

Documents tabled on 26 August 2008:

**National Interest Analysis [2008] ATNIA 26
with attachment on consultation**

**Text of the proposed treaty action: Optional Protocol to the Convention on the
Elimination of All Forms of Discrimination Against Women of 18 December
1979, done at New York, 6 October 1999 ([1999] ATNIF 32)**

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979, done at New York, 6 October 1999 ([1999] ATNIF 32)

Nature and timing of proposed treaty action

1. The Optional Protocol to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women was adopted on 6 October 1999 and opened for signature on 10 December 1999. It entered into force on 22 December 2000. It currently has 90 states parties.
2. Australia has not signed the Optional Protocol. Since the Optional Protocol has already entered into force, it is proposed that Australia consent to be bound by the Optional Protocol through lodging an instrument of accession under Article 15(4). Australia is permitted to accede to the Optional Protocol, under Article 15(3), because it has signed and ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) [1983] ATS 9, which entered into force for Australia on 28 July 1983.
3. Once Australia has lodged its instrument of accession to the Optional Protocol, the Optional Protocol will enter into force for Australia three months after the lodging of this instrument (Article 16(2)).

Overview and national interest summary

4. Parties to the Optional Protocol recognise the competence of the Committee on the Elimination of Discrimination against Women to receive and consider written complaints (communications) about alleged violations of obligations under the CEDAW. The Committee can issue views on whether a breach has occurred and recommendations on methods for addressing a breach.
5. Acceding to the Optional Protocol would give women in Australia greater opportunity to contest the implementation and application of human rights, thus providing for greater accountability within Australia for the promotion of gender equality and non-discrimination between men and women. Australia is an international leader in the promotion and protection of the rights of women and this role would be demonstrated and enhanced by becoming a party to the Optional Protocol.

Reasons for Australia to take the proposed treaty action

6. Acceding to the Optional Protocol will provide people in Australia with the opportunity to make a complaint to a UN committee about discrimination in women's access to, and equal opportunities in, among other things, political and public life, education, marriage, social security, health and employment, once they have exhausted all domestic legal avenues. It will increase accountability of Government in ensuring equality and non-discrimination between men and women by enabling an expert UN Committee to consider concerns raised and recommend how these concerns are to be addressed. Acceding to the Optional Protocol would give women, such as Indigenous women, women with disability, immigrant women and rural women, who seek equality in the community, not just gender equality, but also the potential to pursue concerns regarding their human rights through an additional mechanism outside the Australian judicial and political context.
7. It will demonstrate the Government's strong commitment to promoting the elimination of discrimination against women and the standards enshrined in the CEDAW. It also shows that the Government is confident Australia's approach in this area would stand up to international scrutiny.
8. The Australian Government has identified active membership of the United Nations as one of the three pillars underpinning its approach to foreign policy. Acceding to the Optional Protocol demonstrates the priority the Government places on the UN to address global challenges such as the protection of human rights.
9. The Optional Protocol enables individuals, or groups of individuals, to complain to the Committee about alleged violations by States parties of the obligations under CEDAW. A complaint can only be made when remedies within the State party have been exhausted. The UN Committee is a body of experts elected by States parties in their personal capacity that can issue views in response to complaints lodged against States parties. The views of the Committee are non-binding, and therefore, while they could guide Australia in its implementation of international law, Australia would not be obliged to conform to the Committee's views if it believes that there is a better way to implement its obligations under CEDAW.
10. Australia has been a party to CEDAW for over 25 years. As a longstanding party to the Convention, Australia has continued to implement substantial policy and legislative changes to support the Government's commitment to eliminating discrimination against women. In its regular reports to the Committee, Australia has stated that it has implemented its obligations under that Convention in Commonwealth, State and Territory legislation and policies. It has also acknowledged where more work is required to fully meet our obligations under CEDAW, especially in relation to the challenges faced by Indigenous women and girls and in the area of violence against women. All parties to CEDAW are obliged to report to the UN Committee every four years on their implementation of CEDAW. The Committee issues concluding observations on the state party's achievements and may recommend further steps needed in implementing the Convention.
11. When considering state party reports, and issuing recommendations, the Committee considers broad policy and legislative programmes and highlights areas of systemic failure to implement obligations. When considering communications under the Optional Protocol, the Committee addresses how the way a state party implements its obligations under CEDAW affects the individual making the complaint in light of their particular circumstances. In that sense, the Optional Protocol does not create any new substantive rights, but allows the Committee to consider existing rights under CEDAW. No implementing legislation or policy changes would be required if Australia became a party to the Optional Protocol. The *Sex Discrimination Act 1984* implements Australia's obligations under CEDAW by providing for the elimination, as far as possible, of discrimination on the grounds enumerated in CEDAW and for the promotion of equality between men and women.

