

Issues arising from the Committee's inquiry

- 3.1 The Joint Standing Committee on Treaties (the Committee) affirms Australia's continued abhorrence of acts of torture and other cruel, inhuman or degrading treatment or punishment. The Committee recognises the importance of substantive international mechanisms such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention), the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC) in proscribing violations of human rights.
- 3.2 During the course of the Committee's inquiry a number of views were raised in relation to Australia's position towards ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Optional Protocol) and the relative advantages and disadvantages of becoming a State Party to the Optional Protocol. During its deliberations the Committee considered, among other things
- the adequacy of existing mechanisms in Australia in relation to the prohibition of torture
 - the experience of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)
 - the adequacy of UN resources
 - the reporting procedure under the Convention and Optional Protocol

- Australia's leadership role in relation to human rights
- the Government's substantial and procedural concerns regarding the Optional Protocol.

3.3 These issues are briefly canvassed in this Chapter.

Adequacy of existing mechanisms

3.4 The Committee recognises that the Convention is a substantive human rights instrument with 134 State Parties. The Committee also observes that Australia complies with all of its obligations under the Convention.

3.5 The Attorney-General's Department has the responsibility to report to the Committee against Torture on Australia's implementation of the Convention. Detailed analyses of Australia's legal status and practice in relation to the Convention are comprehensively presented in Australia's First Report under the Convention (the First Report) (1991), and *Australia's Second and Third Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1999).

3.6 Ms Renée Leon, from the Attorney-General's Department, informed the Committee that the practice of the Commonwealth Government in relation to 'human rights instruments has been to implement them by a combination of state and federal laws', depending on the relevant area.¹ Ms Leon advised it has also been practice 'to only legislate where there is a need for the Commonwealth to do so'.² At the Committee's public hearing on 9 February 2004, Ms Leon stated that

The same approach has been taken to the obligations under the torture convention. For instance, the head obligation to prohibit acts of torture is implemented almost comprehensively by state and criminal law.³

3.7 The Commonwealth *Crimes (Torture) Act 1988* was enacted in order to bring Australia into full compliance with the Convention and incorporates the definition of torture (in article 1 of the Convention).

1 Mr Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 16.

2 Mr Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 16.

3 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 16.

- 3.8 The Committee was advised by Ms Leon that 'Australia has extensive mechanisms in place for ensuring that torture is not committed' and that there has never been a case of alleged torture communicated to the Committee against Torture in relation to Australia.⁴ The Committee against Torture has therefore not sought permission to make a visit to Australia.⁵
- 3.9 Also, Amnesty International Australia 'has not reported systemic torture being perpetrated in Australia'.⁶
- 3.10 In relation to the Human Rights and Equal Opportunity Commission (HREOC), the Commission informed the Committee that it cannot investigate allegations that relate directly to the Convention as it is not included in the Commission's complaint handling jurisdiction.⁷ HREOC also advised that its complaint handling functions are limited to 'violations of human rights which have already occurred', and acts 'done or engaged in by or on behalf of the Commonwealth; wholly or partly within a "Territory"', or under Commonwealth or Territory enactment.⁸
- 3.11 However, the Committee understands that under the Convention the Commonwealth and State and Territory governments conduct education and training programs, and have a range of adequate mechanisms which involve preventative elements in relation to torture. The Committee also noted that while the Convention is not scheduled under the *Human Rights and Equal Opportunity Act*, the ICCPR and CRC include provisions proscribing and preventing torture, as identified in HREOC's submission.⁹
- 3.12 As identified in the First Report, in addition to the protections afforded by Commonwealth, State and Territory legislation, human rights are protected by Australia's democratic system of government, an independent judiciary and free press, Royal Commissions and

4 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 10.

5 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, pp. 2 and 5.

6 Amnesty International Australia, *Submission*, p. 3.

7 Ms Rocky Clifford, *Transcript of Evidence*, 9 February 2004, p. 42.

8 Human Rights and Equal Opportunity Commission (HREOC), *Submission*, pp. 8. HREOC's submission notes that 'Territory' is defined so as to exclude the ACT and NT.

