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**Submission to the
National Interest Analysis
of the
Optional Protocol
to the
*Convention against Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment***

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1. Executive Summary

The Human Rights Law Resource Centre (**HRLRC**) strongly supports Australia's accession to the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**Optional Protocol**).

This submission to the National Interest Analysis examines the benefits of Australia's accession to the Optional Protocol and outlines what the obligations for its implementation would be.

The HRLRC considers that Australia's accession to the Optional Protocol would:

- (a) protect the human rights of persons deprived of liberty and reduce the incidence and likelihood of ill-treatment of such persons;
- (b) complement and strengthen existing domestic inspectorate and monitoring mechanisms for places of detention and promote human rights compatible detention management;
- (c) foster and promote systematic analysis (and systemic change where necessary) of laws and policies affecting the rights of persons deprived of their liberty;
- (d) strengthen Australia's leadership role within the international community; and
- (e) be consistent with the Australian Government's commitment to constructive engagement with the UN human rights system and to the harmonisation of domestic laws, policies and practices with international human rights standards.

The HRLRC considers that the Optional Protocol can be implemented with relative ease within Australia's existing political and legal structures.

Each of these issues is considered further below.

2. Background

On 18 December 2002, the UN General Assembly adopted the Optional Protocol. The Optional Protocol establishes a system of regular visits to places of detention by independent expert bodies in order to prevent torture and other forms of ill-treatment from occurring. In this regard, the Optional Protocol:

- (a) provides for the creation a new international body – the United Nations Subcommittee on the Prevention of Torture (**SPT**); and
- (b) requires each State Party to establish or designate its own national preventative mechanism(s).

The HRLRC notes that, under customary international law, there is *already* a requirement for states to prevent torture.¹ The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)*,² as well as article 7 of the *International Covenant on Civil and Political Rights (ICCPR)*,³ also imposes on each State Party negative, positive and procedural obligations to prevent torture and other forms of ill-treatment:

- (a) the *negative* obligation requires each State Party not to commit acts of torture or other forms of ill-treatment;
- (b) the *positive* obligation requires each State Party to take effective legislative, administrative, judicial or other measures to prevent acts of torture or other forms of ill-treatment; and
- (c) the *procedural* obligation requires each State Party to ensure that there be 'effective' official investigations of arguable claims of torture or other of ill-treatment.

The obligations contained in the Optional Protocol recognise the importance and significance of the positive and procedural obligations required by article 2 of the *Convention against Torture*.

The HRLRC considers that mechanisms for investigation and inspection of places of detention are essential to ensure the effective prohibition of and protection against torture and other forms of ill-treatment. As the UN Special Rapporteur on Torture has explained:

The rationale for [the Optional Protocol] is based on the experience that torture and ill-treatment usually take place in isolated places of detention, where those who practise torture feel confident that they are outside the reach of effective monitoring and accountability.⁴

The Optional Protocol, therefore, aims to provide the structure and support to assist each State Party to ensure the actual prevention of torture and other forms of ill-treatment within its jurisdiction.

¹ International Criminal Tribunal for Former Yugoslavia, *Prosecutor v. Furundzija* (10 December 1998), Case No. IT-95-17/I-T, [148].

² The *Convention against Torture* was signed by Australia on 10 December 1985 and ratified on 8 August 1989.

³ The *ICCPR* was signed by Australia on 18 December 1972 and ratified on 13 August 1980.

⁴ Report of the UN Special Rapporteur on Torture, UN Doc.A/61/259 (14 August 2006), [67].

3. Benefits of Accession to the Optional Protocol

3.1 Ensure protection of the human rights of persons deprived of liberty

The HRLRC considers that accession to the Optional Protocol will assist to ensure the protection of the human rights of people deprived of their liberty, including persons subject to arrest and detention, prisoners, involuntary psychiatric patients, asylum-seekers and others in immigration detention, and juvenile detainees. The system of periodic and follow-up visits required by the Optional Protocol recognises that a comprehensive system of inspection and investigation is required *in addition to* a complaints-based system in order to adequately protect the human rights of persons deprived of their liberty.

The existence of inspection and investigation mechanisms is particularly important in the context of persons deprived of their liberty. In most situations of detention, the power imbalance between the detainor and the detainee can be immense. As a result, detainees who have been the subject of ill-treatment may be extremely reluctant to make complaints about their treatment. This is particularly the case where there is no independent body to whom such complaints may be made. Indeed, those to whom detainees are usually complaining wield enormous power over every aspect of their daily lives and their susceptibility to pressure, threats or reprisals are great.

