*Devika Hovell**

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

ABSTRACT

As the political and legal consequences of Australia's non-compliance with international obligations become greater, it is timely to consider the nature of the process by which Australia chooses to assume these obligations. Prior to the 1996 reforms, Australia's entry into treaty obligations was controlled almost exclusively by the executive, with little role for Parliament, opposition parties, the media or the general public. As a result, the reasons for Australia's entry into many treaties remain unexplored and unexplained. This article examines the decision-making process leading to Australia's entry into the Optional Protocol to the International Covenant on Civil and Political Rights. Recognising that Australia's relationship with the body established by the Optional Protocol has deteriorated since accession, the aim of the article is to explore whether the nature of the accession process impacted upon Australia's capacity to comply with the international legal obligations assumed. The article then considers whether the problems identified in the accession process have been tackled successfully, or whether they continue to affect Australia's relationship with the international legal order.

I INTRODUCTION

The major players involved in Australia's decision to accede to the First Optional Protocol to the International Covenant on Civil and Political Rights ('Optional Protocol')[1] remember the decision as having been relatively uncontroversial.[2] As Melbourne newspaper *The Age* reported

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* BA, LLB (Hons) (UWA), LLM (NYU); Director, International Law Project,,Gilbert Tobin Centre of Public Law, University of New South Wales. I would like to thank Gough Whitlam, Michael Duffy, Elizabeth Evatt, Ernst Willheim, Duncan Kerr and other, anonymous interviewees who were very generous in imparting their share of the corporate memory of Australia's accession to the Optional Protocol. Thank you also to Professor Hilary Charlesworth, Professor George Williams and Wendy Lacey for their very helpful comments on earlier drafts. This case study forms part of a Project, 'International Law and the Australian Legal System', funded by the Australian Research Council.

1 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

2 Interview with former officer, Human Rights Branch, Attorney-General's Department, 27 November 2003.

it, '[w]ith little fanfare and no outcry, Australia has got itself a de facto bill of rights'.[3] However, if the decision itself was uncontroversial, its consequences have proved to be anything but. Under the Optional Protocol, Australia recognised the jurisdiction of the United Nations Human Rights Committee to hear claims of human rights violations against Australia. With the exception of the first successful claim against Australia in the *Toonen*[4] decision, which was positively received and acted upon by the Commonwealth government, the Australian government has declined to comply with any of the Committee's eight subsequent decisions against Australia. Australia's reasons for failing to comply, where reasons have been given, consistently relate to the government's stated perception of the illegitimacy of the Committee's right to inquire into matters of domestic concern to Australia.[5] This reasoning fails adequately to address the serious violations alleged against Australia in the Committee's decisions, including mistreatment of children,[6] arbitrary detention of asylum seekers,[7] discrimination on the grounds of sexual orientation,[8] inhumane treatment of prisoners,[9] cruel, inhuman or degrading treatment,[10] denial of the right to family,[11] undue trial delay[12] and denial of a remedy for rights violations.[13]

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3 Margo Kingston, 'Australia's Back-door "Bill of Rights"', *The Age*, 5 August 1991.

4 *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

5 For a more detailed account of Australia's responses to the Committee, see Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28(6) *Alternative Law Journal* 297.

6 *Bakhtiyari v Australia*, Communication No UN Doc 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), *Winata v Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001).

7 *Bakhtiyari v Australia*, Communication No UN Doc 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), *Baban v Australia*, Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003); *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002)*Winata v Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

8 *Young v. Australia*, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003).

9 *Cabal and Bertran v Australia*, Communication No 1020/2001, UN Doc CCPR/C/78/D/1020/2001 (2003).

10 *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).

11 *Bakhtiyari v Australia*, Communication No UN Doc 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003); *Winata v Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001)

12 *Rogerson v Australia*, Communication No. 802/1998, UN Doc CCPR/C/74/D/802/1998 (2002).

13 *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

The negative impact of Australia's relationship with the Committee on its international reputation raises the question as to why Australia decided to accede to the Optional Protocol in the first place. More than 10 years after Australia's accession to this instrument, it is timely to reflect on the preceding decision-making process in order to ascertain whether Australia's unsatisfactory relationship with the Committee is in part attributable to weaknesses in this procedure. Given the expanding interface between domestic and international law, it is apposite to consider the political and legal process by which Australia decides to sign up to treaties to avoid future dissonance in Australia's interaction with the international legal order.

