AUSTRALIA'S ACCESSION TO THE FIRST OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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1. *INTRODUCTION*

A little marked, but significant, development has recently occurred in the protection of human rights in Australia. On 25 September 1991, the Minister for Foreign Affairs and Trade, Senator Evans, deposited Australia's instrument of accession to the First Optional Protocol[1] to the International Covenant on Civil and Political Rights[2] (ICCPR) with the United Nations' Secretary General in New York.[3] With intriguing, if inadvertent, symbolism, the Optional Protocol came into force for Australia three months later[4] on Christmas Day 1991.

Accession to the Optional Protocol brings Australia more fully into the international human rights community. Australia had been the only major western power, apart from the United States, which has been consistently reluctant to accept any international human rights legal commitments, whose population had no access to an international complaints procedure over human rights violations. Canada has been a party to the Optional Protocol since 1976 and New Zealand since 1989. Most European countries, including the United Kingdom, have accepted a right of individual petition under the European Convention on Human Rights.

Why has Australia, a party to the ICCPR since 1980, been so slow to accept the Optional Protocol? Accession had certainly been considered by the Commonwealth for almost a decade,[5] but it was a controversial issue in the politics of federalism. Some States and Territories resisted accession because they were concerned about international scrutiny of particular human rights issues within

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1 Referred to hereafter as the Optional Protocol. The Second Optional Protocol to the ICCPR concerns the abolition of the death penalty. Australia has been a party to this instrument since February 1991.

2 999 U.N.T.S. 171; A.T.S. 1991 No. 39.

3 This action had been foreshadowed by an announcement at a session of the United Nation's Sub-Commission on Prevention of Discrimination and Protection of Minorities' Working Group on Indigenous Populations in Geneva on 31 July 1991 by Robert Tickner, the Commonwealth Minister for Aboriginal Affairs. Joint Media Release (Minister for Aboriginal Affairs, Acting Minister for Foreign Affairs and Trade, Attorney-General) 31 July 1991.

4 Optional Protocol, Art. 9(2).

5 Rose, A., 'Commonwealth State Aspects: Implementation of the First Optional Protocol' (paper delivered at a symposium on 'Internationalizing Human Rights Protection in Australia: Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights', Law School, University of Melbourne, 10 December 1991) 11-2.

their jurisdiction, such as the treatment of prisoners.[6] Stimulated perhaps by Australia becoming a member of the United Nations' Commission on Human Rights in 1991 and by the 1991 *National Report of the Royal Commission into Aboriginal Deaths in Custody* which recommended accession,[7] the Commonwealth finally decided to override State and Territorial hesitation and commit Australia to an international human rights complaints procedure.

2. *THE OPTIONAL PROTOCOL*

The enforcement of states parties' obligations under the ICCPR is achieved in three distinct ways. The only mandatory supervisory procedure is the reporting mechanism under Article 40: parties undertake to submit periodic reports to the Human Rights Committee (established under Article 28) on their implementation of the human rights covered in the ICCPR. A second, optional procedure, provided for in Article 41, is the possibility of a state party recognizing the competence of the Human Rights Committee to consider claims by other states parties that it is not fulfilling its obligations under the ICCPR.[8] The third enforcement mechanism is the Optional Protocol.

During the drafting of the ICCPR, provision of some form of international judicial examination of states' compliance with their human rights obligations was considered. For example, a proposal was made to include an optional right of individual petition within the ICCPR itself (parallel to Article 25 of the European Convention on Human Rights). Concern that such a provision would be regarded as unacceptably impinging on national sovereignty, particularly on the part of the Soviet Union,[9] led to the drafting of a separate instrument containing an individual complaints procedure, the Optional Protocol.[10]

