices, other tribunals and administrative appeals bodies.

Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Elimination of all Forms of Racial Discrimination (CERD).

12. Australia is also in the process of acceding to the Optional Protocol to the Convention on the Elimination All Forms of Discrimination against Women (CEDAW), which creates a similar communications mechanism.

13. It is envisaged that the number of communications made under the Optional Protocol will be relatively few, given that Australia is in compliance with the immediately applicable obligations outlined in the Convention. Nonetheless, complaints may be made by individuals or groups of individuals who consider that their rights under the Convention have not been fully implemented by the Australian Government. If a complaint is made, the Committee may suggest that Australia is not in compliance with the Convention, and recommend amendments to Australian laws, policies and practices. The Australian Government will need to respond to any recommendation put forward by the Disability Committee but would not be obliged to make changes to laws, policies and practices as recommendations are not legally binding.

### **Obligations**

14. The purpose of the Optional Protocol is to assist States Parties to realise the commitment made under the Convention to promote, protect and ensure the full and equal enjoyment of human rights for people with disability. This commitment is satisfied when State Parties recognise the power of the Disability Committee to receive and consider communications from or on behalf of individuals or groups of individuals and by engaging in a dialogue with the Disability Committee.

15. Article 1 of the Optional Protocol requires a State Party to recognise the competence of the Disability Committee to receive and consider communications.

16. Following the receipt of a communication, the Disability Committee will consider its admissibility. Pursuant to Article 2, a communication is inadmissible if: it is anonymous; the matter has already been examined by the Disability Committee or is the subject of another procedure or international investigation; domestic remedies have not been exhausted; or the communication is not sufficiently substantiated.

17. Articles 3, 4 and 5 set out the procedures by which the Disability Committee will respond to a valid communication. Once admissibility is determined, the Committee will notify the State Party confidentially that a communication has been made (Article 3). The State Party will then have six months in which to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State Party. All communications are considered in closed meetings (Article 5). At any time after the receipt of a communication and before a determination on the merits, the Disability Committee may request that urgent interim action be taken to avoid possible irreparable damage to the victims of the alleged violation (Article 4). After examining a communication, the Disability Committee will forward its suggestions and recommendations, if any, to the State Party and the petitioner (Article 5).

18. Articles 6 and 7 set out the process by which the Committee may conduct inquiries into alleged grave or systemic breaches of the Convention, where there is reliable information to support such allegations. Following receipt of reliable evidence indicating a grave and systemic breach, the Disability Committee will invite the State Party concerned to cooperate in the examination of the information and submit observations. Taking into account any observations that may have been submitted by the State Party, as well as any other reliable information available to it, the Disability Committee may designate one or more of its members to conduct an inquiry and to report back urgently. Where warranted, and with the consent of the State Party concerned, the inquiry may

include a visit to the territory of the State Party. All inquiries are conducted in cooperation with the State Party and in confidence.

19. Once the Disability Committee has examined the findings of its inquiry, it will convey its conclusions, comments and recommendations to the State Party concerned. The State Party will then have six months in which to respond by submitting its observations to the Disability Committee. The Disability Committee may also invite the State Party concerned to detail any measures taken in response to its inquiry under Article 6 in the State Party's regular progress report submitted pursuant to Article 35 of the Convention.

20. Article 8 of the Convention allows a State Party to choose not to recognise the competence of the Committee to receive and consider complaints of grave and systemic violations of the Convention. A State may declare that it does not recognise Articles 6 and 7 at the time it signs, ratifies or accedes to the Optional Protocol. Australia does not propose to make a declaration under Article 8. A similar inquiry procedure exists under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 8 to 10 of the Optional Protocol to CEDAW.

21. Article 14 does not allow State Parties to make reservations that are incompatible with the object and purpose of the Optional Protocol and notes that valid reservations may be withdrawn at any time.

22. Pursuant to Article 16, any State Party wanting to denounce the Optional Protocol must do so by written notification to the Secretary-General of the United Nations.

### **Implementation**

23. The Optional Protocol will not require changes to current Commonwealth, State and Territory legislation, policies or programs. It creates no new rights other than an entitlement to make a complaint to the Disability Committee for consideration.

24. If a communication relating to Australia is made to the Disability Committee, Australia will be required to respond to the Committee in accordance with the Articles outlined above. If the Disability Committee receives reliable information indicating a grave and systemic violation of the Convention by Australia, Australia will be expected to cooperate with the Disability Committee and may be requested to permit the Disability Committee to visit Australia in the course of its inquiry. No changes are required in order for Australia to recognise the competence of the Disability Committee to receive and inquire into complaints in this manner.

25. The Office of International Law (OIL), within the Attorney-General's Department, will be responsible for drafting all reports and submissions to the Disability Committee. In preparing submissions, OIL will consult with the Australian Government Department with portfolio responsibility for the issue raised, as well as any State or Territory governments whose policies may be affected.

### **Costs**

26. The costs of preparing and submitting written explanations or statements to the Disability Committee are expected to be absorbed within the usual budget of the Attorney-General's Department. Any costs associated with visits by the Disability Committee will also be absorbed within the usual budget of the departments involved.

## **Regulation Impact Statement**

27. The Attorney-General's Department has assessed the implementation of the treaty against criteria in the *Best Practice Regulation Handbook*. This regulatory option has no impact on business and individuals or on the economy and a Regulation Impact Statement or Business Cost Calculator report is not required. It is unlikely to have a significant impact on business as the obligations and communications under the Optional Protocol are directed at State Parties.

## **Future treaty action**

28. Article 15(1) of the Optional Protocol provides that any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General will communicate all proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposal. In the event that, within four months from the date of such communication, at least one-third of the States Parties favour such a meeting, the Secretary-General will convene a meeting under the auspices of the United Nations.

