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**Submission to the National Interest Analysis
on the Optional Protocol to the
Convention on the Rights of Persons with
Disabilities**

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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

1. The Human Rights Law Resource Centre (**HRLRC**) unreservedly supports Australia's accession to the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (**Optional Protocol**).¹
2. The HRLRC considers that accession to the Optional Protocol would:
 - (a) complement and strengthen existing domestic mechanisms designed to promote disability rights;
 - (b) foster and promote analysis and change;
 - (c) strengthen Australia's role within the international community;
 - (d) be consistent with the Australian Government's commitment to constructive engagement with the UN human rights system and to the harmonisation of domestic laws, policies and practices with international human rights standards; and
 - (e) enhance public awareness and understanding of the rights of people living with disabilities.
3. 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.
4. Each of these issues is considered below.

¹ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006 (entered into force 3 May, 2008).

2. Background

5. The Australian Government ratified the *Convention on the Rights of Persons with Disabilities (CRPD)* on 17 July 2008.² The CRPD enshrines the civil, political, economic, social and cultural rights that are necessary to ensure that people with disabilities have the capacity and opportunity to fully participate in and contribute to our community. It sets out a detailed code for the implementation of human rights for persons with disabilities.
6. The UN High Commissioner for Human Rights characterised the CRPD as rejecting the 'view of persons with disabilities as objects of charity, medical treatment and social protection' and affirming persons with disability as 'subjects of rights, able to claim those rights as active members of society'.³ This paradigm shift has been welcomed by disability advocacy groups around the world.
7. Both the National Interest Analysis and the Joint Standing Committee on Treaties (**JSCOT**) recommended that Australia ratify the CRPD and strongly supported the CRPD's goals.⁴

² *Convention on the Rights of Persons with Disabilities*, 13 December 2006, (entered into force 3 May 2008). For a current list of States parties see: <http://www2.ohchr.org/english/bodies/ratification/15.htm>

³ Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006.

⁴ National Interest Analysis on the United Nations Convention on the Rights of Persons with Disabilities, [2008] ATNIA 18, tabled on 4 June 2008 (**NIA**); Joint Standing Committee on Treaties, Parliament of Australia, *Report 95: Treaties tabled on 4 June, 17 June, 25 June and 26 August 2008*, tabled 16 October 2008 (**JSCOT Report**). The JSCOT Report advises at [2.57] that '[i]n the event that the Australian Government decided to ratify the Optional Protocol, the protocol would be referred to this Committee prior to binding treaty action being taken. At that point the Committee would conduct an inquiry into the question of ratification. The Committee urges the Government to consider the views expressed in submissions to this inquiry when developing its approach to the Optional Protocol.'

8. The Optional Protocol entered into force on 3 May 2008 and has been signed by 78 States and ratified by 25.⁵ The Optional Protocol does not grant additional rights above those already recognised in the CRPD. Rather, the Optional Protocol establishes two procedures designed to supplement the CRPD and strengthen and promote its implementation. These procedures are:
 - (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 Rights of Persons with Disabilities (**Committee**) alleging violations of the substantive rights protected under the CRPD.
10. The inquiry procedure allows the Committee to initiate inquiries into reliable information indicating grave or systematic violations of the CRPD by a State Party.

⁵ For a current list of States parties to the Optional Protocol see:
<http://www2.ohchr.org/english/bodies/ratification/15a.htm>

3. Benefits of Accession to the Optional Protocol

3.1 Complement and Strengthen Existing Mechanisms Protecting Disability Rights

11. It is well recognised that people with disabilities are more vulnerable than the broader community to a range of deprivations and disadvantages, including poverty, social exclusion, discrimination, poor health, unemployment and low educational attainment.⁶
12. With one in five Australians living with a disability, it is imperative that Government take a robust approach towards the protection and promotion of disability rights and make a strong commitment to compliance with the CRPD.⁷ Ratification of the Optional Protocol would constitute a positive indication of Australia's willingness to be accountable for the implementation of its CRPD obligations.
13. Currently Commonwealth, State and Territory legislation and policies exist to protect and promote the rights of people living with disabilities. Significant examples include the Federal *Disability Discrimination Act 1992*, State and Territory anti-discrimination legislation,⁸ Commonwealth, State and Territory Disability Services Acts,⁹ the Commonwealth State-Territory Disability Agreement and the National Disability Strategy.
14. The Optional Protocol is not intended to replace existing domestic mechanisms or to eliminate the need for analysis and change – in fact, the goal of the Optional Protocol is to strengthen the protection and promotion of disability rights 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 people with disabilities can establish a violation of their human rights and seek an appropriate remedy.