Part I of the article considers the obligations contained in the Optional Protocol, and the nature of the role assigned to the Human Rights Committee to hear individual communications against states. Part II describes the decision-making process that led to Australia's decision to accede to the Optional Protocol. This Part draws on interviews with individuals involved in the process at Commonwealth and State level, including a former Prime Minister, a former Attorney-General and members of the relevant departments and committees. Part III identifies five key problems with the process by which Australia acceded to the Optional Protocol. Part IV of the article concludes by examining whether these problems have been addressed by subsequent reform.

II OPTIONAL PROTOCOL TO THE ICCPR

The Optional Protocol is a treaty attached to the International Covenant on Civil and Political Rights ('ICCPR').[14] The ICCPR establishes a number of fundamental human rights such as the right to life,[15] prohibition of torture,[16] prohibition of arbitrary detention,[17] fair trial rights,[18] the right to privacy,[19] freedom of religion[20] and freedom from non-discrimination.[21] The Optional Protocol establishes a complaints procedure by which individuals may complain to the Human Rights Committee about violations of these rights by states parties.

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14 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

15 Article 6.

16 Article 7.

17 Article 9.

18 Article 14.

19 Article 17.

20 Article 18.

21 Article 26.

The Optional Protocol was the compromise established at the conclusion of negotiations of the ICCPR and its sibling covenant, the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[22] Negotiation of an international bill of rights, first in the form of a non-binding statement of rights, the Universal Declaration of Human Rights,[23] and subsequently binding instruments in the form of the two covenants, took place over a 20 year period between 1946 and 1966. Australia took a consistently active role in the negotiations, particularly on the question of methods for monitoring and responding to alleged human rights violations.[24] Initially, Australia (represented in the early phase of the negotiations by Dr HV Evatt) was at the forefront of calls for an International Court of Human Rights. As one Australian delegate explained:

> The Australian proposals for an International Court of Human Rights have been put forward because we favour a continuous, effective and just system of international supervision. In English law, the remedy is to us as important as the right, for without the remedy there is no right. Our basic thesis is that individuals and associations as well as states must have access to and full legal standing before some kind of international tribunal charged with supervision and enforcement of the covenant. In our view, either a full and effective observance of human rights is sought, or it is not.[25]

Ultimately, Australia's proposal to establish an International Court of Human Rights was not accepted. In its place, an individual complaints procedure was established in the form of the United Nations Human Rights Committee. Concern by states such as the Soviet Union that even this procedure would unacceptably impinge upon national sovereignty led to the inclusion of the procedure in a separate Optional Protocol to the ICCPR.[26]

One hundred and four states are currently party to the Optional Protocol to the ICCPR. Under the Protocol, states recognise the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be

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22 Opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

23 General Assembly resolution 217A (1948).

24 An excellent description and analysis of Australia's involvement in the negotiation of these instruments is provided in Annemarie Devereux's article, 'Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946-1966' (2003) 22 *Australian Yearbook of International Law* 47.

25 Statement by Australian representative on International Court of Human Rights, undated, in NAA A 432/82, Item 1947/725 Pt 3, quoted in Devereux, ibid, 56.

26 Hilary Charlesworth, 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 *Melbourne University Law Review* 428, 429.

victims of a violation by States Parties of any of the rights set forth in the ICCPR.[27] The Committee is made up of 18 independent experts in human rights, each elected for a four year term. Claims brought to the Committee are conducted in two phases. First, the Committee determines whether the claim is admissible.[28] Among other things, this involves a determination by the Committee that the complainant has exhausted all domestic remedies in the state against which the violation is alleged. It is only where a state's domestic legal system fails to provide a remedy for a human rights violation that the Committee will agree to hear the claim. If the claim is found to be admissible,[29] the Committee will proceed to the second phase, that is, to determine the merits of the claim.[30]

