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UNITED NATIONS ASSOCIATION OF AUSTRALIA

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International House
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Mr Kelvin Thomson MP
Chair, Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 3200

12 June 2012

Dear Mr Thomson,

I am pleased to provide a submission to the Joint Standing Committee on Treaties' inquiry into the ratification of the Optional Protocol to the Convention Against Torture on behalf of the United Nations Association of Australia (Tasmanian Division).

The United Nations Association of Australia acts as a link between the United Nations and the citizens of one of its member states. UNAA is a non-profit, community organisation represented in every state and territory through its divisions and national body.

Our members seek support for the United Nations, its programmes and its agencies amongst the community, Government and business, and strive to demonstrate why the UN matters to people everywhere. As well as promoting the role of the United Nations within the community, UNAA also seeks to hold Australia to the principles and obligations that flow from membership of the international community.

UNAA Tasmania urges JSCOT to support the ratification of the Optional Protocol to the Convention Against Torture and move at the earliest opportunity to implement the National Preventive Mechanism. UNAA Tasmania also urges the Australian Government to evaluate associated policy on detention, including alternative methods of accountability such as press freedom and legislative protections in custody and interrogation, with a view to reducing the risk of torture, cruel, inhuman or degrading treatment and strengthening human rights.

Yours sincerely,

Pat McConville
President
UNAA Tasmania

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UNAA Tasmania submission to the **Joint Standing Committee on Treaties** on the **Optional Protocol to the Convention Against Torture**

Background

The United Nations Association of Australia (Tasmanian Division) is pleased to provide a submission to the Joint Standing Committee on Treaties (JSCOT) in respect of its deliberations on Australia's ratification of the Optional Protocol to the Convention Against Torture (the Protocol).

Australia is already party to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention), having ratified it on 8 August 1989. The Protocol is intended, "to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty…," and in doing so strengthen the protections of persons deprived of their liberty against torture.

Specifically, the Protocol requires States parties to establish a domestic independent visiting body able to examine the treatment of persons deprived of their liberty, known as the National Preventative Mechanism (NPM). The Protocol also requires that the Subcommittee on Prevention of Torture (SPT), a supranational body comprised of experts elected by States parties, be allowed to conduct visits and report on States parties' compliance with their obligations under the Convention.

JSCOT previously considered the Protocol in 2003, shortly after its adoption and three years prior to its entry into force in June 2006. At that time, a majority of the Committee felt that inspections by the SPT resulting from Australia's succession to the Protocol would not, without compelling reasons, be an appropriate use of United Nations resources. It should be noted that while notwithstanding the exclusion of the SPT, Australia has been required to report on its compliance with the Convention, most recently in 2008.[1]

Moreover, between the periods of consideration by JSCOT more than 63 States have acceded to the Protocol, including a number of nations with issues in respect of detention comparable to Australia. Much has changed in the means by which the United Nations manages human rights issues. In 2006, the Commission on Human Rights was replaced with

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[1] Committee Against Torture, *Concluding Observations: Australia* (2008), CAT/C/AUS/CO/3

the Human Rights Council. At the same time, the Universal Periodic Review was introduced, requiring all States to report on their compliance or otherwise with human rights instruments to which they are party every four years. Australia appeared before the Universal Periodic Review on 27 January 2011. Arguably, the objections raised against ratification in 2003 are not valid.

Australia signed the Protocol on 19 May 2009, and recently announced its intention to ratify.[2] UNAA Tasmania welcomes the Australian Government's in-principle support for the ratification of the Protocol and recommends JSCOT's endorsement of the same. This submission reflects briefly on the reasons for ratification of the Protocol and the effective application of National Preventative Mechanisms (NPMs) across institutions susceptible to abuses of Australia's obligation under the Convention.