9 HREOC, *Submission*, pp. 6-7.

other official inquiries set up for specific purposes, parliamentary committees, ombudsmen, and non-government organisations.¹⁰

Australian Capital Territory

3.13 The ACT Government submission to the inquiry states that

The ACT Government strongly supports Australian signature and ratification of the Optional Protocol. Australian adherence to this important human rights instrument would be an important contribution to international action to prevent torture and other gross violations of human rights.¹¹

3.14 The Committee was advised however that the *Human Rights Bill 2003*, introduced into the Legislative Assembly on 18 November 2003¹², is intended 'to promote the protection of human rights in the ACT consistent with the International Covenant on Civil and Political Rights'.¹³ In addition, the Committee was informed that the ACT Government is developing legislation for the operation and management of the new ACT prison and that

Development of prison legislation will take place within the framework of the *Human Rights Bill 2003* and international standards that apply to the protection of prisoners. Provision for an independent official visitor will be part of the Government's consideration when developing the statutory framework for the facility.¹⁴

Western Australia

3.15 The WA Government submission informed the Committee that

10 Attorney-General's Department (AGs), 1991, *Australia's First Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Canberra, p. 4.

11 ACT Government, *Submission*, p. 1.

12 The *Human Rights Bill 2003* was subsequently passed in the ACT Legislative Assembly on 2 March 2004, see ACT Legislative Assembly, *Minutes of Proceedings*, 2 March 2004, p. 11343.

13 ACT Government, *Submission*, p. 2.

14 ACT Government, *Submission*, p. 3.

Consultation with relevant State Government departments and agencies confirms broad support for the provisions of the Optional Protocol.¹⁵

- 3.16 The submission draws the Committee's attention to the Office of the Inspector of Custodial Services established under the *Prisons Act 1981*. The Office was established

to bring independent external scrutiny to the standards and operational practices relating to custodial services within the State, including adult prisons (public and private), court custody and prisoner transportation. The Inspector's jurisdiction has recently been extended to juvenile detention centres by *The Inspector of Custodial Services Act 2003*.¹⁶

- 3.17 The WA Government advised that the Inspector reports 'directly to the Parliament on the findings of inspections and recommendations for change'.¹⁷

- 3.18 The submission from Professor Richard Harding (Inspector of Custodial Services) outlines the work of the Office of the Inspector of Custodial Services. Professor Harding states that prison 'inspection has enhanced custodial services'¹⁸ and that the 'Western Australian model is the most robust in the English-speaking world'.¹⁹

- 3.19 The WA Government advised the Committee that the Office of the Inspector of Custodial Services would satisfy the requirements in 'Part IV of the Optional Protocol, in relation to Western Australia's preventative mechanisms'.²⁰

- 3.20 The Committee was also informed that the WA Police Service is confident that 'current practices are sufficient to prevent cruel, inhuman or degrading treatment or punishment of individuals in police custody'.²¹

15 WA Government, *Submission*, p. 1.

16 WA Government, *Submission*, p. 1.

17 WA Government, *Submission*, p. 2.

18 Prof Richard Harding, *Submission*, p. 5.

19 Prof Richard Harding, *Submission*, p. 4.

20 WA Government, *Submission*, p. 1.

21 WA Government, *Submission*, p. 2.

European Committee for the Prevention of Torture (CPT)

- 3.21 Professor Harding and Professor Michael Levy, Director of the Centre for Health Research in Criminal Justice, Corrections Health Service, drew the Committee's attention to the work of the CPT. The Committee recognises the successes of the CPT, and that it can be 'considered a prototype for other regional systems or the universal human rights regime'.²²
- 3.22 The CPT was developed from the draft text of the Optional Protocol, prepared by the Swiss Committee against Torture and the International Commission of Jurists, submitted to the UN Commission on Human Rights in March 1980 by Costa Rica.²³ As little progress was made on the draft at the UN, the Council of Europe worked towards developing a European system.
- 3.23 The *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT) was adopted, and opened for signature on 26 November 1987 and entered into force in 1 February 1989.²⁴ Currently 45 Member States of the Council of Europe have ratified or acceded to it.²⁵
- 3.24 The Committee was interested to learn that as of 1 March 2002, the Committee of Ministers of the Council of Europe can invite any non-member State to accede to the ECPT.²⁶
- 3.25 The CPT conducts visits to places of detention to examine the treatment of persons deprived of their liberty, and where necessary
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22 *Exhibit*, Jastine Barrett, 2001, 'The Prohibition of Torture under International Law: Part 1: The Institutional Organisation' in *The International Journal of Human Rights*, Vol. 5, No. 1, (Spring 2001), Frank Cass, London, p. 28.