Decisions rendered by the Committee are not binding on states. Instead, the Committee's decisions are regarded as an authoritative guide to the interpretation of state obligations under the ICCPR (obligations which, it should be noted, are binding on states). Rather than being enforceable, the decisions achieve their strength through publicity, alerting the government, the domestic community and the international community to violations. The Committee's decisions are forwarded to the state and individual concerned, and published in an annual report to the General Assembly and the United Nations. A Special Rapporteur is appointed by the Committee to follow up on decisions, for the purpose of ascertaining the measures taken by States Parties to give effect to the Committee's views. Publicity is therefore the key tool available to the Committee to encourage compliance with its decisions. States are asked to publicise the decisions and are generally given six months to inform the Committee what action has been taken in response to its findings. When publicised pursuant to the Committee's request, the decisions provide a valuable mechanism to guide informed debate on the issue of rights protection in domestic and international spheres.

III AUSTRALIA'S DECISION TO RATIFY: PERSONALITIES AND PROCESS

Australia acceded to the Optional Protocol 24 years after it was opened for signature. The decision-making process leading to this outcome spanned a period of eight years between 1983 and 1991, overlapping with the entire period of the Hawke government. During this period, attention to the Protocol was inconstant

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27 Article 1.

28 See Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev.6 (24 April 2001), rules 87–92, for the procedure to determine admissibility.

29 Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev.6 (24 April 2001), rule 94(2).

30 See Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev.6 (24 April 2001), rules 93–95, for the procedure for consideration of communications on the merits.

and the participants involved in the process changed. At a political level, the period saw two changes in the Minister for Foreign Affairs[31] and three different Attorneys-General.[32] The main participants in the process were the Commonwealth Attorney-General, the States through the Standing Committee of Attorneys-General and interested high-profile personalities such as former Labor Prime Minister, Gough Whitlam. Participants notably absent from the process were Parliament, the Federal Opposition, the media and the general public.

Australia adopted the Optional Protocol by a process known as 'accession'. A nation's entry into binding international legal obligations through a treaty will generally entail four steps: negotiation of the treaty, signature, ratification and implementation into domestic law. At the end of the negotiation process, the treaty will be adopted and opened for signature. Australia may then sign the treaty, although it will not become bound by a treaty until it takes the final step of submitting its instrument of ratification. The period between signature and ratification is traditionally regarded as the period within which the state can implement the treaty obligations into its domestic law. Where a state wishes to sign a treaty subsequent to its entry into force, the two-step signature and ratification process is merged in a process known as accession.

In examining the process of Australia's accession to the Optional Protocol, it is appropriate to have brief regard also to the nature of Australia's entry into the Optional Protocol's parent treaty, the ICCPR, and the ICESCR (together, 'International Bill of Rights').

A *The Whitlam Government: Australia's Signature of the International Bill of Rights*

By General Assembly resolution 2200 (XXI) of 16 December 1966, ICCPR, the ICESCR and the Optional Protocol were adopted and opened for signature, ratification and accession. Gough Whitlam signed the two human rights Covenants on behalf of Australia on their sixth anniversary on 18 December 1972. The then-Prime Minister decided to defer ratification and implementation of the Covenants until they had entered into force — provisions in each covenant provided that they would enter into force three months after the deposit of the 35th instrument of ratification or accession.[33] The reason for this deferral was that Mr Whitlam thought Commonwealth legislation under the external affairs power would be less

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31 Bill Hayden (11/3/83 – 2/9/88) and Gareth Evans (2/9/88 – 24/3/93).

32 Gareth Evans (11/3/83 – 13/12/84), Lionel Bowen (13/12/84 – 4/4/90) and Michael Duffy (4/4/90 – 24/3/93).

33 ICCPR, art 49; ICESCR, art 27.

vulnerable to challenges if based on an international instrument which was already part of international law.[34]

Similarly, the Whitlam government elected not to sign the Optional Protocol at that stage on the basis that it considered it was inappropriate to do so until the ICCPR had entered into force.[35]

B *The Fraser Government: Australia's Ratification of the International Bill of Rights*

The ICCPR and ICESCR entered into force on 3 January 1976 and 23 March 1976 respectively. The Fraser government lodged Australia's ratification of the ICESCR and ICCPR on 10 December 1975 and 13 August 1980 respectively. No measures were taken to implement the obligations in the two Covenants into domestic law. Moreover, the Fraser government took no action to sign or ratify the Optional Protocol to the ICCPR.