Interrogation

Following the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010*, torture is defined as the infliction of severe physical or mental pain or suffering, when that suffering is inflicted for the purpose of obtaining from the victim or another person information or a confession; punishing a person for an actual or suspected act; or for intimidation or coercion.[3]

While the Commonwealth definition of torture does not include the entire range of actions implied under the Convention, it does recognise that persons are particularly vulnerable to torture during questioning, interrogation and law enforcement investigations. In general, the right to have legal representation present during interviews acts as a safeguard against torture, abuse and mistreatment. However, during certain types of interrogation under the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), a person can be questioned in the absence of a lawyer of their choice, and denied contact with a lawyer of their choice.[4] Instead, the same authority undertaking the interrogation is required to approve the interviewee's legal counsel. Even when legal counsel is approved, contact with counsel must be conducted in a way that can be monitored by the Australian Security Intelligence Organisation (ASIO).[5]

Plainly, the risk of torture and degrading treatment increases sharply in extreme and urgent circumstances. However, notwithstanding the presence of the Inspector General of Intelligence and Security (IGIS) and the express prohibition on cruel, inhuman and degrading treatment, restrictions on legal representation severely weaken the safeguards against torture during interrogations. Combined, these conditions mean that the use of the special powers accorded to ASIO represents a substantial risk of torture. Ratification of the Protocol

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[2] Attorney-General and Minister for Foreign Affairs, *Gillard Government moves to ratify OPCAT*, 28 February 2012, accessed 22 May 2012, www.foreignminister.gov.au/releases/2012/kr_mr_120228.html.

[3] *Criminal Code Act 1995* (Cth), the *Criminal Code*, s. 274.2 (1).

[4] *Australian Security Intelligence Organisation Act 1979* (Cth), s. 34ZP, 34ZO.

[5] Ibid, s. 34ZQ.

presents an opportunity for Australia to re-examine the appropriateness of these powers, or at least to augment the means of monitoring the use of these powers.

Prisons, gaols and custodial centres

The Universal Declaration of Human Rights clearly notes that the curtailment of fundamental human rights and freedoms, such as those consequential from criminal convictions, should be limited to those necessary for, "the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[6]

Human rights are universal and must be afforded to all people regardless of their status, including convict status. People are sent to prison as punishment, not for punishment. The retributive element of the Australian prison network consists in the deprivation of an inmate's liberty. Excessively harsh conditions do not contribute to rehabilitative outcomes, nor do they assist in securing recognition and respect for rights and freedoms required by the Declaration.

Correctional and custodial facilities are necessarily highly managed. The coercive and opaque nature of prison management also makes prisons vulnerable to abuse and subject to the threat of torture. Mitigating the threat of torture involves both clear oversight and the development of a culture amongst custodial officers which is alert to the risks of torture and violations of human rights. Those risks comprise not only damaging the dignity of the person, but also material risks to the welfare of prisoners and guards, the exacerbation of difficult conduct and the undermining of rehabilitative efforts.

Experience in Australia and overseas shows that prisons, gaols and custodial centres are particularly vulnerable to conditions amounting to cruel and degrading treatment. Excessive lockdowns of prisoners and the overcrowding of holding cells in police stations and other places of detention are of particular concern.

The dissemination of monitoring standards against which custodial officers are aware they will be held would assist in fostering a culture that is vigilant of conduct and conditions that may constitute torture. A number of nations, including New Zealand[7] and the United Kingdom,[8] have used the ratification of the Protocol as an opportunity to create useful standards or identify issues across a range of detention facilities. In these cases, as might be anticipated in Australia, a number of recurring issues have been identified and knowledge has been shared to enable centres to improve standards.

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[6] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 29 (2).

[7] National Interest Analysis [2012] ATNIA 6, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* done at New York on 18 December 2002, [2009] ATNIF 10, para. 10.

[8] UK National Preventive Mechanism, *Monitoring Places of Detention: First Annual Report of the United Kingdom's National Preventive Mechanism 2009-10*, February 2011, p. 10.

Implementation

The National Interest Analysis (NIA) identifies the most efficient and cost-effective method of implementation of the Protocol as taking existing State, Territory and Federal authorities together to constitute the NPM.[9] Research undertaken by the Australian Human Rights Commission recommends that a mixed-model should be adopted, in which existing State, Territories and Australian Governments are coordinated by a designated national authority; likely the AHRC.[10]

Where compliant authorities already exist, their coverage or structure may be able to be adapted to carry out of the obligations of included in the Protocol. However, in some jurisdictions, including Tasmania and Queensland, the fundamental requirements of functional independence and free and unfettered access to places of detention cannot be achieved by existing bodies. In these jurisdictions, the authorities charged with prison and correctional centre inspections are in fact subordinate to the systems they are charged with regulating. In such cases, substantial change will be required; and it is encouraging that jurisdictions such as Tasmania are moving towards a model of greater transparency outside the process of ratification.[11]

Role of the press in immigration detention

The spirit of the Protocol resides in enhancing the transparency of conditions of those at risk of torture. While the Protocol and the required NPMs are formal processes of national and international authority, there are significant ways outside of State control by which the objects of the Convention might be achieved.

