

**Submission to the
Joint Standing Committee on Treaties on the
Possible Accession of Australia to the
Optional Protocol to the Convention on the
Elimination of All Forms of Discrimination against
Women**

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Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000
www.hrlrc.org.au

Contact:

Rachel Ball
Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000

T: + 61 3 9225 6647
F: + 61 3 9225 6686
E: hrlaw@vicbar.com.au
W: www.hrlrc.org.au

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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1. Overview

2. The *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Optional Protocol)* was tabled in parliament on 26 August 2008.¹
3. This submission in support of Australia's accession to the Optional Protocol is made by the Human Rights Law Resource Centre (**HRLRC**). The HRLRC considers that accession to the Optional Protocol would:
 - (a) complement and strengthen existing domestic anti-discrimination mechanisms;
 - (b) foster and promote analysis (and change where necessary) of discriminatory laws and practices;
 - (c) strengthen Australia's role within the international community;
 - (d) exemplify commitment to constructive engagement with the UN human rights system and the harmonisation of domestic laws, policies and practices with international human rights standards; and
 - (e) enhance public awareness and understanding of the particular rights and fundamental freedoms of women.
4. The HRLRC further considers that the Optional Protocol can be implemented with relative ease within Australia's existing political and legal structures and is unlikely to subject the Australian Government to a flood of complaints and investigations. Each of these issues is considered further below.
5. The HRLRC makes the following recommendations in relation to Australia's possible accession to the Optional Protocol:

Recommendation 1:

That the Australian Government accede to the Optional Protocol in its entirety.

¹ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000). For a current list of States Parties to the Optional Protocol see <http://www2.ohchr.org/english/bodies/ratification/8_b.htm> at 24 June 2008.

Recommendation 2:

That the Australian Government give positive consideration to establishing effective domestic mechanisms, including judicial and parliamentary mechanisms, to ensure and monitor implementation of and compliance with Views of the Committee on the Elimination of Discrimination against Women, together with Views of other UN treaty bodies on individual communications.

2. Background

6. Australia has been a party to *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* since 1983.² CEDAW codifies women's right to non-discrimination and equality with men. These principles are also reflected in the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and all other major international human rights instruments.
7. The Optional Protocol to CEDAW was adopted by the United Nations General Assembly on 6 October 1999 and opened for signature by states on 10 December 1999. Ninety countries have acceded to the Optional Protocol, but Australia is not yet a party.
8. The Optional Protocol establishes two procedures:
 - (a) a communication procedure; and
 - (b) an inquiry procedure.
9. The communication procedure allows individuals or groups of individuals or people acting on their behalf to submit a communication to the Committee on the Elimination of Discrimination against Women (**Committee**) alleging violations of the substantive rights protected under CEDAW. The inquiry procedure allows the Committee, upon receipt of reliable information, to initiate inquiries into grave or systematic violations of CEDAW by a State Party. The Optional Protocol does not grant additional rights above those already recognised in CEDAW.

² *Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). For a current list of States Parties to CEDAW see <<http://www2.ohchr.org/english/bodies/ratification/8.htm>>. For a current list of States Parties to CEDAW see <<http://www2.ohchr.org/english/bodies/ratification/8.htm>> at 24 June, 2008.