Acceptance of the Optional Protocol is open to any party to the ICCPR. By the end of 1991, 59 of the 94 parties to the ICCPR had accepted the optional procedure. It allows identified individuals ('authors') who are under the jurisdiction of a country which has accepted its terms, to communicate directly with the Human Rights Committee (made up of 18 independent experts in human rights elected for four year terms) about violations of the provisions of the ICCPR. The ICCPR contains a wide catalogue of civil and political rights such as the right to life,[11] a prohibition on torture and other forms of cruel and unusual punishment,[12] the right to liberty and security of the person,[13] the right to due process,[14]

[6] See generally Thomson, P., 'Implications of Australia's Ratification and Potential Ratification of International Human Rights Treaties' *Proceedings 1991 International Law Weekend* (A.N.U. Centre for International and Public Law 1991) 86, 89, 99-101; Rose, A., *op. cit.* n. 5, 11-2.

[7] *Royal Commission into Aboriginal Deaths in Custody National Report* (1991) vol. 5, 26.

[8] Australia has not made an Article 41 declaration. As at the end of 1991, no communications had been received by the Human Rights Committee under Article 41.

[9] The Soviet Union finally acceded to the Optional Protocol five days after Australia, on 1 October 1991.

[10] Schwelb, E., 'Civil and Political Rights: The International Measures of Implementation' (1968) 62 *American Journal of International Law* 827, 830-5.

[11] Art. 6.

[12] Art. 7.

[13] Art. 9.

[14] Art. 14.

the right to freedom of thought,[15] expression,[16] and association,[17] and the norm of non-discrimination.[18]

The Optional Protocol provides for a two-level procedure in the consideration of individual communications. First, the Human Rights Committee must decide that a communication is admissible: it must not be anonymous,[19] an abuse of the right of submission[20] or incompatible with the provisions of the ICCPR;[21] the same matter must not be in the course of examination under 'another procedure of international investigation or settlement'[22] and the individual must have 'exhausted all available domestic remedies' except where the application of the remedies is 'unreasonably prolonged'.[23] Once a communication is found to be admissible, the Committee examines the claim of violation of the ICCPR on its merits.

The right of individual communication with the Human Rights Committee is not a judicial procedure. The Committee's adoption of views in a particular case are not strictly binding on the country concerned: the Committee's views are simply forwarded to both the state and the individual involved[24] and are published in its annual report to the General Assembly of the United Nations.[25] Publicity is thus the Committee's greatest enforcement power. Over the 15 years of the Committee's existence there have been a number of complaints that its findings of violations of the ICCPR under the Optional Protocol have been ignored by the state concerned.[26] In 1990 the Committee decided that it would place a time limit of six months on state responses to its findings of violations of the ICCPR. Inaction by states would be noted in the Committee's annual reports.[27] It remains to be seen whether these innovations induce greater compliance with the Committee's views.

A major obstacle to the effective operation of the Optional Protocol has been the workload of the Human Rights Committee and the consequent delay in considering communications. The Committee sits for three sessions, a total of nine weeks each year (in Geneva and New York). In fourteen years, the

15 Art. 18.
16 Art. 19.
17 Art. 22.
18 Arts 2, 3, 26.
19 Art. 3.
20 *Ibid.* For a discussion of what amounts to an abuse of the right of submission see McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) 197.
21 Art. 3. A communication would be inadmissible on this ground if, for example, it related to an alleged violation of the ICCPR occurring before the Optional Protocol came into force for a particular nation. See generally McGoldrick, *op. cit.* n. 20, 160-82.
22 Art. 5(2)(a).
23 Arts 2, 5(2)(b).
24 Art. 5(4).
25 Art. 6.
26 *Report of the Human Rights Committee* U.N. Doc. A/45/40 (1990) vol. I, 144-5.
27 *Ibid.* vol. II, 205-6. The Human Rights Committee also amended its Guidelines for the Preparation of Reports (under Article 40 of the ICCPR) to request states in respect of which any finding of a violation of the ICCPR had been made under the Optional Protocol to include material in their periodic reports on the measures they had taken to remedy the violation. A Special Rapporteur for the Follow-Up of Views was appointed in 1990. The duties of this individual include the recommendation of action to the Committee in cases where victims of a violation claim that no remedy has been made. *Ibid.*