For these reasons, the HRLRC considers that a complaints-based system alone can not be relied upon to ensure that detainees are receiving appropriate protection of their rights. Investigation and inspection mechanisms are also essential to ensuring that the human rights of persons deprived of their liberty are properly protected.

3.2 Complement and strengthen existing domestic mechanisms

While some mechanisms that provide for inspection and investigation of places of detention currently exist in Australia, most situations that involve the detention of individuals rely on a complaints-based system. The HRLRC considers that accession to the Optional Protocol will ensure that existing domestic mechanisms are complemented and strengthened by the inclusion of investigation and inspection requirements.

Australia already possesses a comprehensive complaints-based system. There are many avenues that exist for persons deprived of their liberty to make complaints, including the Human Rights and Equal Opportunity Commission, state and territory commissions, Commonwealth Ombudsman, state and territory ombudsmen, anti-discrimination boards, health services commissioners and so on.

However, the mechanisms for the inspection of detention facilities throughout Australia are not as well developed. Furthermore, where such procedures do exist, many of these mechanisms lack proper independence. They are often agencies that form part of, or are answerable to, state departments of justice and their independence may therefore arguably be compromised.

An additional concern with some existing mechanisms is that their findings are often not published. This also has the potential to compromise their independence and undermine the transparency of these agencies.

In these respects, the HRLRC considers that the system of investigation and inspection required by the Optional Protocol would complement and strengthen Australia's existing domestic mechanisms. The Optional Protocol would provide an important opportunity to review existing mechanisms to ensure that they meet these important standards of independence and transparency.

3.3 Foster and promote systematic analysis

The HRLRC considers that accession to the Optional Protocol will provide an important opportunity to undertake more systematic and holistic reviews of Australia's places of detention. By shifting the emphasis from the ad hoc nature of individual complaints to an investigative and inspection model, the Optional Protocol enables a more systematic analysis of the compliance of Australia's places of detention with international human rights standards. The HRLRC considers that this is essential in ensuring the elimination of torture and other forms of ill-treatment in Australia.

Significantly, the Optional Protocol presents an opportunity to undertake this review using a human rights framework and by reference to established international standards. In this sense, the Optional Protocol seeks to establish a dialogue between the international preventative mechanism, the SPT, and domestic preventative mechanisms. Article 11 of the Optional Protocol makes provision for the SPT to 'advise and assist' the national preventative mechanisms, to maintain direct and confidential contact, and to offer training and technical assistance.

This contact would foster a systematic analysis of domestic issues in Australia within a global context and assists the national preventative mechanism to draw on developing international human rights law and practice in this area. Such an approach would allow a more comprehensive analysis of any systemic issues that may exist in Australia's places of detention, as well as how to deal with such issues.

3.4 Australia's international role

The HRLRC considers that accession to the Optional Protocol would give very real substance to the Government's commitment to promote and provide leadership on human rights at the international level. Indeed, Australia has a long and distinguished legacy of engagement with the United Nations and leadership in the field of human rights.

It is unfortunate that Australia's reputation as a country committed to international human rights standards has been eroded over recent years. Accession to the Optional Protocol would demonstrate the current Australian Government's commitment to reversing this trend and becoming a regional and global leader in the protection and promotion of human rights.

3.5 Consistency with Government Commitment to Constructive Engagement with the UN Human Rights System

Accession to the Optional Protocol is supported by the Australian Labor Party's National Platform and Constitution, which endorses both the promotion of human rights internationally and the development of international standards and mechanisms for the protection and enforcement of these rights.⁵

In its recent Concluding Observations on Australia, the Committee against Torture 'notes with appreciation [Australia's] commitment to become a party to the Optional Protocol to the Convention'.⁶ By following the Committee's recommendation 'to speedily conclude its internal consultation and ratify the Optional Protocol to the Convention in order to strengthen the prevention against torture',⁷ the Australian Government would demonstrate its commitment to constructive engagement with the UN human rights system. Accession to the Optional Protocol would also place Australia in a good position to consider a possible role within the proposed SPT.

4. Implementation Obligations

The HRLRC considers that implementation of the obligations required by accession to the Optional Protocol is likely to involve the allocation of limited resources. While the HRLRC does not consider that Australia is currently fully compliant with the obligations required by the Optional Protocol, it does consider that implementation of the obligations may require a reasonably wide-ranging review of the operation and functions of existing domestic agencies.

This section outlines the consideration that the Australian Government will need to give to meet the obligations contained in the Optional Protocol.