3. Benefits of Accession to the Optional Protocol

3.1 Complement and Strengthen Existing Anti-Discrimination Mechanisms

10. Australia has made important strides towards eliminating discrimination against women and is currently ranked third in the *2007-2008 Human Development Report's Gender-related Development Index*.³ Despite this, significant challenges remain before substantive equality for women is achieved.
11. Currently, legislation exists to prohibit sex discrimination at federal, state and territory levels. However, the existing legislation fails to give full effect to CEDAW. For example, the *Sex Discrimination Act 1984* (Cth) (**SDA**) includes the text of CEDAW as a schedule, but aims only to implement 'certain' CEDAW provisions.⁴ This is in contrast to the *Racial Discrimination Act 1975* (Cth), which aims to give full effect to the *International Convention on the Elimination of All Forms of Racial Discrimination* and closely follows the language of that Convention.⁵
12. The goal of CEDAW is the elimination of all forms of discrimination against women. It applies a broad definition of discrimination and focuses on achieving substantive equality, requiring consideration of the underlying issues that contribute to systemic discrimination.⁶ Protection from sex and gender discrimination should – but often does not – extend beyond a purely formal obligation of equal treatment of men and women. Equality should exist in both the public and private spheres and women should be free from discrimination by any 'person, organization or enterprise'.⁷ CEDAW obliges States Parties to confront the persistence of gender-based stereotypes that affect women as

³ United National Development Program (UNDP), *Human Development Report 2007/2008*, p. 326

⁴ Sex Discrimination Act (1984), section 3. See discussion in Elizabeth Evatt, "Falling short on women's rights: mis-matches between SDA and the international regime", (Speech delivered at the Castan Centre for Human Rights Law, Melbourne, 3 December 2004).

⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁶ The Committee has stated that "a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results": General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 30th Session, 2004.

⁷ CEDAW, article 2(e).

- well as other underlying causes of discrimination.⁸ CEDAW also recognises the need to address compounded forms of discrimination – where sex or gender discrimination is experienced in addition to discrimination on other grounds such as race, disability or age.⁹
13. In contrast, the SDA is limited in the fields of activity which it covers and the types of conduct to which it applies.¹⁰ The failure of the SDA to capture the full ambit of CEDAW was the basis of the HRLRC's recent submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the effectiveness of the SDA.¹¹ The discrepancies between CEDAW and the SDA highlight the value of secondary enforcement mechanisms at the international level.
14. The Optional Protocol is not intended to replace existing domestic remedies or eliminate the need for analysis and change – in fact, the goal of the Optional Protocol is to strengthen the protection and promotion of women's human rights and fundamental freedoms at the domestic level. However, even where domestic measures are strong, in some circumstance they might fail. If this occurs, access to international mechanisms provides a secondary procedure by which women can access a remedy for the violation at issue.
15. It is a basic principle of international human rights law that the obligation to respect, protect and fulfil international human rights obligations includes a duty to provide effective remedies to victims.¹² The Optional Protocol provides an additional means by which the Australian Government can ensure that this obligation is met.

⁸ CEDAW, article 5(a). See also General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, para. 6-7.

⁹ General Recommendation No. 25, above n. 8, para 12.

¹⁰ Elizabeth Evatt, above n. 4.

¹¹ HRLRC Submission available at:
http://www.aph.gov.au/Senate/committee/legcon_ctte/sexdiscrim/submissions/sub20.pdf. The failure of the SDA to fully implement CEDAW has also been noted by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission Australian Law Reform Commission, *Equality before the Law, Justice for Women*, ALRC 69, part I, 2003; Human Rights and Equal Opportunity Commission, *Report on Review of Permanent Exemptions under the SDA 1984*, AGPS, 1992.

¹² Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

3.2 Foster and Promote Analysis and Change

16. When the Optional Protocol was opened for signature in 1999, the Special Adviser on Gender Issues and Advancement of Women, Ms Angela EV King, and the High Commissioner for Human Rights, Mrs Mary Robinson, observed that the Optional Protocol:¹³

will act as an incentive for Governments to take a fresh look at the means of redress that are currently available to women at the domestic level... It is action at the national level which will create the environment in which women and girls are able to enjoy all their human rights fully, and where their grievances will be addressed with the efficiency and speed they deserve.
17. Accession to the Optional Protocol will encourage current and future Australian governments to improve upon existing enforcement mechanisms for women's rights and to take additional steps to implement CEDAW. Use of the enforcement procedures under the Optional Protocol also enables the Committee to develop a focused and detailed jurisprudence that can assist Australia in the implementation of its normative obligations under CEDAW to eliminate all forms of discrimination against women.
18. Another benefit flowing from accession is the opportunity it presents for Australian women and the Australian women's rights movement to engage in the development of the international community's understanding of equality and human rights.¹⁴

