

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women

Background

- 6.1 The proposed treaty action is accession to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- 6.2 Parties to the Optional Protocol recognise the competence of the Committee on the Elimination of All Forms of Discrimination Against Women (the CEDAW committee) to receive and consider written complaints about alleged violations of Australia's obligations under CEDAW.¹ These obligations include access to and equal opportunities for women in, political and public life, education, marriage, social security, health and employment.² The CEDAW committee is a body of experts elected by State Parties to CEDAW, who serve in their personal capacity.³
- 6.3 Australia has not previously signed the Optional Protocol, which was adopted on 6 October 1999 and came into force on 22 December 2000. It can accede to the Optional Protocol, however, as it is a party to

1 National Interest Analysis (NIA), para 4.

2 Mr Geoffrey Skillen, *Transcript of Evidence*, 15 September 2008, p. 2.

3 NIA, para 9.

CEDAW. There are currently 190 parties to CEDAW and 90 parties to the Optional Protocol.⁴

Obligations

- 6.4 There are two main facets to the Optional Protocol. The first is the complaints procedure (Articles 2 to 7) and the second is the inquiry powers of the CEDAW committee (Articles 8 to 10).
- 6.5 The Optional Protocol allows individuals or groups of individuals to make complaints (communications) to the CEDAW committee about discrimination once they have exhausted all domestic legal avenues.⁵ The CEDAW committee can then issue views as to whether a breach of CEDAW has occurred and make recommendations on methods to address this breach (Article 7).⁶
- 6.6 In relation to the exhaustion of domestic remedies, the Protocol provides the CEDAW committee with the power to consider a communication where, in its judgement, 'the application of such remedies is unreasonably prolonged or unlikely to bring effective relief' (Article 4(1)).
- 6.7 Articles 8 and 9 empower the CEDAW committee to conduct confidential investigations into alleged systemic or grave discrimination, as opposed to individual discrimination, by a Party unless that Party has made a declaration under Article 10 that it does not recognise the competence of the CEDAW committee to conduct inquiries.
- 6.8 Parties to the Optional Protocol are also obliged to:
- Ensure individuals under their jurisdiction are not subject to ill-treatment or intimidation as a consequence of communication with the CEDAW committee (Article 11);
 - Report annually on their activities under the Optional Protocol (Article 12); and

4 Ms O'Rourke, *Transcript of Evidence*, 15 September 2008, p. 6; NIA, para 1.

5 NIA, para 6.

6 NIA, para 4.

- Publicise CEDAW and the Optional Protocol and facilitate access to information about the views and recommendations of the CEDAW committee (Article 13).
- 6.9 The Committee notes that as findings are made against State Parties, this effectively means that if a complaint was made in Australia in relation to discrimination that has occurred in, for example, the workplace or private sector, the CEDAW committee's response would be directed at the Commonwealth.⁷
- 6.10 Government representatives informed the Committee that the views of the CEDAW committee are non-binding and can only guide Australia in its implementation of international law. Australia would not be obliged to conform to the CEDAW committee's views if it believed there was a better way to implement its obligations under CEDAW.⁸
- 6.11 Australia made two reservations to CEDAW in relation to maternity leave and combat duties for women in the Defence Force. Communication could not be entered into by the CEDAW committee on issues relevant to these reservations as Australia is not bound by the obligations in the articles to which the reservations relate.⁹

Reasons for Australia to take treaty action

- 6.12 Accession to the Optional Protocol would give women in Australia a greater opportunity to contest the implementation and application of human rights. It would also increase accountability in promoting gender equality and non-discrimination between men and women.¹⁰
- 6.13 The Government considered that the Optional Protocol would:
- provide women with an additional mechanism outside Australia's judicial and political context;
 - demonstrate the Government's strong commitment to promoting the elimination of discrimination against women and the standards enshrined in CEDAW; and