23 Council of Europe, 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Historical background and main features of the Convention', <http://www.cpt.coe.int/en/documents/historical-background.htm> (15/3/04).

24 Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT), <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=1&DF=&CL=ENG> (15/3/04).

25 Council of Europe, 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=1&DF=&CL=ENG> (15/3/04).

26 Protocol 1, ECPT.

make recommendations to States.²⁷ Similar to the provisions of the Optional Protocol, the CPT has unlimited access to places of detention and information necessary for the CPT to carry out its functions, and operates under the principles of cooperation and confidentiality.

3.26 Since the CPT undertook its first inspection in May 1990, it has conducted a total of 173 visits (111 periodic visits and 62 ad hoc visits) and visited each of the 45 Member States.²⁸ The CPT has published 122 reports.²⁹

3.27 In his submission, Professor Harding acknowledged that 'As with all accountability systems, there is difficulty in measuring the precise extent of compliance'.³⁰ Professor Harding also draws attention to Morgan and Evans, *Combating torture in Europe* where it states that

the links between the recommendations of the CPT and the final outcomes are generally shrouded in some mystery... In the final analysis, the truth is that there are too many imponderables to be able to make a definitive assessment of the impact of the CPT. What is certain is that many CPT recommendations concerning conditions of detention have been implemented and that these have undoubtedly had beneficial effects... Equally clearly, many recommendations have not been implemented.³¹

3.28 Professor Harding reflects that

A fundamental tenet of accountability systems of this kind is that improvement is more commonly achieved by way of gradual accretions rather than radical change.³²

3.29 The Committee was interested to learn about some of Professor Levy's experiences as part of a mission of the CPT to Hungary between May and June 2003, whilst respecting the confidential aspects of the Mission. Professor Levy observed that the 'Mission was of the highest professional order' and that 'No activities were undertaken unless they were strictly within the terms of reference of

27 Articles 1 and 10, ECPT.

28 Council of Europe, 'About the CPT', www.cpt.coe.int/en/about.htm (15/3/04).

29 Council of Europe, 'About the CPT', www.cpt.coe.int/en/about.htm (15/3/04).

30 Prof Richard Harding, *Submission*, p. 3.

31 Morgan and Evans, 2001, *Combating torture in Europe*, see Prof Richard Harding, *Submission*, p. 3.

32 Prof Richard Harding, *Submission*, p. 3.

the mission'.³³ Professor Levy also commented on some of the successes of the CPT, such as the abolition of the death penalty in all countries.³⁴ At the Committee's public hearing he stated that

I would judge the CPT as being very conservative in their approach and absolutely committed to the process of the guidance of government through trust, confidentiality and expertise to the point that many countries seek the guidance of the CPT and invite them to visit.³⁵

3.30 Professor Levy also commented that

Australia has a number of citizens in overseas prisons. While the minority would be in European prisons, they are beneficiaries of a level of protection not offered to other Australian prisoners overseas, nor to Australian prisoners at home.³⁶

3.31 The Committee observes that 13 signatories to the Optional Protocol have ratified the ECPT. While the Committee recognises that the operation of these bodies could complement and enhance the other, it is concerned about the potential for duplication of visits and reporting activities and differing standards under the Optional Protocol and the ECPT.

3.32 The Committee also considers that international preventative mechanisms would potentially be more effective on a regional level than on a global level, and therefore has reservations as to whether the work of the CPT can be effectively translated to a global experience in the form of the Optional Protocol.

United Nations resources

3.33 The Forum of Australia Services for Survivors of Torture and Trauma (FASSTT) submission indicated that the cost of establishing the Subcommittee on Prevention and its operation over a two-year period is estimated at 'approximately \$US two million dollars, which is less

33 Assoc Prof Michael Levy, *Submission*, p. 1.

34 Assoc Prof Michael Levy, *Submission*, p. 2.

35 Assoc Prof Michael Levy, *Transcript of Evidence*, p. 31.

36 Assoc Prof Michael Levy, *Submission*, p. 2.

than 0.1% of the UN regular budget'.³⁷ Nevertheless, the Committee is concerned that significant UN resources would be expended in the operation of the Optional Protocol.

