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**Submission to the Attorney-General's Department  
Human Rights Branch**

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

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## **Introduction-**

Torture and other cruel, inhuman or degrading forms of treatment or punishment continue to pose a serious threat to global human rights and is therefore a key area of concern to the international community. The international community has demonstrated its commitment to eliminating torture by adopting the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.<sup>1</sup>

In 2002 the United Nations General Assembly adopted the Optional Protocol to the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment with overwhelming support (127 in favour, 2 against and 42 abstentions).

The main purpose of the Optional Protocol is to establish a system of regular visits by independent international and national bodies to places where individuals are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment.<sup>2</sup> Places of interest in Australia include prisons, police stations, juvenile detention centres, immigration detention centres and psychiatric institutions (where individuals are held under administrative detention).

These places of detention are of particular concern to international and national human rights bodies as restricted public access may create an environment in which torture and other cruel, inhuman or degrading treatment may occur.

Although there are no “substantive concerns on allegations of torture” in Australia, the Government should adopt a proactive approach to combating human rights abuses and demonstrate its commitment to eliminating torture and other forms of ill-treatment.<sup>3</sup>

## **Obligations imposed by the Optional Protocol-**

- Australia’s key obligations under the Optional Protocol will require the Government to cooperate with-
  - the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment; and
  - an independent National Preventative Mechanism;

## **Requirements in implementing the Optional Protocol-**

### *The Subcommittee*

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<sup>1</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987

<sup>2</sup> South African Human Rights Commission, *Report: Roundtable Discussion on the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*, April 2006

<sup>3</sup> Media Alert, Issued 23 March 2004, Joint Standing Committee on Treaties, Optional Protocol to the Convention against Torture, Dr Andrew Southcott MP

- The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (hereafter “the subcommittee”) is established under Part II of the Optional Protocol;<sup>4</sup>
- The primary function of the Subcommittee is to conduct regular visits to places where individuals are deprived of their liberty, to ensure that such persons are not subject to torture and other cruel, inhuman or degrading treatment or punishment;<sup>5</sup>
  - For the purposes of the Optional Protocol, “deprivation of liberty” is defined broadly to include any place of detention or imprisonment where an individual is held “by order of any judicial, administrative or other authority”;<sup>6</sup>
- The Subcommittee is required to communicate any observations or recommendations confidentially to the Australian Government, and where relevant, to the National Preventative Mechanism;<sup>7</sup>
- The Government is entitled to request that the Subcommittee publish its report or comments on Australia at any time.<sup>8</sup>

#### *National Preventative Mechanism*

- The Australian Government will be required to establish (within 1 year of ratifying the Optional Protocol) an independent body which is authorised to prevent incidents of torture and other cruel, inhuman or degrading treatment;<sup>9</sup>
- The relevant National Preventative Mechanism will be responsible for:
  - monitoring conditions of detention by making regular visits to place of detention; and
  - making recommendations and submissions to the Government on existing or proposed legislation; and
  - cooperate with the Subcommittee; and
  - any other functions which the Government deems necessary for the body to fulfil its duties.
- The Optional Protocol allows a high level of discretion as to what action will be taken in this respect.

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<sup>4</sup> Article 5 to 10, OP CAT

<sup>5</sup> Article 11(a), OP CAT

<sup>6</sup> Article 4(2), OP CAT

<sup>7</sup> Article 16(1), OP CAT

<sup>8</sup> Article 16(2), OP CAT

<sup>9</sup> Article 3, OP CAT

- The establishment of a National Preventative Mechanism will be a relatively simple process for the Commonwealth and State Governments as existing bodies (the Human Rights and Equal Opportunity Commission [HREOC] and relevant State equivalents (eg. Equal Opportunity Commissions, Ombudsmen, the WA Prisons Inspectorate, and Prison Visitors) already fulfil many of the types of functions proposed, and parallel developments are taking place pursuant to Bills of Rights in the ACT and Victoria;
- However the Australian Government will need to ensure that the mandate of the relevant body accurately reflects its duties under the Optional Protocol. For example, at the moment HREOC does not have specific powers to monitor compliance with the Convention against Torture.

#### *Australia's obligations*

- The effective functioning of the Optional Protocol requires States-parties to cooperate with the Subcommittee in the execution of its duties;
- Accordingly the Australian Government will be expected to:<sup>10</sup>
  - allow the Subcommittee unrestricted access to places of detention (as defined under Article 4);
  - allow the Subcommittee to conduct private interviews with detainees and any other persons of interest;
  - provide any relevant information requested by the Subcommittee in connection with the execution of its duties;
  - facilitate cooperation between the Subcommittee and National Preventative Mechanism;
  - consider any recommendations by the Subcommittee and the implementation thereof;
- The Australian Government may object to a visit to a particular place of detention in limited circumstances (national security, public safety, natural disaster or serious disorder in the place in question);<sup>11</sup>
- However it must be emphasised that the right to object is extremely limited and must not be used as a way to obstruct the Subcommittee in the performance of its duties;
- It should also be noted that these visits are intended to be “educational and persuasive, not confronting”, so the Australian Government should not have any concerns about potential politicization of such visits;<sup>12</sup>

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<sup>10</sup> Article 12 and 14, OP CAT

<sup>11</sup> Article 14(2), OP CAT

<sup>12</sup> Bill O’Shea, Law Institute of Victoria

- Failure to cooperate with the Subcommittee in accordance with Articles 12 and 14 or to respond adequately to its recommendations may result in the Subcommittee making a public statement in relation to the matter or the publication of its report.<sup>13</sup>
- The Australian Government will also be required to grant similar rights of access to places of detention, information and individuals to the National Preventative Mechanism to enable it to effectively exercise its functions.<sup>14</sup>

#### **Likely financial costs associated with implementing the Optional Protocol-**

- The crux of financial expenditure associated with implementing Australia's obligations under the Optional Protocol will stem from the establishment and maintenance of the National Preventative Mechanism;
- This will generally entail expanding the budget of the relevant body authorised to carry out the functions of the National Preventative Mechanism.
- Any costs or expenses incurred by the Subcommittee in the execution of its duties under the Optional Protocol will be assumed by the UN.

#### **Foreseeable economic, environmental, social and cultural effects of implementation-**

- By ratifying the Optional Protocol, the Australian Government will firmly establish its clear commitment to preventing and eliminating torture and other cruel, inhuman or degrading treatment;
- Ratification of the Optional Protocol will help to further validate this position and allow the Government to exercise its influence both in the region and globally to combat incidents of torture;
- The Australian Government will effectively demonstrate to the Australian people that individuals detained by the Commonwealth, States or Territories will not be subjected to torture or other forms of ill-treatment;
- Implementation of the Optional Protocol will also ensure the promotion and establishment of a uniform national regime regulating conditions in places of detention;
- This will effectively assist in the promotion of a culture of openness and transparency in places of detention and in turn help to combat incidents of torture at the preventative stage.

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<sup>13</sup> Article 16(4), OP CAT

<sup>14</sup> Article 20, OP CAT

- Importantly, the processes set up under the Optional Protocol should help to prevent acts of torture or other ill treatment in places of detention, and should help to alert the government of any substantive violations of the Convention that might be taking place.