The conditions of detention for both punitive and administrative detention are significant matters of public interest. In a liberal democracy, wherein government is accountable to the people, there is a strong presumption that government activities should be open and transparent. Similarly, there exists an implied freedom of political communication that extends to all people in Australia by virtue not just of Australian law, but also international instruments complementary to the Convention to which Australia is party. In both of these respects, civil society and the press typically act as conduits through which the public is able to hold governments to account, and by which the freedom of political communication is exercised.

In the case of prisons, gaols and custodial centres there are a number of reasons media access to facilities and to detained persons might be restricted. These include the surrender of certain freedoms relating to participation in public affairs by persons convicted of crimes; that revealing privileged information would put at risk the volatile environments of custodial

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[9] National Interest Analysis, para. 34.

[10] Harding, Richard and Neil Morgan, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, 2008.

[11] A key recommendation of the *Breaking The Cycle: Strategic Plan for Tasmanian Corrections 2011-2020* is to, "… explore options for the establishment of an independent Prisons Inspectorate."

centres; and that the media profile of a detainee may cause a risk to the good order of a custodial centre.[12] These reasons can be understood in the context of punitive detention.

In the case of immigration detention, it is less clear that these reasons should apply. A person being assessed for refugee status has not necessarily done anything to justify the abrogation of their freedoms. As aforementioned, the reduced severity and different character of immigration detention should ensure that these environments do not harbour the same type of resentment and are far less volatile than punitive detention centres.

Currently, press access to immigration detention parallels the restrictions on access to prisons, gaols and other custodial centres. Indeed, the Deed of Agreement which journalists are required to sign before entering any immigration detention centres is based, in part, on practice in prisons across NSW, Victoria and Queensland.[13] Networks and journalists must be accompanied by Department of Immigration and Citizenship (DIAC) staff at all times, not substantially communicate with detainees and submit video footage for approval by DIAC.[14]

This is not to say there are not reasons for which media access to immigration detention might be restricted. Indeed, the Deed of Agreement also contains reasonable provisions for protecting the privacy of individuals and preventing refugee claims *sur place* (wherein public comments can become grounds for a claim for protection where none previously existed).

However, it is difficult to reconcile such generally heavy restrictions on the media and detainees with the notion of public accountability, individual political freedom or the transition of persons potentially originating from conditions of extreme repression to a society in which they will have, and must appreciate, the rights and responsibilities of liberal democracy. Even if the same reasons for restricting freedom of political communication as in punitive detention did exist, such blanket restrictions are unlikely to constitute an appropriate adaptation to the particular circumstances of immigration detention.

Conclusion

Ratification of the Protocol is likely to result in greater awareness of human rights when assessing standards of detention and an increased accountability against those standards. The creation of an NPM is likely to assist in providing uniformity in reporting on conditions of detention and establishing and disseminating best practice. Additionally, ratification of the Protocol provides an opportunity to evaluate associated policy on detention, including alternative methods of accountability such as press freedom and legislative protections in custody and interrogation. UNAA Tasmania strongly urges JSCOT to support ratification of the Protocol by Australia and implementation of it as soon as practicable.

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[12] *Wotton v State of Queensland and Anor* [2012] HCA S314 (Submission on behalf of the First Defendant, 26 July 2011, paras. 21-38.)

[13] Philip Dorling, “US prison inspired media rule,” *The Age*, March 14 2012 accessed 22 May 2012, www.theage.com.au/opinion/political-news/us-prison-inspired-media-rule-20120313-1uyh9 html.

[14] Department of Immigration and Citizenship, *Deed of agreement: Media access*, accessed 22 May 2012, www.immi.gov.au/media/media-access/_pdf/media-access-deed-of-agreement.pdf.