

OPCAT

**Cochran, Jenny (REPS)**

Submission No: .....16.....

**From:** ALHR [alhr@alhr.asn.au]  
**Sent:** Sunday, 8 February 2004 11:26 PM  
**To:** Committee, Treaties (REPS)  
**Subject:** The Optional Protocol to the Convention Against Torture

*Simon Rice*  
9/2/04

**Importance:** High



CAT Optional  
Protocol ALHR.dot..  
8 February 2004

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

Dear Madam,

submission to the JOINT STANDING committee ON TREATIES  
The Optional Protocol to the Convention Against Torture and Other Cruel,  
Inhuman or degrading Treatment or Punishment

Thank you for agreeing to receive the attached submission after the  
deadline for submissions.

Sincerely,

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8 February 2004

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

Dear Madam,

**SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES**

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

Thank you for agreeing to receive this submission after the deadline for submissions.

**1. Australian Lawyers For Human Rights (ALHR)**

Australian Lawyers for Human Rights (ALHR) is an association of lawyers with expertise in human rights law, its principles and practice. ALHR educates lawyers in human rights practice, and offers independent expert views on contemporary human rights issues. It has a national membership of over 800, with active National, State and Territory committees.

Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

ALHR welcomes the opportunity to make a submission to the Joint Committee and to submit that Australia should move to ratify the Optional Protocol.

**2. Australia, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

2.1 Australia ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT") on 8 August 1989. Pursuant to Article 27, CAT came into force for Australia on 7 September 1989.

2.2 In addition to the terms of CAT, the mechanisms of the Optional Protocol will reflect the obligations under articles 7 and 10 of the International Covenant on Civil and Political Rights. The Human Rights Committee's General Comments Number 20 at paragraph 11, and Number 21 at paragraph 6, confirm that States should 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 is an effective means of preventing cases of torture and ill-treatment.

2.3 CAT is directed at eliminating torture in all its forms. CAT encourages States to prohibit torture and respond promptly whenever an allegation of torture, cruel, inhuman or degrading treatment is raised.

2.4 The principal obligations in CAT are found in the following articles:

*Article 2*

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

*Article 10*

1. Each State Party shall ensure that education and information regarding the prohibition against torture 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.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

*Article 11*

Each State Party shall 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.

*Article 12*

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

2.5 None of the Commonwealth, the States or Territories has enacted laws which expressly incorporate the provisions of CAT and which provide effective local remedies for the victims of torture. The lack of specific and comprehensive protections against torture and other forms of cruel treatment is of concern; the protections in Australia are limited:

- In Queensland section 208 of the Queensland Criminal Code makes it an offence to torture. This has recently been used in relation to the treatment of young children.
- The ACT also has provisions making torture an offence under criminal law.
- The *Crimes (Torture) Act 1988* (Cth) enables a person who claims to be a victim of torture in a jurisdiction other than Australia to seek the Attorney-General's consent for a prosecution of those overseas offences in an Australian court.

A survey of other jurisdictions, which is documented in Australia's report to the CAT Committee, shows that while conduct that might be described as torture is covered by criminal offences under domestic law such as grievous bodily harm, assault etc that there are no provisions which are expressly said to operate with respect to combating torture within the terms of the torture convention in Australian law.

- 2.6 Notwithstanding the absence of comprehensive Australian laws, Australia has since 28 January 1993 recognised the rights of individuals, subject to the jurisdiction of Australia, to lodge complaints directly to the CAT Committee where all available and local remedies have been exhausted.
- 2.7 ALHR is aware of seven decisions of the CAT Committee in relation to complaints concerning Australia. In *Elmi v Australia* the Committee considered that there were substantial grounds for believing that the author would be in danger of being subjected to torture if returned to Somalia. The Committee said that Australia should refrain from forcibly returning Mr Elmi to Somalia or to any other country where he runs a risk of being expelled or returned to Somalia.
- 2.8 In the following matters, the Committee found no violation or that the complaints were inadmissible:
- *ZT v Australia* (11 November 2003)
  - *MPS v Australia*
  - *H.M.H.I. v Australia*
  - *YHA v Australia*
  - *MS v Australia*
  - *NP v Australia*
- 2.9 Australia's actions in meeting its obligations under CAT have been documented in Australia's combined Second and Third Periodic Reports to the CAT Committee which was considered in November 2000.
- 2.10 In its Concluding Comments on the Australian report, the Committee made the following recommendations:
- (a) The State party ensure that all States and territories are at all times in compliance with its obligations under the Convention;
  - (b) The State party consider the desirability of providing a mechanism for

independent review of ministerial decisions in respect of cases coming under article 3 of the Convention;

(c) The State party continue its education and information efforts for law enforcement personnel regarding the prohibition against torture and further improve its efforts in training, especially of police, prison officers and prison medical personnel;