Committee has had 468 communications registered for consideration. Of these, 124 have been declared inadmissible, 70 have been discontinued or withdrawn; views have been adopted by the Committee in 119 cases, 93 of which were found by the Committee to involve a violation of the ICCPR.[28] In July 1991 it had 158 registered cases pending and several hundred other communications on file awaiting further information from their authors. Over three sessions the Committee had time to formulate its views on nine cases, make 16 determinations that a communication was inadmissible and make procedural decisions in a number of pending cases.[29] Even when a communication is held admissible, there may be up to four years or more before the Committee considers the merits of the case. The Committee has recently taken steps to streamline its processes,[30] but it is unlikely to ever provide a rapid resolution of a human rights complaint.[31]

3. *THE SIGNIFICANCE OF THE OPTIONAL PROTOCOL FOR AUSTRALIA*

At the time of the announcement of Australia's intention to accede to the Optional Protocol there was some speculation that accession would amount to introducing a bill of rights 'by the back door'.[32] In fact, the Optional Protocol is no substitute for a constitutionally entrenched bill of rights and it is important to appreciate its limitations in remedying human rights violations.

First, there are the restrictions on admissibility referred to above. For example, only individuals (the alleged victim of a violation of the ICCPR or a duly appointed representative) can communicate with the Human Rights Committee.[33] Groups and organizations, which are often in the best position to use international legal procedures, will thus need to identify appropriate individuals to bring test cases if they wish to take advantage of the Optional Protocol procedure. A more significant restriction on invocation of the Optional Protocol is its requirement of exhaustion of all available domestic remedies. While the Human Rights Committee requires states to provide evidence that effective remedies are available in a particular case,[34] the Committee has taken a relatively strict approach to the exhaustion of remedies condition. Thus it involves appealing an adverse decision right through a domestic court structure unless appeals 'objectively have no prospect of success',[35] for example because of a

[28] *Report of the Human Rights Committee* U.N. Doc. A/46/40 (1991) 160; Centre for Human Rights, *Civil and Political Rights: The Human Rights Committee* (Fact Sheet No. 15 1991) 7.

[29] *Report of the Human Rights Committee* U.N. Doc. A/46/40 (1991) 160-1.

[30] A Special Rapporteur on New Communications has been appointed to process new communications as they are received, between Committee sessions. In some cases the Special Rapporteur has recommended to the Committee that communications be declared inadmissible without being first sent to the state concerned. *Ibid.* 162.

[31] The problem of delay is slightly mitigated by Rule 86 of the Rules of Procedure of the Human Rights Committee which has been interpreted to allow the Committee to request states to take interim measures in order to avoid irreparable damage to the victim of the alleged violation. See McGoldrick, *op. cit.* n. 20, 202.

[32] *E.g.* Kingston, M., 'Australia's back-door "bill of rights"' *Age* (Melbourne) 5 August 1991.

[33] *Group of Associations for the Defence of the Rights of Disabled Persons in Italy, Selected Decisions of the Human Rights Committee under the Optional Protocol* (1990) v. 2, 47.

[34] McGoldrick, *op. cit.* n. 20, 188-9.

[35] *Pratt and Morgan v. Jamaica, Report of the Human Rights Committee* U.N. Doc. A/44/40 (1989) 222.

contrary binding precedent. This means that in a case alleging race or sex discrimination under Victorian law a person must proceed under the Victorian Equal Opportunity Act 1984 to the Equal Opportunity Board, appeal from an adverse decision to the Victorian Supreme Court, and from there seek special leave to appeal to the High Court. Only when no further remedies are available, or if it can be shown to be fruitless to pursue them, is a complainant eligible to communicate with the Human Rights Committee. Of course in cases of violations of particular rights protected by the ICCPR, it may be possible to show that there is simply no appropriate Australian domestic remedy available.[36] The Human Rights Committee would then be able to consider the merits of the case directly.