29. Under Article 15(2), any amendment adopted and approved by a majority of two-thirds of the State Parties present and voting at the meeting will be submitted to the United Nations General Assembly for approval and thereafter to all States Parties for acceptance. Amendments shall enter into force on the 30th day after the number of instruments of acceptance deposited reaches two-thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the 30th day following the deposit of its own instrument of acceptance. Amendments will only be binding, once they come into force, on those States Parties that have accepted.

30. Any adoption by Australia of proposed amendments to the Optional Protocol will be subject to the Australian domestic treaty process, including consideration by the Joint Standing Committee on Treaties (JSCOT).

## **Withdrawal or denunciation**

31. Article 16 of the Optional Protocol provides for denunciation. A State Party may denounce the Optional Protocol by written notification to the Secretary-General of the United Nations. A denunciation becomes effective one year after receipt of notification. Denunciation by Australia would be subject to our domestic treaty process, including consideration by the JSCOT.

## **Contact details**

Human Rights Branch  
Classification, Human Rights and Copyright Division  
Attorney-General's Department.

## ATTACHMENT ON CONSULTATION

### Optional Protocol to the Convention on the Rights of Persons with Disabilities New York, 13 December 2006 [2008] ANTIA 31

#### CONSULTATION

##### State and Territory Governments

32. On 3 September 2008, the Attorney-General and Parliamentary Secretary for Disabilities and Children's Services notified relevant State and Territory Ministers about the commencement of consultations on the Optional Protocol, and informed them that consultations with their jurisdictions would be progressed through the Standing Committee on Treaties (SCOT)<sup>3</sup>.

33. All State and Territory Attorneys-General were contacted, as well as: the Australian Capital Territory Minister for Disability and Community Services; the Queensland Minister for Disability Services; the South Australian Minister for Disability; the South Australian Minister for Mental Health and Substance Abuse; the Victorian Minister for Mental Health; the Western Australian Minister for Disability Services; and the New South Wales Minister for Disability Services.

34. The Attorney-General also provided an update regarding the consultation on the Optional Protocol to the Standing Committee of Attorneys-General (SCAG) during its meeting on 6-7 November 2008.

35. On 16 September 2008, the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) wrote to SCOT officers, formally seeking the views of State and Territory governments about whether Australia should become a party to the Optional Protocol.

36. As at 27 November 2008, five jurisdictions provided a written response expressing support for Australia to become party to the Optional Protocol. The Northern Territory stated that it is satisfied with accession to the Optional Protocol; Western Australia referred to its response to the Convention in confirming its support for the Optional Protocol; the Australian Capital Territory, New South Wales, Victoria and Queensland all communicated their support for Australia becoming a party to the Optional Protocol.

##### Commonwealth Departments and Agencies

37. The Attorney-General wrote to Ministers on 28 February 2008, notifying them of the intention to commence consultations on the Optional Protocol. Further consultations co-ordinated by the Attorney-General's Department have been undertaken with the Department of Foreign Affairs and Trade, the Department of Families, Housing, Community Services and Indigenous Affairs, the Department of Immigration and Citizenship and the Department of Health and Ageing.

38. The Attorney-General's Department also liaised with the Human Rights and Equal Opportunity Commission regarding the consultation. The Commission has publicly indicated that it

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<sup>3</sup> In the interests of achieving the best possible outcome for Australia, and where a treaty or other international instrument is one of sensitivity and importance to the States and Territories, the Standing Committee on Treaties seeks to take into account the views of the States and Territories, in formulating Australian negotiating policy and before becoming a party to, or indicating its acceptance of, that treaty or instrument.

supports Australia becoming party to the Optional Protocol (Commissioner Innes, Joint Standing Committee on Treaties, Sydney 29 July 2008).

## **Public Consultation**

39. During the consultation on the Convention on the Rights of Persons with Disabilities in early 2008, many respondents took the opportunity to express their views on the Optional Protocol. In particular, the report of 'The Australian Task Force on the United Nations Convention on the Rights of Persons with Disabilities Ratification' was submitted to the Attorney-General's Department on 31 March 2008. This report was based on consultations undertaken by leading disabilities organisations including the Australian Federation of Disability Organisations, National Association of Community Legal Centres, People With Disabilities and the State and Territory Disability Advisory Councils. The report was unanimous in its support for Australia's accession to the Optional Protocol.

40. In October 2008, further submissions from the public were sought through the Attorney-General's Department website. Non-Government organisations were alerted to the website and interested people and groups were invited to submit their views about the consequences of becoming a party to the Optional Protocol and its likely impact on Australia. Respondents were asked to comment on the following issues:

- the obligations imposed by the Optional Protocol;
- what, if anything, will need to be done to implement the Optional Protocol;
- the likely financial cost, if any, of implementing the Optional Protocol; and
- foreseeable economic, environmental, social and cultural effects of implementing the Optional Protocol.

The following bodies responded to the request for comments:

- Australian Federation of Disability Organisations;
- Blind Citizens Australia;
- Federation of Ethnic Communities' Councils of Australia and The National Ethnic Disability Alliance (Joint submission);
- Human Rights Law Resource Centre Ltd;
- Law Council of Australia;
- National Association of Community Legal Centres and the NSW Disability Discrimination Legal Centre (Inc) (Joint submission);
- The Australian Taskforce on UNCRPD Ratification;
- Vision Australia; and
- Women with Disabilities Australia.

41. All submissions were very positive and urged Australia to become a party to the Optional Protocol. It was also the general view that acceding to the Optional Protocol would help develop Australia's leadership role in the area of international human rights.