- 3.34 The Committee believes that the number of State Parties to the Optional Protocol would directly influence the operating costs of the Subcommittee. Specifically, the greater the number of State Parties, the greater the amount of travel and resources that would be required to maintain the effectiveness of the system of regular visits to places where people are deprived of their liberty in each state.
- 3.35 Ms Carolyn Millar from the Department of Foreign Affairs and Trade (DFAT) stated that
- in a situation where you have the UN human rights committees overburdened with work, including work to investigate quite serious allegations about human rights, you have to wonder a little about the resource aspect of setting up a body that could go and look at any institution it likes in any country, regardless of whether or not there are any serious concerns or not.³⁸
- 3.36 The Committee shares this concern as UN treaty bodies are generally considered to be under-resourced. The Committee is particularly concerned that the costs associated with the functioning of the Subcommittee on Prevention could potentially divert funds away from other UN human rights programs.
- 3.37 In relation to the Convention, Ms Nicole Bieske from Amnesty International Australia acknowledged that
- the number of state parties to the convention against torture at the moment makes it very difficult for the Committee against Torture to be particularly thorough, detailed and able to assess everybody at the same time. In effect, this will be increasing some resources because we will have another subcommittee set up which will be able to go out to assist in preventing torture from occurring.³⁹
- 3.38 However, the Committee notes that 127 states voted for the Optional Protocol at the UN General Assembly. The Committee is therefore

37 Forum of Australia Services for Survivors of Torture and Trauma (FASSTT), *Submission*, p. 2.

38 Ms Carolyn Millar, *Transcript of Evidence*, 9 February 2004, p. 11.

39 Ms Nicole Bieske, *Transcript of Evidence*, 9 February 2004, p. 21.

uneasy about the potential effectiveness and burden on UN resources if a majority of these states go on to ratify the Optional Protocol.

3.39 Further, the FASSTT and HREOC argued that

the domestic and international monitoring mechanisms provided for in the optional protocol would complement and reinforce the domestic and international mechanisms currently available to people in detention in Australian institutions.⁴⁰

3.40 HREOC also reasoned that the Optional Protocol 'is likely to result in less complaints being taken to the Commission and United Nations Committees'.⁴¹

3.41 The Committee recognises that potential significant resources would be involved in the operation of the Optional Protocol and questions whether it is appropriate for Australia to become a party to another instrument that establishes further monitoring by treaty bodies when there are already concerns regarding existing mechanisms.

Reporting procedure under the Convention and Optional Protocol

3.42 The Committee recognises that a very important feature of the Convention is the reporting process of the Committee against Torture. This procedure addresses allegations of acts of torture, and notably provides an opportunity for the Committee against Torture to make recommendations and observations in relation to State Party reports with the view to prevent future violations of the Convention.

3.43 HREOC's submission acknowledges the significance of the reporting procedure and drew the Committee's attention to the limitations of the effectiveness of the procedure.⁴² Specifically, HREOC raised concerns over the reporting period for a State Party being once every four years, the Committee against Torture report consideration sessions occurring twice a year, and that the Committee against

40 Mr Craig Lenehan, *Transcript of Evidence*, 9 February 2004, p. 39.

41 HREOC, *Submission*, p. 13.

42 HREOC, *Submission*, pp. 10-11.

Torture cannot compel a State Party 'to report or cooperate with it in its consideration of any report'.⁴³

- 3.44 The Committee recognises these concerns and questions the ability of the Optional Protocol to completely address HREOC's concerns. The Committee is doubtful that visit and reporting frequency would improve under the Optional Protocol. The Committee also notes that as with the Convention, the Subcommittee or national preventative mechanisms are similarly limited by the non-binding nature of their recommendations.