Another question about the effect the Optional Protocol will have on the protection of human rights within Australia arises from the federal nature of our constitutional system. The Commonwealth government is internationally responsible for violations of the ICCPR under the Protocol, but it is likely that many individual Australian communications will in fact concern the actions of the States and Territories.[37] By what means will the Commonwealth government obtain information, explanations and statements to clarify complaints made to the Human Rights Committee about State activities required under Article 4 of the Protocol? Will the Commonwealth make an independent assessment of the adequacy of information from the States to respond to individual communications? Will it always defend a State's position? How will the Committee's requests for interim action under Rule 86 be implemented if they concern a State? If the Committee finds a violation of the ICCPR in a State's actions, how will the Commonwealth ensure compliance with the Committee's views? Would it rely on its undoubted authority under the Australian Constitution's external affairs power[38] to legislatively ensure modification of a State's laws? The Commonwealth Attorney-General's Department has stated that it will rely on co-operative arrangements with the States and Territories to implement the processes of the Optional Protocol, although the details of the scheme are still to be negotiated.[39] There are grounds for some scepticism about the efficacy of such co-operative efforts in the protection of human rights. As Professor Nettheim has noted: '[h]istory . . . suggests that the States and Territories are unlikely to join with the Commonwealth in a co-operative exercise adequate to ensure full compliance with Covenant obligations.'[40] The traditional timidity of the Commonwealth

[36] It is unlikely that the Human Rights Committee would find s. 11(1)(f) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) which gives the Commission power to 'inquire into any act or practice that may be inconsistent with or contrary to any human right' and, if the Commission considers it appropriate, to attempt to conciliate a settlement of the matter, an effective domestic remedy for violations of the ICCPR generally.

[37] The Protocol itself expressly extends to 'all parts of federal States without any limitations or exceptions' Art. 10.

[38] Australian Constitution, s. 51(29). See *Koowarta v. Bjelke Petersen* (1982) 153 C.L.R. 168; *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.

[39] Rose, A., *op. cit.* n. 5, 12.

[40] Nettheim, G., 'Indigenous People and the Optional Protocol' (paper delivered at a symposium on 'Internationalizing Human Rights Protection in Australia: Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights', Law School, University of Melbourne, 10 December 1991) 6.

about intervening in cases of human rights violations by the States must be challenged if Australia is to properly fulfil its international obligations under the Optional Protocol.

A broader reason for not equating Australia's accession to the Optional Protocol with the *de facto* introduction of a domestic bill of rights is the generally very cautious jurisprudence of the Human Rights Committee in interpreting the rights set out in the ICCPR. The Committee has responded firmly on some occasions to egregious violations of the ICCPR. For example, Mauritian immigration law which required foreign husbands, but not foreign wives, to apply for residence permits was found to violate several provisions of the ICCPR, including the norm of non-discrimination in Article 26.[41] In other cases, however, the Committee has readily accepted states' explanations of discriminatory treatment even if they relied on questionable historical assumptions and claims of administrative convenience.[42]

Although members of the Australian Aboriginal community have welcomed the accession to the Optional Protocol, views adopted by the Human Rights Committee do not promise a great deal to indigenous peoples as groups. Canadian native peoples for example, have invoked the Optional Protocol on several occasions, with only mixed success.[43] The Committee has not accepted any assertion of collective rights such as the right to self determination enshrined in Article 1 of the ICCPR, and confined its jurisdiction to *individual* claims of violations of *individual* rights.[44] Claims brought by indigenous peoples under Article 27, protecting the culture, religion and language of ethnic, religious or linguistic minorities, have been more successful.[45]

One of the most developed areas of the Human Rights Committee's jurisprudence under the Optional Protocol is that of due process in criminal cases under Article 14 of the ICCPR.[46] Australian lawyers should find the Committee's views on issues such as the right to counsel valuable in expanding the Australian domestic notion of due process.[47]

41 *Aumeeruddy-Cziffra v. Mauritius, Selected Decisions under the Optional Protocol* (1985) vol. 1, 67.