12. Australia has two reservations to CEDAW, meaning that it is not bound by the obligations in the articles to which the reservations relate, and a communication could not be entertained by the Committee on an issue relevant to the reservation. The reservations are:

The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.

The Government of Australia advises that it is not at present in a position to take the measures required by article 11 (2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat duties.

13. In relation to maternity leave, the Government considers that Australia's workplace arrangements and the social security safety-net work in a complementary way to provide a comprehensive system of support for families at the time of birth of a child, and ensure that support for families is broad-based, practical and long term. The Government has asked the Productivity Commission to consider models to improve support for parents in the labour force with newborn children. The Productivity Commission's report is due in February 2009.

14. In relation to the restriction of women from serving in direct combat roles in the Australian Defence Force, the *Sex Discrimination Act 1984* exempts the Australian Defence Force from the operation of the Act as far as it relates to the prohibition of women serving in combat duties. The Sex Discrimination Regulations define combat duties as 'duties requiring a person to commit, or participate directly in the commission of, an act of violence against an adversary in time of war.' For several years, the Australian Defence Force has progressively broadened women's roles. Women are now eligible to serve in approximately 90 percent of Australian Defence Force employment categories, up from 73 percent in 2003.

15. There has been strong support for Australia to become party to the Optional Protocol from non-government organisations (NGOs) and members of the public, as well as States and Territories, as outlined in the attachment on consultation below.

16. 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 (ICCPR), the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). In the last twenty years, Australia has responded to 55 communications under the ICCPR, ten communications under CAT and nine communications under CERD.

17. There is potential overlap of communications made under the Optional Protocol to the ICCPR and those made under the Optional Protocol to CEDAW, as CEDAW, to a certain extent, provides for rights under the ICCPR, including non-discrimination between women and men. However, the Optional Protocol to CEDAW allows individuals to make complaints that are gender-oriented, and provides them with a forum which has expertise on the particular situations which women face in terms of inequality, and also on women's rights.

18. It is envisaged that the number of communications under the Optional Protocol to CEDAW will be relatively few, given Australia has implemented its obligations under CEDAW for 25 years

and considering that the Committee has only considered ten communications made against States parties in the last eight years. Nonetheless, there is the possibility that complaints could be made by individuals or groups of individuals in Australia where they consider that their rights under CEDAW have not been fully implemented by the Australian Government and this causes them harm. If complaints are made, this could lead to negative findings against Australian law, policies and practices by the Committee and the Australian Government would have to respond to such complaints.

19. Of the ten communications the Committee has considered since the Optional Protocol came into force in 2000, five were found to be inadmissible, one was found to demonstrate no violation and four were found to demonstrate violations by a state party of various articles of CEDAW, in relation to three counts of failure to protect from domestic violence and one of coerced sterilisation.

Obligations

20. As explained above, Australia already has obligations under CEDAW, which provides for women to have equal access to, and equal opportunities in, different aspects of public and private life. Parties to the Optional Protocol have the obligation to receive, consider and reply to communications in accordance with the procedures outlined below. Parties also have an obligation to ensure that individuals making a complaint under its jurisdiction are not subjected to ill treatment or intimidation as a result of this communication with the Committee (Article 11).

21. After receipt, the Committee considers whether a complaint is admissible. To be admissible the complainant must first have exhausted all domestic remedies (Article 4). This means that the complainant must have attempted to resolve their complaint in Australia through existing legal and administrative mechanisms available before approaching the UN Committee.

22. The Committee is also obliged to declare a communication inadmissible where:

- the Committee has already examined the matter or another international body is examining the matter
- the communication does not allege violations of the obligations under CEDAW
- it is ill-founded or not substantiated, or
- the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for a state party, except where those facts continued after that date of entry into force.

23. The Committee can issue interim measures which ask a States to refrain from doing something where necessary to protect the person making the complaint from any potential violation until the complaint has been considered by the Committee (Article 5). Such interim measures requests are not binding, but the Australian Government would have to carefully consider whether it agreed with the interim measures request and take action where necessary to give effect to the Committee's request before it has considered the communication fully.

24. A State which is the subject of a communication has six months to consider both the admissibility of the claim and the merits of the claim and provide a written response (Article 6).

25. If the Committee determines that a communication is admissible, it will then consider the merits of the communication; that is, whether a violation of the obligations under CEDAW has occurred. The Committee issues written views, and may issue recommendations, which it provides to the complainant and state party before making them public on its website. A State that receives adverse views and any recommendations is required to consider them and respond within six months, including information on any action taken in the light of the views and recommendations of the Committee (Article 7(4)). The Committee may also invite a State Party to submit further information about any measures the State has taken in response to the views or recommendations.