⁶ See, eg, UN, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (2007) 1-6.

⁷ Australian Bureau of Statistics estimation and projection based on 2003 census data ('Disability, Ageing and Carers: Summary of Findings', Australia, 2003 (cat. no. 4430.0)).

⁸ *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1998* (NT); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1995* (Vic); and *Equal Opportunity Act 1984* (WA).

⁹ *Disability Services Act 1986* (Cth); *Disability Services Act 1991* (ACT); *Disability Services Act 1993* (NSW); *Disability Services Act 2004* (NT); *Disability Services Act 2006* (Qld); *Disability Services Act 1993* (SA); *Disability Services Act 1992* (Tas); *Disability Services Act 1991* (Vic) and *Intellectually Disabled Persons' Services Act 1986* (Vic); and *Disability Services Act 1993* (WA).

15. It is a basic principle of international human rights law that the obligation to respect, protect and fulfil human rights includes a duty to provide effective remedies to victims where their rights have been breached.¹⁰ The Optional Protocol provides an additional means by which the Australian Government can ensure that this obligation is met.
16. Further, there is strong evidence that a human rights approach to disability and disadvantage can:¹¹
- (a) empower marginalised and vulnerable individuals, communities and groups;
 - (b) provide a framework for the development of more effective, efficient and holistic public and social policy;
 - (c) promote more flexible, responsive, individualised and 'consumer friendly' public and social services;
 - (d) challenge 'poor treatment' and thereby 'improve the quality of life' of marginalised and disadvantaged individuals and groups; and
 - (e) assist in the development of more effective social inclusion and poverty reduction strategies.
17. There is an increasing body of economic research which demonstrates that there is a strong correlation between effective and equitable social policy, on the one hand, and economic development and growth on the other.¹² Seen this way, the effective implementation of the CRPD may yield economic benefit. As a mechanism designed to promote effective implementation, the Optional Protocol contributes to the realisation of this benefit.

¹⁰ *International Covenant on Civil and Political Rights*, 16 December 1966 (entered into force 23 March 1976), article 2(3) (**ICCPR**); 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.

¹¹ See, eg, British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006); Ministry of Justice (UK), *Human Rights Insights Report* (2008); Audit Commission (UK), *Human Rights Act: Improving Public Services* (2003); Office of the United Nations High Commissioner for Human Rights, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002).

¹² See, eg, Thandika Mkandawire (ed), *Social Policy in a Development Context* (2004); Amartya Sen, *Development as Freedom* (1999); Nick Pearce and Will Paxton (eds), *Social Justice: Building a Fairer Britain* (2005).

3.2 Foster and Promote Analysis and Change

18. In its 2007 National Constitution and Plan of Action, the Australian Labor Party (ALP) committed to implement policies and programs for people with a disability which 'recognise and promote the worth and dignity and improve the quality of life.'¹³ Similarly, the ALP's 2007 election campaign material provides that 'Labor believes that all people should be able to participate as valued members of a civil society.'¹⁴

19. Despite the progress that has been made in the field of disability rights in Australia, significant challenges remain. For example, the ALP has stated in party documents that:¹⁵

[t]here is strong evidence that many people with disabilities and their carers are not getting the services they need. The AIHW estimates that over 23 000 people are waiting for accommodation and respite services nationally and almost 4000 need community access services.

20. While Australia's existing legal instruments are generally considered to be relatively advanced in terms of the extent to which they recognise and address disability rights, the HRLRC considers that it would be premature to assert that Australia is already fully compliant with the CRPD.¹⁶

21. Ratification of the Optional Protocol will encourage current and future Australian governments to improve upon existing mechanisms for the protection of disability rights and to take additional steps to implement the CRPD.

22. 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 the CRPD to promote the rights of persons living with disabilities.

¹³ Australian Labor Party, *2007 National Platform and Constitution*, adopted by the 44th National Conference in Sydney on 27–29 April 2007, < <http://www.alp.org.au/platform/index.php>> at 27 June 2008, 209.

¹⁴ Senator Jan McLucas, "Disability and Carers", available at http://www.alp.org.au/download/now/071107_disability_and_carers_policy_doc___with_header.pdf at 17 October 2008.

¹⁵ *Ibid*, 3.

¹⁶ NIA and JSCOT Reports, above n 4.

