



MONASH University
Castan Centre for Human Rights Law

Optional Protocol (OP3) to the Convention on the Rights of the Child (CRC).

Submission in Favour of Australia Signing and Ratifying the Third Optional Protocol to the Convention on the Rights of the Child

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The Castan Centre thanks the Australian Government for the opportunity to comment on whether Australia should sign the third Optional Protocol (OP3) to the Convention on the Rights of the Child (CRC).

There are several reasons why it would be in Australia's interest to sign (and, ultimately, become party to) OP3, including:

- UN treaty bodies are a key component in the international system of accountability for implementation of human rights norms. OP3 creates, for the first time, a complaints mechanism tailored for children and guided by their best interests. It therefore represents a significant step forward in the promotion and protection of children's rights in the international arena.
- Australia was an early signatory of the CRC and its other two Optional Protocols. It is now a party to those instruments, along with ILO Convention 182 on the Worst Forms of Child Labour, thereby positioning itself as a strong supporter of international protection of children's rights. This position has been underscored by recent statements made in the Human Rights Council (see below).
- The need for a National Children's Commissioner in Australia is clear (as recognised in recommendations from the UN,¹ other governments² and civil society³), and OP3 would complement the Commissioner's role once he or she is appointed.
- In May 2012, Australia will be subject to periodic review by the Committee on the Rights of the Child regarding its compliance with CRC. In the absence of any announcement on a National Children's Commissioner, it would be desirable for the Australian delegation to have some positive developments to report to the Committee, and signing OP3 would certainly fit the bill.
- Signing OP3 would build on the active and constructive role taken by Australia in negotiations leading up to its adoption by the General Assembly. The final version represents a reasonable compromise between the views of States and those of civil society, and the Castan Centre is confident that, if there are any remaining objections on the part of the Government, these can be addressed before Australia becomes a party.
- Australia's ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities and accession to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women demonstrated our acceptance of the UN communication mechanisms generally, and it would be disappointing if the Government were to change course when it comes to OP3.

¹ The Committee on the Rights of the Child and the High Commissioner for Human Rights have recommended the establishment of a National Commissioner – see *List of issues concerning additional and updated information related to the consideration of the fourth periodic report of Australia*, CRC/C/AUS/4, and www.theage.com.au/national/do-more-for-children-un-urges-20110814-1it05.html.

² See UPR recommendation 28 from New Zealand, contained in: *Report of the Working Group on the Universal Periodic Review – Australia*, A/HRC/17/10.

³ www.unicef.org.au/Media/Media-Releases/July-2011/Australia-committed-to-its-children-.aspx.

Australians can already lodge communications with the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women. The Committee on the Rights of the Child is the last of the 'core' human rights treaty bodies to be given jurisdiction to receive individual communications. Children can (and do occasionally) bring complaints to the other treaty bodies, but they obviously have special needs over and above those of other complainants and a mechanism tailored to those needs is desirable.

Despite the availability of the four communications procedures above, if one puts aside the asylum-seeker caseload temporarily,⁴ the number of complaints against Australia that have been brought to these bodies over the years has been modest. Given the common admissibility requirement that communications may only proceed where domestic remedies have been exhausted,⁵ these mechanisms are inherently complementary to national courts, tribunals and human rights institutions.

Australian courts and tribunals – especially those which specialise in children's issues such as the Family Court of Australia and Children's Courts in each state and territory – are well-equipped to deal with controversies involving children's rights. In addition, the principle of the primacy of the best interests of the child has been incorporated into our family law.⁶ However, most Australian jurisdictions lack specific legislative protection for human rights and Australian courts are not bound to refer to relevant international law or jurisprudence.⁷ As such, an international body comprising experts on the rights of children is well-placed to deal with any cases which cannot be resolved satisfactorily in Australia. In the context of our specialist courts and the National Framework for Protecting Australia's Children,⁸ it is to be hoped (and expected) that such cases will be rare.

One other function which communications procedures serve is the development of international human rights jurisprudence. When it comes to interpreting the Government's obligations under the International Covenant on Civil and Political Rights, for example, there is a wealth of material from which to draw, largely due to the communications lodged under the first Optional Protocol to that Covenant. This indispensable resource enables legal advisers (as well as courts and tribunals) to ascertain with relative precision the scope of the relevant obligations. It is therefore in Australia's interest to encourage the development of such jurisprudence – particularly in the context of children's rights, where normative development is lacking.

⁴ This caseload is disproportionately large for obvious reasons, and sometimes obscures the importance of the issues raised by other cases referred to the treaty bodies – for example the *Toonen*, *Brough*, *Nystrom* and *Hagan* communications.

⁵ In CRC OP3, this requirement is embodied in article 7(e).

⁶ See eg *Family Law Act 1975* (Cth), s 60CC.

⁷ This is so despite variance between judges as to the relevance of human rights norms – see eg *B & B & Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 [248-288] or *Re Tracey* [2011] NSWCA [43-50]; cf eg *U v U* [2002] HCA 36. For a discussion of the significance of this unpredictability, see Nicholson, *Australian Judicial Approaches to Human Rights Conventions and "Family Law,"* available at:

<www.familycourt.gov.au/wps/wcm/resources/file/eba6b2034667460/capetown.pdf>.

⁸ <www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf>.

In a Statement to the 19th Session of the Human Rights Council in March 2012,⁹ the Australian Government expressed an interest in improving protections for children who come into contact with the justice system, including through learning about international best practice. Given the highly relevant expertise of the Committee on the Rights of the Child, signature (and ratification) of OP3 would be of assistance in this regard. In another statement also delivered in March,¹⁰ the Government said it “strongly supports the global campaign for the universal ratification of the Convention on the Rights of the Child and its Optional Protocols,” and that it is “deeply committed to the protection of children and young people.” Signing OP3 would strengthen this assertion.

Finally, in the context of reform of the treaty body system, the Australian Government acknowledged to the Council the “essential role the Committees play in enhancing people’s enjoyment of their rights.”¹¹ The Castan Centre recognises that there are concerns about the treaty body system as a whole – in particular in relation to resourcing – but a critical factor in resolving these concerns is States’ ongoing support for the system.

For all the reasons outlined above, and to further Australia’s commendable approach to international human rights and UN engagement generally since 2007,¹² the Castan Centre urges the Government to sign OP3, and eventually to ratify it. We are happy to provide further information and advice if required, and would be pleased if interested parties could attend our symposium on Recent Developments Concerning the CRC on 24 April, where further reasons to sign OP3 will be discussed.¹³

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⁹ <www.geneva.mission.gov.au/gene/Statement296.html>.

¹⁰ <www.geneva.mission.gov.au/gene/Statement295.html>. See also Australia’s Statement 181 to the 16th Session of the Council: <www.geneva.mission.gov.au/gene/Statement181.html>.

¹¹ <www.geneva.mission.gov.au/gene/Statement289.html>.

¹² See: <www.ag.gov.au/Documents/Ministerial_Statement_on_Universal_Periodic_Review.PDF>.

¹³ <<http://www.law.monash.edu.au/castancentre/events/2012/symposium-child-rights.html>>.