4.1 Subcommittee on the Prevention on Torture

The primary obligation of each State Party is to allow and facilitate a visit by the SPT.⁸ On accepting a visit from the SPT, each State Party is required to collect and provide access to information concerning people in detention, including:

- (a) unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of places and their location; and

⁵ Australian Labor Party, *2007 National Platform and Constitution*, adopted by the 44th National Conference in Sydney on 27–29 April 2007, <<http://www.alp.org.au/platform/index.php>>, 206-226.

⁶ Committee against Torture, *Concluding Observations*, 40th session, CAT/C/AUS/CO/3 (22 May 2008), [6].

⁷ *Ibid*, [34].

⁸ Articles 4 and Part III of the Optional Protocol sets out the obligations of each State Party to receive and support the SPT to undertake its functions of investigation and inspection.

- (b) all information referring to the treatment of those persons as well as their conditions of detention.⁹

The National Interest Analysis must therefore consider whether such information is currently collected. Depending on the extent to which this information is already collected, this requirement under the Optional Protocol may require the commitment of minimal resources.

The HRLRC notes that Australia is already required to collect much of this information pursuant to its obligations under the *Convention against Torture* and other international instruments, such as the *ICCPR*. It is therefore likely that the requirements under the Optional Protocol would not impose the commitment of significant further resources by the Australian Government in order to comply with these obligations.

4.2 National Preventative Mechanisms

Article 3 and Part IV of the Optional Protocol set out the obligations concerning the establishment or designation of independent national preventative mechanisms. The HRLRC notes that the national prevention mechanism can be 'one or several'. In this sense, the HRLRC considers that it would be appropriate to use and develop the roles and functions of existing federal and state-based mechanisms. This particularly important given that existing responsibilities for particular situations of detention are shared between federal and state bodies; for example, responsibility for prisons and detention within our justice systems is a state responsibility, whereas places of immigration detention fall within the federal jurisdiction.

(a) A central co-ordination point

Importantly, the Optional Protocol would require a particular agency to take responsibility for national co-ordination of prevention mechanisms and as a liaison point with the SPT. The HRLRC considers that the Human Rights and Equal Opportunity Commission (**HREOC**) may be an appropriate body to undertake this role. In this respect, HREOC:

- (i) is an independent institution in accordance with the Paris Principles;
- (ii) is experienced in liaising with United Nations agencies and coordinating domestic and international approaches to human rights; and
- (iii) already has the authority to conduct investigations into certain places of detention, such as immigration detention.

HREOC may therefore be an appropriate body to ensure the level of coordination required by the Optional Protocol so that a national preventative mechanism and SPT can function harmoniously and mutually support the work of each other.

⁹ *Optional Protocol*, article 14(1)(c)-(e).

The HRLRC notes that it is likely that a central co-ordinating body, such as HREOC, will require additional funding to ensure that it is properly resourced to undertake this function.

(b) Roles and functions of existing federal and state-based mechanisms

As discussed previously in this submission, accession to the Optional Protocol would provide an important opportunity to review Australia's existing federal and state-based mechanisms to ensure that their roles and functions comply with the requirements imposed by the Optional Protocol.

Importantly, the Optional Protocol requires national preventative mechanisms to:

- (i) be independent;¹⁰
- (ii) be properly resourced;¹¹ and
- (iii) have access to information, detention facilities and detainees, including the opportunity to conduct private interviews.¹²

In this respect, the HRLRC considers that the structure and functions of some existing agencies may need to be reviewed. For example, the Office of Correctional Services Review in Victoria may not be sufficiently independent from the Victorian Department of Justice and may need to be reviewed in light of the requirements in the Optional Protocol.

On the hand, there are some bodies that will require little change as a result of accession to the Optional Protocol. For example, the Inspector of Custodial Services in Western Australia is likely to already conform with most requirements of the Optional Protocol. Under enabling legislation, the Inspector of Custodial Services is an independent body that is able to undertake periodic visits to all prisons, detention centres custody centres and lock-ups and to publish reports on these visits.

For the purposes of the National Interest Analysis, the requirement for Australia to undertake a detailed analysis and review of existing preventative mechanisms will require the most attention. However, as explained throughout this submission, the HRLRC considers that such a review is essential to ensure that these existing mechanisms are complemented and strengthened to guarantee the adequate protection of the human rights of people deprived of their liberty.

¹⁰ *Optional Protocol*, article 18 (1).

¹¹ *Optional Protocol*, article 20.

¹² *Ibid.*

About the Human Rights Law Resource Centre

The HRLRC is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.

The HRLRC's activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

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