23. Another benefit flowing from ratification is the opportunity it presents for Australians to engage in the development of the international community's understanding of equality and human rights.¹⁷

3.3 Australia's International Role

24. Australia played a central role in the negotiation of the CRPD and signed on the first day that the CRPD was open for signature. The Australian Government should be commended for its role in the promotion of disability rights at the international level. Ratification of the Optional Protocol would allow the Rudd Government to continue to play a leadership role in this important area.
25. Australia has recently nominated Professor McCallum AO as a member of the Committee on the Rights of Persons with Disabilities. Membership of the Committee will be decided at the first session of the Conference of the States parties to the CRPD which will take place in New York on 31 October and 3 November 2008. Given this clear expression of commitment to the CRPD and its aims, it is vital that Australia continue to engage fully with the CRPD and the Optional Protocol.
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 of people living with disabilities to the same extent as other human rights.

3.4 Consistency with the Australian Government's Commitment to Constructive Engagement with the UN Human Rights System

27. More broadly, ratification of the Optional Protocol is supported by the ALP's National Platform and Constitution which endorses both the promotion of human rights internationally and the development of international standards and mechanisms for the protection and enforcement of these rights.¹⁸
28. Ratification of the Optional Protocol by the Australian Government would demonstrate its ongoing commitment to constructive engagement with the UN human rights system.

¹⁷ 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).

¹⁸ Australian Labor Party, *2007 National Platform and Constitution*, above n 13.

3.5 Enhance Public Awareness and Understanding

29. Ratification of the Optional Protocol would raise awareness of the CRPD and of the rights in people with disabilities more generally. The JSCOT Report stated that the CRPD 'serves an important educative purpose by fostering a more inclusive society and further encouraging the participation of people with disability in the wider community.'¹⁹ Similarly, the Optional Protocol contributes to the achievement of this goal.
30. In addition, the positive symbolism associated with a public commitment to the full realisation of the human rights of people with disabilities should not be underestimated. Historically, 'disability has been an invisible element of international human rights law'.²⁰ Australia's full commitment to the international recognition of the rights of people with disability is required if this trend is to be reversed in the domestic setting.

¹⁹ JSCOT Report, above n 4 [2.23].

²⁰ Rosemary Kayess and Phillip French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities", *Human Rights Law Review* 8(1) (2008), 12. Despite being the 'largest minority' group in the world, persons with disability are not explicitly recognised in the equality clauses in the *Universal Declaration of Human Rights*, the ICCPR or ICESCR.

4. Implementation Obligations

31. The Centre considers that the Optional Protocol can be implemented with relative ease and minimal cost within Australia's existing political and legal structures.
32. The Optional Protocol does not impose any new substantive obligations outside a commitment to co-operate in the communication and inquiry procedures.
33. In addition, article 2 of the Optional Protocol sets out strict admissibility requirements that must be met before the Committee can consider the merits of a communication alleging a violation of the CRPD by Australia. A communication will also be declared inadmissible if:
- (a) it is anonymous;
 - (b) it constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the CRPD;
 - (c) the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
 - (d) all available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
 - (e) it is manifestly ill-founded or not sufficiently substantiated; or when
 - (f) the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.
34. Similarly, stringent threshold requirements must be met before the Committee will initiate an inquiry. First, the Committee must receive reliable information indicating grave or systematic violations by a State Party of rights guaranteed in the CRPD.²¹ The Committee will then invite the State Party to co-operate and make submissions on the

²¹ Optional Protocol, Article 6(1).

- 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
35. At the conclusion of an inquiry or a communication, the Committee will issue its findings, comments and recommendations to the State Party. The State Party is then required, within six months, to submit its observations on the findings, comments and recommendations to the Committee.²⁴
36. In light of Australia's existing high level of compliance with CRPD and the strict admissibility requirements, ratification of the Optional Protocol is unlikely to subject the Australian Government to a flood of complaints and investigations.
37. 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.

²² Optional Protocol, Article 6(1).

²³ Optional Protocol, Article 6(2).

²⁴ Optional Protocol, Article 6(4).

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.

5. The Opt-out Clause

38. While article 8 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 failure to realise disability rights.
39. The inquiry procedure is particularly important in the context of discrimination and equality rights. Discrimination is often systemic in nature and systemic discrimination is 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 people with disabilities.
40. Given Australia's leadership role in the field of disability rights, its failure to support the Optional Protocol in full would send a negative message to other States who might be considering ratification.
41. 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 ratify the Optional Protocol in full.