In response to a question on notice in the Senate on 20 April 1982 as to when it had last given consideration to Australia's ratification of the Optional Protocol, the Fraser government acknowledged that it had not given consideration to ratifying the Optional Protocol for several years. The Fraser government was of the view that ratification of the Optional Protocol should only be considered 'after the implications and consequences of Australia's ratification of the International Covenant on Civil and Political Rights on 13 August 1980 have been allowed to become clearer'.[36]

This attitude was consistent with the reasoning the Fraser government had given for declining to introduce domestic legislation, in the form of a domestic bill of rights, to implement the Covenant itself. At the inauguration of the Human Rights Commission in Canberra on 10 December 1981, Prime Minister Fraser expressed the view that Australia already had adequate human rights guarantees:

> In Australia, many of our rights are established and protected by law, both common law and statute law. In our courts, and through our system of responsible government we have strong, vital and practical mechanisms for securing our rights ... Those who criticise these mechanisms as inadequate guarantors of rights underestimate their strength and effectiveness, as well as their adaptability and their capacity to take account of particular circumstances, because where questions of rights are concerned, the proof of

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34 Gough Whitlam, 'National and International Maturity', 40th Roy Milne Memorial Lecture, The Australian Institute of International Affairs, Brisbane, 8 July 1991, 8.

35 Telephone conversation with Gough Whitlam, May 2004.

36 'Question on Notice: the Optional Protocol to the International Covenant on Civil and Political Rights', Question No. 1769, Senate Debate, 20 April 1982, 1325.

> the pudding is very decidedly in the eating, and in the overall sense human rights command great respect and protection in Australia. Any consideration of rights in Australia, or of problems which still need to be overcome, really does need to proceed against the background of this overall perspective.[37]

Mr Fraser's view, as expressed at that time,[38] was that it was a trap to depend too much upon law for the enjoyment of rights. The then Prime Minister saw human rights as 'a matter of attitudes and relationships between people':

> In the absence of respect for people, or a recognition of human dignity, in the absence of the attitude which believes in the opportunities for all and encourages the fullest use of human potential, in the absence of an understanding of the social factors, both existent and emerging, which impinge on the enjoyment of rights, there is little which the law or any other mechanism can do. ... Indeed, when people resort to the law to protect their rights, they typically do so only because their rights have already been infringed. It is a trap to depend too much upon law for the enjoyment of rights, or to imagine that more laws, different kinds of laws, or a greater resort to law, can be a substitute for attitudes and relationships between people, and it is worth remembering Cicero's words: 'the more law, the less justice'.[39]

This reflected a common perception among the broader public at that time that Australians did not require legal guarantees for the protection of human rights. Australia's ratification of the Covenants was therefore regarded as a confirmation of an approach to rights that was already considered to prevail in Australia, alleviating the need to enshrine these protections in law to ensure their protection in the future.

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37 'Inauguration of the Human Rights Commission', Canberra, 10 December 1981 quoted in David White and Dennis Kemp (eds), *Malcolm Fraser on Australia* (1986) 227–8.

38 It should be noted that Mr Fraser has subsequently changed his view:

> 'Through much of my political life I accepted the view of noted lawyers, that our system of law, derived from Britain and the development of common law best protected the human rights of individuals. I now believe that our own system has so patently failed to protect the "rights" of Aboriginals that we should look once again at the establishment of a Bill of Rights in Australia.'

Malcolm Fraser, *Fifth Vincent Lingiari Memorial Lecture*, Northern Territory University, 24 August 2000.

39 'Inauguration of the Human Rights Commission', Canberra, 10 December 1981 quoted in White and Kemp (eds), above n 37, 227–8.

C *The Hawke Government: Consideration of the Optional Protocol*

1 The Evans' Era: Towards Domestic Implementation of the International Bill of Rights

The Commonwealth's approach to human rights changed with the election of the Hawke government in 1983. While implementation of the human rights Covenants and accession to the Optional Protocol were not regarded as priorities of the Fraser government, both issues were placed on the agenda of the Hawke government by the first Attorney-General of the Hawke administration, Gareth Evans.