26. The Optional Protocol also empowers the Committee to conduct investigations into alleged systematic or grave discrimination, as opposed to individual discrimination, by States parties. If the Committee considers information of a systematic and grave violation of the rights provided for under CEDAW to be credible, the Committee can ask the State party for its cooperation and consideration of the issue and, if necessary, designate one or more of its members to conduct an inquiry into the alleged violations (Article 8). With the consent of the State party, this inquiry may include a visit to that State. The Committee will examine any findings from the inquiry and transmit these findings to the State party and, if necessary, ask for the State's response to the findings within six months (Article 9). The Committee has conducted only one investigation in the last eight years, which was into reports of mass murders, gender-based violence and disappearances of women in a particular region of Mexico, Ciudad Juárez. The Committee found that there had been serious lapses in Mexico's compliance with CEDAW and made numerous recommendations, which Mexico agreed to take into account.

Implementation

27. No new legislation is required to implement the Optional Protocol. The Office of International Law, Attorney-General's Department, has the processes and procedures in place to respond to communications to three other UN human rights committees. The same procedures and processes will be used in responding to communications to the Committee on the Elimination of Discrimination Against Women.

28. The Office of International Law would be responsible for drafting all submissions to the Committee, including those in response to adverse views of the Committee, and would consult with the relevant Commonwealth Department with portfolio responsibility for the issue raised, or any State or Territory Government where the communication concerns State or Territory laws and policies, and the Australian Government Office for Women in the Department of Families, Housing, Community Services and Indigenous Affairs.

Costs

29. The costs involved are expected to be absorbed within the usual budget of the Attorney-General's Department.

Regulation Impact Statement

30. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

31. Pursuant to Article 18, any state party may propose an amendment to the Optional Protocol and file it with the Secretary-General of the United Nations. The Secretary-General will communicate this amendment to all states parties and ask them if they would like to consider it at a Conference of States Parties. If at least one third of the states parties favour such a conference, the Secretary-General shall convene the conference.

32. Amendments shall come into force when they have been approved by the General Assembly and accepted by a two-thirds majority of the states parties to the Optional Protocol. Amendments will only be binding, once they come into force, on those states that have accepted. The proposal or adoption of amendments would be subject to Australia's domestic treaty process, including consideration by the Joint Standing Committee on Treaties.

Withdrawal or denunciation

33. Article 19 of the Optional Protocol provides that a state party can denounce the Optional Protocol at any time, by written notification to the Secretary-General of the United Nations. Denunciation will take effect six months after the receipt of notification by the Secretary-General. The state party will, however, be obliged to consider and respond to any communications or inquiry that had already been submitted prior to notification of denunciation. The denunciation would be subject to Australia's domestic treaty process, including consideration by the Joint Standing Committee on Treaties.

Contact details

International Security and Human Rights Branch
Office of International Law
Attorney-General's Department.

Attachment on Consultation

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979, New York, 6 October 1999 ([1999] ATNIF 32)

CONSULTATION

State and Territory Governments

34. On 3 June 2008, the Attorney-General wrote to his State and Territory counterparts asking them for their views on the impact of Australia acceding to the Optional Protocol. On 13 June 2008, the Minister for the Status of Women wrote to her State and Territory counterparts in similar terms. The Attorney-General's Department also sought the views of Standing Committee on Treaties officers in the Departments of Premier and Cabinet or Chief Minister.

35. Five States and Territories have provided a positive written response to the question of whether Australia should become party to the Optional Protocol. Victoria has offered its support for Australia to become party to the Optional Protocol. Western Australia also supports Australia becoming a party to the Optional Protocol as it is in line with its *Equal Opportunity Act 1984*. The Northern Territory said that there is nothing in their law or administration that would cause any problem if Australia acceded to the Optional Protocol. The Australian Capital Territory (ACT) supports Australia becoming a party to the Optional Protocol to CEDAW. New South Wales has indicated that it is strongly committed to eliminating discrimination against women and would support accession to the Optional Protocol to CEDAW.

Commonwealth Departments and Agencies

36. The following Ministers and their relevant portfolio agencies were consulted: Attorney-General (which also consulted with the Human Rights and Equal Opportunity Commission, the Commonwealth Department of Public Prosecutions and the Australian Federal Police), Health and Ageing, Education, Employment and Workplace Relations, Human Services, Immigration and Citizenship, Prime Minister and Cabinet, Defence, Families, Housing, Community Services and Indigenous Affairs (including the Australian Government Office for Women), Foreign Affairs.

37. All Ministers consulted welcomed the move towards Australia becoming a party to the Optional Protocol on the basis that accession to the Optional Protocol to the CEDAW would provide individuals, including Indigenous women, vulnerable women and exploited women, with the opportunity to bring forward alleged violations of the CEDAW to the CEDAW Committee. Accession to the Optional Protocol would further demonstrate the Australian Government's commitment to improving women's human rights in Australia.