3.3 Australia's International Role

19. Australia has a long and distinguished legacy of engagement with the United Nations and leadership in the field of human rights. Australia was instrumental in the formation of CEDAW and was at the forefront of the development of the Optional Protocol.¹⁵ Andrew Byrnes and Jane Connors, both Australians, were key figures in the drafting of the Optional Protocol.¹⁶

¹³ "Joint Statement by the Special Adviser on Gender Issues and Advancement of Women, Ms. Angela E.V. King and the High Commissioner for Human Rights, Mrs. Mary Robinson, on the occasion of the opening for signature of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women", (10 December 1999), <<http://www.un.org/womenwatch/daw/news/akop.htm>> at 24 June 2008.

¹⁴ Emilia Dela Torre, "Women's Business: The development of an Optional Protocol to the United Nations Women's Convention", *Australian Journal of Human Rights*, vol 9, (2000).

¹⁵ Elizabeth Evatt, "Falling short on women's rights: mis-matches between SDA and the international regime", (Speech delivered at Castan Centre for Human Rights Law, Melbourne, 3 December 2004).

¹⁶ Andrew Byrnes and Jane Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention", 21 *Brooklyn Journal of International Law* 679 (1995-1996); Andrew Byrnes, "Slow and Steady Wins the Race?: The Development of an Optional Protocol to the Women's Convention", 91 *American Society of International Law and Procedure* 383 (1997).

20. In this respect, Australia's delay in becoming a party to the Optional Protocol is disappointing and places Australia behind the 90 countries that have already acceded, including Canada, New Zealand and the United Kingdom. Accession to the Optional Protocol would allow Australia to finally lay claim to its legacy in the international movement to promote and protect the human rights and fundamental freedoms of women.
21. Further, many countries in the Asia Pacific region - including Cambodia, Timor-Leste, Indonesia, Vanuatu, the Philippines and Thailand - have already ratified the Optional Protocol. If Australia is to take a leadership role in the region it must demonstrate that it adheres to the standards accepted by other Asia Pacific nations.
22. Accession would demonstrate Australia's commitment to becoming a regional and global leader in the protection and promotion of human rights.

3.4 Constructive Engagement with the UN Human Rights System

23. Accession to the Optional Protocol would constitute a step towards the promotion of human rights internationally and the development of international standards and mechanisms for the protection and enforcement of these rights.
24. To date, Australia's failure to accede to the Optional Protocol has been a source of criticism and concern to the international community. Indeed, in its Concluding Comments in 2006, the Committee encouraged the Australian Government to ratify the Optional Protocol to CEDAW.¹⁷
25. By implementing the Committee's recommendation, the Australian Government would demonstrate its commitment to constructive engagement with the UN human rights system.
26. In addition, Australia is already party to individual communication procedures under the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel and Degrading Treatment or Punishment*. Accession to the Optional Protocol would signify that the Australian Government recognises and respects the human rights and fundamental freedoms of women to the same extent as other human rights.

¹⁷ Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Australia*, Thirty-fourth Session, 16 January – 3 February 2006, CEDAW/C/AUL/CO/5.

3.5 Enhance Public Awareness and Understanding

27. Article 13 of the Optional Protocol requires States Parties to publicise the Optional Protocol and its procedures, including any views or recommendations issued by the Committee. This obligation will help enhance public awareness and understanding of CEDAW, including the principles of non-discrimination and substantive equality. This process will be further aided if the Committee considers communications or undertakes inquiries into alleged violations of CEDAW by Australia. 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. Knowledge and understanding of rights can also act as an empowering force for women and communities.
28. Accession to the Optional Protocol would promote a more robust understanding of CEDAW and of the full ambit of women's rights, an achievement which would contribute to the realisation of the women's rights in Australia.