42 *E.g. Vos v. Netherlands, Report of the Human Rights Committee* U.N. Doc. A/44/40 (1989) 232. See the critique of this case in Bayefsky, A., 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1, 15.

43 See Simpson, G., 'Canada's First Nations Peoples and the Optional Protocol to the International Covenant on Civil and Political Rights' (paper delivered at a symposium on 'Internationalizing Human Rights Protection in Australia: Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights', Law School, University of Melbourne, 10 December 1991).

44 *Ominayak, Chief of the Lubicon Lake Band v. Canada, Report of the Human Rights Committee* U.N. Doc. A/45/40 (1990) vol. II, 1.

45 *E.g. Kitok v. Sweden, Report of the Human Rights Committee* U.N. Doc. A/43/40 (1988) 221. See generally McGoldrick, D., 'Canadian Indians, Cultural Rights and the Human Rights Committee' (1991) 40 *International and Comparative Law Quarterly* 658.

46 See McGoldrick, *op. cit.* n. 20, 413-39.

47 For example, counsel argued in a recent, successful, application for special leave to appeal to the High Court that the right to legal assistance in criminal matters set out in Article 14(3)(d) of the ICCPR formed part of Australian law (transcript of proceedings, *Dietrich v. R.* 15 November 1991, High Court of Australia). *Cf. McInnis v. R.* (1979) 143 C.L.R. 575. Australia's accession to the Optional Protocol may be influential in persuading the High Court that it should have regard to the jurisprudence of the Human Rights Committee when deciding this issue.

The record of the Human Rights Committee since its first meeting in 1976 indicates that it does not regard itself as a 'court of fourth instance', an international appellate tribunal which will review decisions of national courts.[48] It has on many occasions refused to consider whether domestic law has been properly applied and has generally been reluctant to reassess judicial evaluation of the facts in a case or the exercise of discretion by domestic authorities.[49]

Perhaps because of the great range of legal cultures of the parties to the Optional Protocol, the Committee has seen its role as general supervision of national implementation of the ICCPR, leaving a wide 'margin of appreciation'[50] to individual countries in this task.

4. *CONCLUSION*

Australia's accession to the Optional Protocol is an important and welcome move. It does not impose any new human rights obligations on Australia, but will allow Australia's implementation of its obligations under the ICCPR to be scrutinized internationally in a more specific and testing way than is possible under the reporting obligations of the ICCPR. One valuable, indirect, effect of the accession may be to encourage Australian judges to interpret domestic law in the light of international human rights law: the views of the Human Rights Committee take on special significance if that Committee has jurisdiction to declare Australian laws in violation of the ICCPR.

Acceptance of the Optional Protocol is not, however, a panacea for all human rights violations within Australia. Both the technical requirements of admissibility and the conservative jurisprudence of the Human Rights Committee indicate it will offer limited relief to individuals in Australia. Rather than providing Australians with a *de facto* bill of rights, accession to the Optional Protocol may be a spur to the introduction of a constitutionally entrenched bill of rights: if there were adequate domestic remedies for human rights abuses in Australia, there would be little need for individuals to invoke the Optional Protocol.

48 McGoldrick, *op. cit.* n. 20, 156-8.

49 *E.g. Hertzberg et al. v. Finland*, *Selected Decisions under the Optional Protocol* (1985) vol. 1, 124.

50 A doctrine first developed in the jurisprudence of the European Court of Human Rights. See Yourow, H., 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987) 3 *Connecticut Journal of International Law* 111.