Leadership role of Australia

- 3.45 The Committee recognises that Australia is regarded as a leader in human rights standards. For example, the joint departmental submission by three Commonwealth departments highlights Australia's work at the multilateral level in co-sponsoring the annual resolution on torture tabled by Denmark at the UN Commission on Human Rights and at the Third Committee of the UN General Assembly.⁴⁴ At the bilateral level, the submission highlights Australia's human rights dialogues with China, Vietnam and Iran.⁴⁵
- 3.46 The Committee received a significant number of submissions supporting Australia becoming a State Party to the Optional Protocol, drawing attention to Australia's leadership role, amongst other concerns. The Law Society of NSW argued that ratification would
- continue to strengthen Australia's stance on human rights and send a clear message to the international community that Australia remains a leading nation in the advancement of human rights.⁴⁶
- 3.47 The Refugee Council of Australia also stated that
- It is an appropriate act of leadership from the Chair of the United Nations Human Rights Commission⁴⁷

43 HREOC, *Submission*, p. 11.

44 AGs, Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), and Department of Foreign Affairs and Trade (DFAT), *Submission*, p.1.

45 AGs, DIMIA and DFAT, *Submission*, p.1.

46 Law Society of New South Wales, *Submission*, p. 1.

47 Refugee Council of Australia, *Submission*, p. 1.

- 3.48 In addition, a number of submissions advocated the importance of maintaining Australia's leadership in the region.⁴⁸ For example, the Christian World Service Commission of the National Council of Churches believes that Australia
- signing the Protocol would set a strong example for regional states and give credibility to Australia's regional human rights dialogue.⁴⁹
- 3.49 The Justice and International Mission Unit of the Synod of Victoria and Tasmania of the Uniting Church in Australia also claimed that by not becoming a party to the Optional Protocol Australia 'could be perceived as a reluctance to co-operate with partner nations in the eradication and prevention of a crime universally condemned'.⁵⁰
- 3.50 The Committee believes in the importance of maintaining Australia's reputation as a leader in human rights standards, and the advancement of human rights mechanisms through reform at the UN. However the Committee believes that Australia strongly demonstrates its commitment to the protection of people deprived of liberty against torture by being a Party to the Convention, and other substantial international instruments such as the ICCPR and CRC.

Australian Government's reservations concerning the Optional Protocol

- 3.51 The Committee observed that on a number of occasions during and after the drafting of the text of the Optional Protocol, the Australian Government expressed concern in relation to procedural and substantive aspects of the treaty action.⁵¹

48 See for example FASSTT, *Submission*, p. 2; Refugee Council of Australia, *Submission*, p. 2; Australian Lawyers for Human Rights, *Submission*, p. 6; Human Rights Committee of NSW Young Lawyers, *Submission*, p. 5; and United Nations Association of Australia, *Submission*, p. 2.

49 Christian World Service Commission of the National Council of Churches, *Submission*, p. 3.

50 Justice and International Mission Unit of the Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 3.

51 See for example: Statement by Mr Crispin Conroy on behalf of the Australian Delegation to the 52nd Session of the Commission on Human Rights, Item 8, 4 April 1996; 'Explanation of Vote' in AGs, DIMIA and DFAT, *Submission*, Attachment A; and Senate

Procedural concerns

- 3.52 The Committee explored the Government's concerns raised in relation to the way in which the text of the draft Optional Protocol was adopted by the UN Commission on Human Rights.
- 3.53 The joint submission by the Commonwealth departments indicated that a draft text of the Optional Protocol was submitted by Costa Rica to the Commission on Human Rights in its 47th session in 1980. In 1992 the Commission on Human Rights then established a Working Group to develop the draft text. There were 10 annual negotiation sessions, with the last meeting occurring in 2002.⁵²
- 3.54 Australia was represented on the Commission on Human Rights Working Group and attended the first eight sessions (being absent at the January 2001 and 2002 sessions).⁵³ The Committee observes that the Government took a pragmatic approach to the Working Group and decided not to attend the last two negotiation sessions, due to there being 'little likelihood of useful progress at those meetings'⁵⁴ and further that
- Australia wanted to send a positive message that we wished to focus our energies and limited resources only on productive exercises. This was in line with our overall approach to engagement with the UN Treaty Body System, which the Government believes is in need of reform to make it more efficient.⁵⁵
- 3.55 According to the joint departmental submission at the tenth meeting of the Working Group in 2002, the Chair of the Working Group (Mrs Elizabeth Odio Benito, Vice-President, Costa Rica⁵⁶) independently prepared and tabled a draft text of the Optional Protocol. The submission further recounts that the Working Group did not consider the draft Optional Protocol in detail or reach consensus on the text. The joint departmental submission states that this 'is desirable for

Legal and Constitutional Legislation Committee, Estimate Hearing, *Transcript of Evidence*, 26 May 2003.