4. The Opt-out Clause

29. While article 10 of the Optional Protocol contains an 'opt-out clause', which allows a State Party to declare that it does not recognise the Committee's competence with respect to the inquiry procedure, the HRLRC considers that the Optional Protocol should be acceded to in full. The inquiry procedure enables the Committee to address widespread violations and to make recommendations to combat the structural causes of discrimination against women.
30. The inquiry procedure is important because discrimination against women is often systemic in nature and may be embedded in social structures such as family, market and religion. Issues of systemic discrimination are often ill-suited to the incident-specific analysis that takes place under the Optional Protocol's communication mechanism. Opting out of the inquiry procedure would exclude the opportunity that the Optional Protocol provides to consider and combat these more insidious forms of discrimination against women.
31. Further, opting out of the inquiry procedure would weaken Australia's role within the international community and undermine its claim to leadership in the promotion of human rights. If Australia is to enjoy the full range of benefits that accompany accession to the Optional Protocol it must accede to the Optional Protocol in full.

Recommendation 1:

That the Australian Government accede to the Optional Protocol in its entirety.

5. Implementation Obligations

5.1 Implementation of the Optional Protocol

32. The Centre considers that the Optional Protocol can be implemented with relative ease within Australia's existing political and legal structures.
 33. The Optional Protocol does not impose any new substantive obligations outside a commitment to co-operate in the communication and inquiry procedures.
 34. Accession to the Optional Protocol is unlikely to subject the Australian Government to a flood of complaints and investigations. In the first eight years of the Optional Protocol's operation, the Committee has considered 10 communications (only 5 of which have been considered on the merits) and conducted one inquiry.
 35. Articles 2-4 of the Optional Protocol set out strict admissibility requirements that must be met before the Committee can consider the merits of a communication alleging a violation of CEDAW by Australia. Among these is the requirement that the author of a communication exhaust all available domestic remedies in relation to an alleged violation.¹⁸ A communication will also be declared inadmissible if:
 - (a) it is anonymous or not in writing;
 - (b) the same matter has already been examined by the Committee or has been or is being examined by another procedure of international investigation or settlement;
 - (c) the case is incompatible with the provisions of CEDAW;
 - (d) the case is manifestly ill-founded or not sufficiently substantiated; or
 - (e) it is an abuse of the right to submit a communication.¹⁹
 36. In addition, communications will be declared inadmissible where the facts that are alleged occurred prior to the entry into force of the Optional Protocol for Australia, unless the facts continue after that date.²⁰
 37. Similarly, stringent threshold requirements must be met before the Committee will initiate an inquiry. First, the Committee must receive reliable information indicating grave or
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¹⁸ Note that if domestic remedies have been unreasonably prolonged or are unlikely to bring effective relief to the victim, the Committee may examine the merits provided that the other admissibility criteria are met: Article 4(1) of the Optional Protocol. See, for example, *A.T. v. Hungary*, CEDAW, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005).

¹⁹ Optional Protocol, Article 3 and Article 4.

²⁰ Optional Protocol, Article 4(e).

- systematic violations by a State Party of rights guaranteed in CEDAW.²¹ The Committee will then invite the State Party to co-operate and make submissions on the information received.²² The Committee may wish to conduct a visit to the State Party concerned, but may only do so with that State Party's consent.²³
38. At the conclusion of an inquiry or a communication, the Committee will issue its views, comments and recommendations (**Views**) to the State Party. The Committee may follow-up on its inquiry by inviting the State Party to make a submission outlining the measures it has taken in response to its Views.²⁴
39. As mentioned above, Australia is already party to individual communication procedures under the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel and Degrading Treatment or Punishment*. Australia's experience as a party to these human rights treaties makes it clear that international communication mechanisms do not undermine democracy or introduce a Bill of Rights 'through the back door'.²⁵ Rather, they promote the recognition, enjoyment and exercise of human rights and fundamental freedoms of Australian citizens.