38. The Human Rights and Equal Opportunity Commission considered that ratification of the Optional Protocol is consistent with the Federal Government's commitment to improve mechanisms for human rights protection in Australia. HREOC considered that the views of the CEDAW Committee arising out of an individual communication under the Optional Protocol would assist the Federal Government to identify areas where current domestic laws, policies, programmes or practices remain inadequate to implement CEDAW obligations. In this way, the international review of Australia's domestic implementation of CEDAW would make a positive contribution to promoting human rights in Australia.

Public Consultation

39. On 23 May 2008, the Attorney-General and the Minister for the Status of Women issued a press release informing the public that consultations would commence shortly.
40. On 28 May 2008, the Department of Foreign Affairs and Trade indicated at its non-government organisation (NGO) human rights consultation in Canberra that the Government was actively considering the Optional Protocol to CEDAW and would be seeking input from NGOs on whether Australia should accede.
41. On 10 June 2008, the Attorney-General made an announcement at his NGO Human Rights Forum in Canberra, that the Government was seeking input from the public, in particular through NGOs, for their views on whether Australia should become a party to the Optional Protocol. On 11 June 2008, an invitation to provide comments as part of this consultation was posted on the websites of the Attorney-General's Department and the Australian Government Office for Women. Submissions were requested by 30 June 2008.
42. On 15 June 2008, the Australian Government Office for Women held a forum in Broken Hill for peak women's organisations, and reiterated the Attorney-General's announcement that consultations had commenced in relation to whether Australia should become a party to the Optional Protocol.
43. Twenty-three submissions were received from 59 NGOs as part of these consultations. All submissions were very positive and urged the Government to become a party to the Optional Protocol. Some submissions emphasised the need for particularly marginalised groups of women in society to have access to a UN human rights committee to have their claims heard directly in relation to their rights under CEDAW, once domestic remedies had been exhausted. Others considered that the Optional Protocol would provide another mechanism for women to ensure their human rights are being upheld. It was also the view that acceding to the Optional Protocol would demonstrate that the Australian Government is a responsible international citizen that upholds its human rights obligations.
44. The NGOs from whom joint or individual submissions were received are:
- UNIFEM
 - Women with Disabilities Australia
 - Human Rights Law Resource Centre
 - Sydney Centre for International Law
 - Sisters Inside
 - Kingsford Legal Centre, University of New South Wales
 - Country Women's Association of NSW
 - Union of Australian Women – Victorian Section
 - Australian Women Lawyers
 - Women's Legal Services Australia
 - Australian Bahá'í Community
 - Women's Health West
 - Victorian Women Lawyers
 - YWCA Australia
 - World Vision Australia
 - Law Council of Australia
 - Koorie Women Mean Business Inc
 - Business & Professional Women (BPW Australia)
 - Public Interest Advocacy Centre

Amnesty International
New South Wales Council for Civil Liberties

Australian Women's Coalition including:

Australian Church Women
Australian Federation of Medical Women
Aboriginal Legal Rights Movement
Australian Local Governments Women's Association
Conflict Resolving Women's Network Australia Inc
Girl Guides Australia
Mothers' Union Australia
Muslim Women's National Network Australia Inc
National Council of Jewish Women Australia Inc
National Council of Women of Australia Inc
Pan Pacific and South East Asia Women's Association of Australia
Salvation Army (Australia)
Soroptimists Australia Inc
VIEW Clubs of Australia
UNIFEM Australia
Zonta International – Districts 24 and 23.

Four Women's Secretariats including:

Aboriginal Legal Rights Movement
Association of Women Educators
Australian Baha'i Community
Australian Church Women
Australian Federation of Medical Women
Australian Federation of University Women
Australian Local Government Women's Association
Australian Women's Health Network
Children by Choice
Conflict Resolving Women's Network Australia
Girl Guides Australia
International Women's Development Agency
Kingsford Legal Centre
Mothers' Union Australia
Muslim Women's National Network of Australia
National Association of Services Against Sexual Assault
National Council of Jewish Women of Australia
National Council of Women of Australia
National Foundation for Australia Women
Pan Pacific & South East Asia Women's Association of Australia
Public Health Association of Australia Women's Health Special Interest Group
Salvation Army (Australia)
Soroptimist International Australia
UNIFEM Australia
Union of Australian Women
United Nations Association of Australia
Victorian Immigrant & Refugee Women's Coalition
VIEW Clubs of Australia
Women in Adult and Vocational Education
Women with Disabilities Australia

Women's Electoral Lobby Australia
Women's International League for Peace and Freedom
Women's Industry Network Seafood Community
Working Women's Centre Northern Territory
Working Women's Centre South Australia
WRANA
YWCA Australia
Zonta International - Districts 24 & 23