(d) The State party keep under constant review the use of instruments of restraint that may cause unnecessary pain and humiliation, and ensure that their use is appropriately recorded;

(e) The State party ensure that complainants are protected against intimidation and adverse consequences as a result of their complaint;

(f) ....;

(g) The State party continue its efforts to address the socio-economic disadvantage that, *inter alia*, leads to a disproportionate number of indigenous Australians coming into contact with the criminal justice system;

(h) The State party keep under careful review legislation imposing mandatory minimum sentences, to ensure that it does not raise questions of compliance with its international obligations under the Convention and other relevant international instruments, particularly with regard to the possible adverse effect upon disadvantaged groups;

(i) The State party submit its next periodic report by November 2004, and ensure that it contains information on the implementation of the present recommendations and disaggregated statistics.

### **3. Optional Protocol to CAT**

3.1 At the present time, the Optional Protocol is not in force. As at 8 February 2004, there are 22 signatories and 3 ratifications, one of which is the United Kingdom.

3.2 The Optional Protocol does not create a new set of substantive rights or obligations in relation to torture. Rather, it provides a means of making CAT more effective to *prevent*, rather than merely respond to, claims of torture.

3.3 The main purpose of the Optional Protocol is to establish a system of regular visits (Article 1). The Optional Protocol will create sub-committee comprised of independent experts whose mandate will be to conduct visits of detention centres in any country that agrees to accept the terms of the Optional Protocol to CAT. States parties to the Protocol will allow the Subcommittee on Prevention to visit any place under its jurisdiction and control where persons 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 (Article 4.1).

- 3.4 The expression 'deprivation of liberty' is found in article 4.2 and means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will by order of any judicial, administrative or other authority.
- 3.5 While in theory the subcommittee members could make 'surprise and unannounced' visits to any detention centre, in reality, a State is likely to be aware and facilitate the visit of the sub committee. The role of the subcommittee will be to engage in constructive dialogue with States to introduce and develop effective means of preventing torture.
- 3.6 The Optional Protocol will also require States to develop or strengthen existing national preventative mechanisms through the use of independent visitors to all forms of detention facilities. Such independent visitors should have access to all places of detention, to interview persons who are deprived of their liberty. The visitors may make recommendations and the State would consider the implementation of the recommendations visits (Article 22) and state parties are also required to publish and distribute the annual reports of the visitors (Article 23).

#### **4. Why the Optional Protocol is in Australia's National Interest**

- 4.1 ALHR welcomes the Optional Protocol to CAT and encourages the Australian Government to move to ratify the Protocol.
- 4.2 The terms of the Optional Protocol are not controversial.
- 4.3 The principal critic of the Optional Protocol has been the United States. Its opposition is concerned with the perceived inconsistency between the terms of the Optional Protocol and the search and seizure protections in the United States Constitution. These issues do not arise for Australia.
- 4.4 The further criticism has been the potential cost to the United Nations in funding the subcommittee to undertake the visits. ALHR submits that while it is essential that the committee be funded to undertake its work, the cost to the United Nations is not a reason for a State to reject the terms of the Optional Protocol.
- 4.5 In relation to Australia's compliance with the terms of the Optional Protocol, there should be no impediment to independent visitors to various detention facilities. Australia has agreed to such visits by United Nations human rights bodies in the past, and is proud of its record of human rights compliance.
- 4.6 With respect to developing national principles, many of the mechanisms in relation to independent visits to detention facilities are currently a feature of State and Territory administrations. There are documented in Australia's Combined Second and Third Periodic Report to CAT.
- 4.7 The Optional Protocol will enable the development of national standards which meet the requirements of CAT. In the absence of specific Commonwealth, State and Territory

statutory provisions incorporating the CAT, the development of independent standards to monitor the treatment of detained persons is an essential and necessary component in meeting Australia's international obligations.

- 4.8 Ratification of the Optional Protocol will enable Australia to be involved in the sub-committee, and to play an active part in the discussion about principles and concerns in this area.
- 4.9 Finally, Australia's ratification of the Optional Protocol will support Australia's efforts to encourage States in the Asia-Pacific Region to review and address human rights concerns. In Amnesty International's 2002 World Report, it was noted that torture and ill treatment of victims by security forces, police and other state authorities was reported in 19 out of the 29 countries in the Asia-Pacific Region.
- 4.10 ALHR encourages the Australian Government to take the lead in the Asia-Pacific Region by ratifying the Optional Protocol and supporting those States in the region to do the same.

Thank you again for receiving this late submission.

We look forward to being able to assist further with the Committee's deliberations.

Yours sincerely,

*By email*

Simon Rice OAM  
President  
Australian Lawyers for Human Rights