Mr Evans assumed the office of Attorney-General with a program proclaiming commitment to human rights as a key aspect. In his 1983 law and justice policy, Evans promised a judicially enforceable Bill of Rights, initially in legislative form but eventually as part of the Constitution. Mr Evans accepted that this would be difficult to sell electorally:

> No one should be under any illusion that a commitment to human rights is good politics in the sense of winning electoral hearts and minds. Most Australians seem to regard fundamental matters of political and civil liberty as of no concern to themselves, but only to noisy and unattractive minorities. As a nation at large...we are monumentally indifferent, if not positively hostile, to most matters of civil liberty and law reform ... Anyone who thinks that a systematic, sane, humane and civilised law and justice platform is going to attract more than a handful of swinging votes to the ALP – and, moreover, attract more votes than it loses – is almost certainly longer on idealism than on good political sense... Reform in this area will always be hard to sell, but decency and humanity demand that the effort be made.[40]

While the focus of Gareth Evans' human rights agenda was clearly the Bill of Rights, the question of Australia's accession to the Optional Protocol was also under consideration by the government during this time. In response to a question on notice on 3 November 1983, Bill Hayden, the then Minister for Foreign Affairs stated:

> The Government strongly supports the principle that states should observe conscientiously their international human rights obligations. Against this background, the Government is currently reviewing Australia's position with regard to the Optional Protocol to the ICCPR and the Article 14 procedures under the International Convention on the Elimination of All Forms of Racial Discrimination.

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40 Gareth Evans, 'Democratic Socialism and Human Rights' quoted in Keith Scott, *Gareth Evans* (1999) 151.

In December 1984, Gareth Evans was replaced as Attorney-General by Lionel Bowen. During his time in office, Mr Evans failed to persuade the rest of his party to support his stance on human rights, particularly on the issue of a bill of rights. Cabinet authorised him to proceed with the Bill of Rights in October 1983, but reversed its decision in March 1984 because of concerns about attacks on it by the States, the Opposition and other vocal opponents in the community during a possible election year.[41] In his personal diary, Mr Evans recorded a telephone conversation with Prime Minister Hawke in which he sensed that

> the new Government's general policy approach...would be on the side of moderation and caution, with nothing particularly radical in the agenda. The implications of all this for my Bill of Rights legislation are looming all too clearly.[42]

Years later, Mr Evans revealed some of the frustration he had felt at not receiving support in early 1984 to push ahead with his own Bill:

> The huge problem I had as Attorney-General in the early 1980s [was] the reaction of most of [my] colleagues that all of this was just an exotic minority interest, and that the community as a whole was at best apathetic and at worst possibly hostile to change.[43]

2 The Bowen Era: A Slow Tussle with the States

In spite of the apparent lack of support within the Labor party, the change in the occupant of the office of Attorney-General from Gareth Evans to Lionel Bowen did not conclude discussion of a bill of rights for Australia. Yet the scope of the government's second Bill of Rights was tempered by a much stronger emphasis on States' rights. On 9 October 1985, Bowen introduced the Australian Bill of Rights Bill which enacted only those provisions of the ICCPR relating to existing areas of Federal responsibility. Bowen concluded his speech by emphasising the government's desire for State cooperation on the issue of human rights:

> The Government has chosen to limit the extent of application of the Bill of Rights to the States, not because of any doubts concerning constitutional power, but in order to achieve if possible a cooperative approach to human rights protection.
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> However, the Commonwealth expects the States and the Northern Territory to take action to amend or repeal legislation which offends human rights and also it is hoped that at least some States will enact their own Bill of Rights. The

41 Scott, ibid 155.
42 Evans' Personal Diary, quoted in Scott, ibid 175.
43 *The Age*, 18 July 1992.

> Government wishes to make it clear that if such action on the part of the States is not forthcoming, the Commonwealth reserves the right to enact specific overriding Commonwealth legislation and to extend the operation of the Bill of Rights to the States.[44]