7 Mr Geoffrey Skillen, *Transcript of Evidence*, 15 September 2008, p. 8.

8 NIA, para 9.

9 NIA, paras 12 to 14.

10 Mr Geoffrey Skillen, *Transcript of Evidence*, 15 September 2008, p. 2.

- demonstrate the Government's priority to addressing global challenges such as the protection of human rights.¹¹
- 6.14 The Committee received a number of submissions supporting accession to the Optional Protocol. Many submitters considered that the Protocol was important to bring CEDAW into line with other major human rights treaties that contain complaint mechanisms, including the Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Civil and Political Rights and the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.¹²
- 6.15 The Human Rights Law Resource Centre argued that Australia's experience as a party to the communication procedures under these treaties:
- ... makes it clear that international communication mechanisms do not undermine democracy or introduce a Bill of Rights 'through the back door'.¹³
- 6.16 The Committee was interested in the international scrutiny that accession to the Optional Protocol would provide and the example that would be set for other countries whose anti-discrimination measures may not be as fully established. The Attorney-General's Department and the Office for Women advised that the Government was prepared to have its domestic remedies critiqued at an international level and that:
- ... the government does see part of the justification for its becoming party to the optional protocol is to set just an example to other countries. The government engages other countries on a regular basis on a range of human right issues. It has a number of ongoing bilateral human rights dialogues with other countries in our region wherein human rights issues are raised with them, including the sort of issues that are dealt with under the convention. It would be fair to say that the government would regard its standing to do that to

11 NIA, paras 6 to 8.

12 Law Council of Australia, Submission No. 22, p. 1; Amnesty International Australia, Submission No. 10, p. 1; United Nations Association of Australia, Submission No. 16, p. 2; NSW Council of Civil Liberties Inc, Submission No. 18, p. 5; Human Rights Law Resource Centre, Submission No. 21, p. 10.

13 Human Rights Law Resource Centre, Submission No. 21, p. 14.

be enhanced by its becoming a party to the optional protocol.¹⁴

- 6.17 The Pacific region is one area where the Government is working to support countries to become a party to the Optional Protocol.¹⁵
- 6.18 A number of submissions provided support for the inquiry powers of the CEDAW committee.¹⁶ Amnesty International Australia argued that:
- [t]he inquiry procedure allows the Committee to focus attention on widespread practices affecting women such as lack of equal opportunities in education, politics or the work place; sexual exploitation; or abuses that cross borders and involve multiple governments such as in trafficking or violence against women in situations of armed conflict. It provides for an in-depth examination of the underlying causes of discrimination against women and can focus on abuses that would not normally be submitted to the Committee by means of the individual complaints procedure.¹⁷
- 6.19 In evidence, Government representatives indicated that the Government did not intend to make a declaration under Article 10 so would recognise the competence of the CEDAW committee to undertake inquiries.¹⁸
- 6.20 The NSW Council for Civil Liberties argued that there should be a statutory mechanism within Australia to ensure that CEDAW committee findings are addressed.¹⁹ This view was echoed by the Human Rights Law Resource Centre.²⁰
- 6.21 Accession to the Optional Protocol was also supported on the basis that the jurisprudence contributed by the CEDAW committee would

14 Mr Geoffrey Skillen, *Transcript of Evidence*, 15 September 2008, p. 6; Ms Sally Moyle, *Transcript of Evidence*, 15 September 2008, pp. 6-7.

15 Ms Sally Moyle, *Transcript of Evidence*, 15 September 2008, pp. 6-7.

16 Amnesty International Australia, Submission No. 10, p.1; Human Rights Law Resource Centre, Submission No. 21, p. 12; Law Council of Australia, Submission No. 22, Attachment p. 4.

17 Amnesty International Australia, Submission No. 10, p. 1.

18 Mr Geoffrey Skillen, *Transcript of Evidence*, 15 September 2008, p. 2.

19 NSW Council for Civil Liberties Inc, Submission No. 18, p. 6.

20 Human Rights Law Resource Centre, Submission No. 21, p. 16.

benefit and inform national courts and lawmakers as well as other international human rights bodies.²¹

- 6.22 The obligation under Article 13 to promote public awareness and understanding of CEDAW and the Optional Protocol was considered important:

For women to be able to claim their human rights and fundamental freedoms, it is important that they know what those rights and freedoms are.²²

Opposition to the Protocol

- 6.23 The Committee received a number of submissions from concerned parties opposing Australia's accession to the Optional Protocol.²³

- 6.24 The key issues raised in these submissions were:

- allowing complaints to be considered by a UN Committee could undermine Australian domestic law and legal sovereignty;
- the present mechanisms within Australia to protect women's rights and deal with complaints are adequate;
- the Optional Protocol could lead to increased liberalisation of Australian laws; and
- the CEDAW committee lacks neutrality and has a particular ideological focus.