52 AGs, DIMIA and DFAT, *Submission*, p. 2.

53 AGs, DIMIA and DFAT, *Submission*, p. 2.

54 AGs, DIMIA and DFAT, *Submission*, p. 2.

55 AGs, *Answer to Question No. 6* for Senate Legal and Constitutional Legislation Committee, Estimate Hearing, 3 November 2003.

56 DFAT, *Exhibit*, p. 1.

human rights instruments to ensure broad support for the standards elaborated'.⁵⁷

3.56 However, Amnesty International Australia

maintains that consensus is not and cannot be an absolute requirement. It does not follow that because a Convention or Protocol is adopted by vote it will not receive broad support.⁵⁸

3.57 The Commission on Human Rights subsequently adopted the draft text with a vote of 29 in favour to 10 against, with 14 abstentions.⁵⁹

3.58 The Committee was informed that at the UN Economic and Social Council, Australia supported a proposal by the United States to resubmit the draft Optional Protocol to the Working Group for further consideration, and that this was not successful.⁶⁰ Australia subsequently made its concerns regarding the draft known, and voted against the draft Optional Protocol in the UN Economic and Social Council in mid-2002.⁶¹

3.59 Australia then abstained from the vote on the Optional Protocol in the Third Committee of the UN General Assembly in November 2002, and made an Explanation of Vote to indicate the Government's concerns.⁶² The Explanation of Vote concluded by indicating that

Australia is unable to support the particular mechanism proposed in the Protocol because of these procedural and substantive concerns. However, we remain strongly committed to seeking more appropriate international mechanisms to eradicate torture.⁶³

3.60 Based on the evidence presented to the inquiry, the Committee shares the Government's concern in relation to the development of the draft text of the Optional Protocol by the Commission on Human Rights. The Committee also advocates the adoption of UN human rights mechanisms by consensus, ensuring their broad support and

57 AGs, DIMIA and DFAT, *Submission*, p. 2.

58 Amnesty International Australia, *Submission*, p. 7.

59 Australia was not a member of the Commission on Human Rights at that time. AGs, DIMIA and DFAT, *Submission*, p. 2.

60 AGs, DIMIA and DFAT, *Submission*, p. 2.

61 AGs, *Answer to Question No. 7* for Senate Legal and Constitutional Legislation Committee, Estimate Hearing, 26 May 2003, p. 1.

62 See AGs, DIMIA and DFAT, *Submission*, Attachment A.

63 AGs, DIMIA and DFAT, *Submission*, Attachment A.

ratification. However the Committee acknowledges that this is not always possible and, as noted in the Refugee Council of Australia's submission, a number of international treaties have been adopted without 'widespread acceptance', such as the Convention on the Elimination of Racial Discrimination.⁶⁴

Substantive concerns

3.61 The Government's substantive concerns regarding the Optional Protocol stem from its continued concern with the UN treaty bodies not operating effectively, and the subsequent need for reform.

3.62 As the Secretary of the Attorney-General's Department, Mr Robert Cornall, indicated to the Senate Legal and Constitutional Legislation Committee on 26 May 2003

This is a process issue. It is an issue that goes to the process by which the United Nations interacts with Australia. It does not go to the underlying principle of the convention.⁶⁵

3.63 Ms Leon told the Committee that the Government has expressed concern about

the way in which some of the UN scrutiny mechanisms work is that the committees are not focusing on the areas of greatest concern in terms of human rights violations across the world but on the most well-behaved, human rights abiding countries. And there are a range of broader concerns that the government announced in the context of its treaty body reform initiative.⁶⁶

3.64 Following a review of Australia's interaction with the UN treaty committee system, the Government announced in August 2000 that it would 'adopt a more robust and strategic approach given its concerns with the functioning and effectiveness of the UN treaty committee system'.⁶⁷ The joint departmental submission states the review's key findings. They were

64 Refugee Council of Australia, *Submission*, p. 4. See also for example Amnesty International Australia, *Submission* p. 7.