5.2 Status of the Committee's Views

40. The National Interest Analysis (**NIA**) that was tabled in parliament alongside the Optional Protocol considers the effect of Committee Views and states that:²⁶
- 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.
41. In relation to interim measures that may be issued by the Committee under Article 5 of the Optional Protocol, the NIA states that:
- 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

²¹ Optional Protocol, Article 8(1).

²² Optional Protocol, Article 8(1).

²³ Optional Protocol, Article 8(2).

²⁴ Optional Protocol, Article 5 and Article 9.

²⁵ Hilary Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights", (1991-1992), 18 *Melbourne University Law Review* 428, 431.

²⁶ National Interest Analysis [2008] ATNIA 26, tables on 26 August 2008, [9].

- action where necessary to give effect to the Committee's request before it has considered the communication fully.
42. The HRLRC considers that these statements do not accurately reflect the status of Committee Views under international law.
43. The Human Rights Committee, the UN treaty body responsible for monitoring the implementation of the ICCPR, has recently issued a draft General Comment on States Parties Obligations under the Individual Communications procedure in the Optional Protocol to the ICCPR.²⁷ This General Comment will be an authoritative statement of the international law pertaining to the views of all of the treaty bodies, including the Committee. The Draft General Comment states that:²⁸
- the function of the Human Rights Committee in considering individual communications has been described as not fully that of a judicial body. However, the views issued by the Committee under the Optional Protocol exhibit most of the characteristics of a judicial decision, follow a judicial method of operation, and are issued in a judicial spirit. Hence, the work of the Committee is to be regarded as determinative of the issues presented.
- ...
- This terminology might be thought to imply that the Committee's views are purely advisory or recommendatory. However, this is not a justifiable conclusion to be drawn, having regard to the place and function of the Optional Protocol in the system of standard-setting and monitoring of obligations established by the International Covenant on Civil and Political Rights [footnotes omitted].
44. The HRLRC notes that while Committee Views are unlikely to be legally binding in a strict sense, they are more significant than a mere 'guide' and import, at least, a legal obligation to fully consider, respect and act in good faith in relation to the Committee's Views. The HRLRC is prepared to provide a more detailed analysis on the legal status of Committee views at JSCOT's request.

5.3 Institutional Review of the Views of Treaty Bodies

45. The views of UN treaty bodies, including those established under each of CEDAW, ICCPR, ICESCR, CAT, and CERD, provide an opportunity for a constructive dialogue as to how best to promote and protect these rights between the Government and independent international human rights experts. This opportunity arises in the context of inquiries and communications (such as those made available under the Optional

²⁷ Human Rights Committee, Draft General Comment 33 of the Human Rights Committee on States Parties' obligations under the first Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33/CRP.3, 25 August 2008.

²⁸ Ibid, [11] and [13].

Protocol) as well as through Australia's periodic reporting requirements under each of the human rights treaties.

46. While international scrutiny and accountability are important aspects of the promotion and protection of human rights, the Committee's views are not enforceable or justiciable under Australian law and no effective domestic mechanisms have been established to ensure and monitor implementation of and compliance with Views.
47. The position in Australia with respect to the Views of treaty bodies can be contrasted with monitoring and implementation mechanisms developed in other jurisdictions, including South Africa, the Netherlands and the United Kingdom. In the United Kingdom, for example, the work of the Joint Parliamentary Committee on Human Rights includes 'scrutinising Government responses to adverse judgments by the European Court of Human Rights'.
48. The Council of Europe has recommended the model and modalities of the UK Joint Parliamentary Committee on Human Rights as a model for other member states.²⁹
49. In this regard, the HRLRC recommends:

Recommendation 2:

That the Australian Government give positive consideration to establishing effective domestic mechanisms, including judicial and parliamentary mechanisms, to ensure and monitor implementation of and compliance with Views of the Committee on the Elimination of Discrimination against Women, together with Views of other UN treaty bodies on individual communications.

²⁹ Further information about the work of the Committee is available in their 2007 Annual Report at: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/38/3802.htm>.