- 6.25 One submitter argued:

Our democratically established laws are made and upheld by Australians, who take human rights abuse and the rights of Australian women very seriously. This treaty deals with matters which should be decided in the Australian

21 Amnesty International Australia, Submission No. 10, p. 1; NSW Civil Liberties Council, Submission No. 18, p. 3.

22 Human Rights Law Resource Centre, Submission No. 21, p. 11.

23 Mr John Gott, Submission No. 4; Mr J Slee, Submission No. 7; Mr Bruce Nickel, Submission No. 8; Ms Fiona Reeves, Submission No. 9; Mr P. Ariens, Submission No. 11; Mr Bridget Marantelli, Submission No. 12; Mr Laurie Marantelli, Submission No. 13; Mr Leon Voesenek, Submission No. 14; Ms Julianne Murphy, Submission No. 15; Ms June and Mr Robert Mears, Submission No. 17; Ms Siobhan Reeves, Submission No. 19; Family Voice Australia, Submission No. 20.

parliament and courts. There should be no final appeal to an United Nations tribunal/committee.²⁴

6.26 Similarly, another participant stated:

It would be imprudent for Australia to sign away the very serious issue of women's human rights to an external ideological committee with an unimpressive record.²⁵

Access to the CEDAW committee

6.27 The Committee questioned how realistic it is to expect that many women would be able to make a complaint to the CEDAW Committee without some form of assistance. The Committee was informed that complaints could be made by other parties on behalf of an individual, such as a lawyer or non-government organisation.²⁶ The Office for Women is also producing an information package on CEDAW, which will include information about the Optional Protocol.²⁷

6.28 The Government considered that as Australia has been a party to CEDAW for 25 years, it could expect that there would be relatively few communications from individuals or groups in Australia.²⁸

CEDAW committee investigations to date

6.29 The Committee notes that the CEDAW committee has considered 10 communications made against State parties in the last eight years with violations found in four cases.²⁹ In each of these cases, while the countries in question accepted some of the recommendations, available evidence suggests that none of the recommendations were fully implemented.³⁰

24 Ms Fiona Reeves, Submission No. 9, p. 1.

25 Ms Siobhan Reeves, Submission No. 19, p. 1.

26 Mr Geoffrey Skillen, *Transcript of Evidence*, 15 September 2008, p. 7.

27 Ms Sally Moyle, *Transcript of Evidence*, 15 September 2008, p. 7.

28 NIA, para 18.

29 Mr Geoffrey Skillen, *Transcript of Evidence*, 15 September 2008, p. 6.

30 Attorney-General's Department, Submission No. 23.

Implementation

- 6.30 The *Sex Discrimination Act 1984* implements Australia's obligations under CEDAW. As the Optional Protocol does not introduce any substantive new obligations, no implementing legislation or policy changes would be required.³¹

Consultation

- 6.31 Relevant Commonwealth Ministers and agencies and State and Territory Governments were consulted about the Optional Protocol and have provided support for accession. Submissions received by the Government as part of its public consultation process also supported accession to the Optional Protocol.³² This included the four women's secretariats funded by the Department of Families, Housing, Community Services and Indigenous Affairs, which represent 38 different non-government organisations.³³

Conclusions and recommendation

- 6.32 While the Committee concurs with the view that the Optional Protocol will provide an additional mechanism to protect women's rights outside the domestic remedies available through Australia's sex discrimination laws, the Committee has some concerns about how far the CEDAW committee can actually effect change given the relatively few investigations that have been undertaken in the past eight years.
- 6.33 The Committee considers, however, that accession to the Protocol will demonstrate Australia's commitment to human rights and allow international scrutiny of this commitment to take place. It therefore supports binding treaty action being taken.

31 NIA, para 11.

32 NIA, Consultation attachment.

33 Mr Geoffrey Skillen, *Transcript of Evidence*, 15 September 2008, pp. 2-3;

Recommendation 9

The Committee supports the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* and recommends that binding treaty action be taken.