65 Mr Robert Cornall, *Transcript of Evidence – Senate Legal and Constitutional Legislation Committee*, 26 May 2003, p. 32.

66 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 4.

67 AGs, *Answer to Question No. 7* for Senate Legal and Constitutional Legislation Committee, Estimate Hearing, 26 May 2003, p. 1.

- to ensure adequate recognition of the primary role of democratically elected governments as it is governments which take on human rights obligations and are responsible for fulfilling them, and the subordinate role of non government organisations in this respect
- to ensure that committees and individual members work within their mandates
- to reduce duplication and improve coordination between committees, and
- to address the inadequate secretariat resources to support the committees' work.⁶⁸

3.65 The Committee was interested to hear about the reception of these issues and the progress of discussion at the UN. Ms Millar observed that

the extent to which many of these issues, which when we raised them three years ago seemed a bit new and radical, are now completely accepted as the way to go in the human rights committees, even though in terms of the implementation quite a lot still needs to be done.⁶⁹

3.66 The Committee noted that the Government identified an important aspect of the treaty body reform initiative to the Senate Legal and Constitutional Legislation Committee. Ms Leigh explained that

The government has made quite clear that it will agree to visits by such committees only where there is a compelling reason to do so, and the government will decide on a case-by-case basis whether it is willing to agree to such visits. It is therefore not willing to bind itself to a protocol that constitutes a standing invitation and that would not provide an opportunity for the government to make a decision on a case-by-case basis.⁷⁰

3.67 The joint departmental submission explains that this should ensure that UN 'committee resources are directed to areas of greatest need'.⁷¹

68 AGs, DIMIA and DFAT, *Submission*, p. 2.

69 Ms Caroline Millar, *Transcript of Evidence*, 9 February 2004, p. 12.

70 Ms Kathy Leigh, *Transcript of Evidence – Senate Legal and Constitutional Legislation Committee*, 26 May 2003, p. 32.

71 AGs, DIMIA and DFAT, *Submission*, p. 3.

But on the broader question Ms Leon advised that 'The government does not have any concern about being subject to UN scrutiny'.⁷²

3.68 Professor Harding stated

It is well understood that there is value both in alerting Governments well in advance to a pending inspection so that they may be given an opportunity to address issues that they consider may cause the Committee concern, and also in conducting inspections with a minimal amount of notice so as to maximise the opportunity to identify problems of which the Government may be unaware or would prefer not to be identified.⁷³

3.69 The Committee notes that Ms Kathy Leigh advised the Senate Legal and Constitutional Legislation Committee that 'At this stage the government does not intend to become a party to the protocol'.⁷⁴

3.70 However, the Minister for Foreign Affairs responded to a question on notice on 1 December 2003, to advise that 'The government has not yet made a formal decision on signing the Protocol'.⁷⁵ In addition, the joint departmental submission to the Committee indicates that

The Australian Government has not made a decision about whether it will ratify the Optional Protocol.⁷⁶

3.71 Ms Leon also affirmed the Government's current position at the Committee's public hearing, indicating that the matter of ratification

is still under discussion within the bureaucracy. I do not think I could say at this stage how far along we might be in that process.⁷⁷

72 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 4.

73 Prof Richard Harding, *Submission*, p. 2.

74 Ms Kathy Leigh, *Transcript of Evidence – Senate Legal and Constitutional Legislation Committee*, 26 May 2003, p. 32.

75 *House of Representatives Votes and Proceedings*, 1 December 2003, p. 23416.

76 AGs, DIMIA and DFAT, *Submission*, p. 2.

77 Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 14. See also Ms Renée Leon, *Transcript of Evidence*, 9 February 2004, p. 10.

Conclusion

3.72 In light of the evidence the Committee is not convinced that there is an immediate need for Australia to ratify the Optional Protocol. The Committee believes that as a State Party to the Convention, Australia has already demonstrated its commitment to proscribing and preventing torture. The Committee therefore does not support that binding treaty action be taken at this time.

Recommendation 1

The Committee recommends against the Commonwealth Government taking binding treaty action with respect to the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at this time.

Dr Andrew Southcott
Committee Chair