The thinly-veiled threat was unsuccessful in achieving State cooperation. Although the Bill was passed by the House of Representatives on 14 November 1985, it was withdrawn from the Senate on 28 November 1986, and did not go back to the House of Representatives or receive assent. Gough Whitlam suggests that the Bill was dropped on the basis of a deal between Hawke and Brian Burke, then-Premier of Western Australia, who considered the Bill would detract from State control over the question of Aboriginal land rights.[45]

While the question of a bill of rights for Australia was shelved by the Hawke government, discussion of the possibility of Australia's accession to the Optional Protocol remained on foot. At the Commonwealth level, the issue was handled in large part by the Human Rights Branch of the Commonwealth Attorney-General's Department. In a speech at the Australian National University in May 1991, Peter Thomson from the Human Rights Branch of the Attorney-General's department stated that opposition to accession focussed on the following claims:

- Australia's legal and political system already provides adequate remedies for complaints of human rights violations;
- The airing of such complaints in an international forum will adversely affect Australia's human rights reputation;
- Recognising the competence of the Committee to receive such complaints is an interference with Australian sovereignty.[46]

Whatever the reasons for the opposition, the degree of opposition at Commonwealth level was minimal, and resolution of these issues in favour of accession appears to have been achieved early on in the process. The Commonwealth first expressed strong views in favour of accession when Lionel Bowen wrote to the State Attorneys-General on 19 June 1985 inviting them to consider the subject and to communicate their views as soon as possible.[47] The

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44 Quoted in Gough Whitlam, *Abiding Interests* (1997) 199.

45 Interview with Gough Whitlam, 8 December 2003; Whitlam, ibid, 192.

46 Peter Thomson, 'Implications of Australian Ratification and Potential Ratification of International Human Rights Treaties', International Law Weekend, Centre for International and Public Law, ANU, 10–12 May 1991, 99.

47 Alan Rose, 'Commonwealth State Aspects: Implementation of the First Optional Protocol', paper delivered at Internationalising Human Rights: Australia's Accession to the First Optional Protocol to the ICCPR', Law School, University of Melbourne, 10 December 1991, 42.

letter also referred to the Commonwealth's desire to establish a formal arrangement between the Commonwealth and the States to process communications under the Protocol and responses by Australia.[48] A detailed Commonwealth paper on the Protocol procedures had been circulated on 14 December 1984 and a further paper outlining the considerations favouring accession was circulated at the Ministerial Meeting on Human Rights held on Hamilton Island in July 1985.[49] There was little debate in Parliament. The only discussion in Parliament arose from a series of questions on notice placed over the years by Colin Hollis MP, Labor member for Throsby.[50] Those in the Attorney-General's department were aware that Mr Hollis raised these questions on behalf of Gough Whitlam, who supplied a number of questions to Mr Hollis over the years seeking information regarding progress with Australia's accession to the Optional Protocol and Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.[51] Mr Whitlam transmitted these questions to Mr Hollis on the basis that Mr Hollis was the caucus representative on UNESCO matters, and was sympathetic to human rights issues due to his declared concern with gay rights.[52]

Yet Commonwealth support for accession to the Optional Protocol was not enough to secure the smooth passage of the decision to accede. Like the bill of rights debate, the question of accession to the Optional Protocol was similarly held hostage to State rights. For the duration of Lionel Bowen's term as Attorney-General, the question as to whether Australia should accede to the Optional Protocol was tied up in the Standing Committee of Attorneys-General (SCAG), one of the main fora used by the Commonwealth for consultation with the States.

Australia's participation in international human rights instruments has traditionally been strongly affected by its federal structure. The need for shared Commonwealth and State responsibility in treaty matters was recognised at the Premiers' Conference in Canberra in October 1977. In 1982, the Premiers and the Commonwealth reached agreement on a set of 'Principles and Procedures for Commonwealth-State Consultation on Treaties'. These procedures were revised by

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48 Ibid.

49 Ibid.

50 Question on Notice No 94, 4 November 1987, Reps Deb 1987, 2043; Question on Notice No 95, 18 November 1987, Reps Deb 1987, 2357; Question on Notice No 248, 18 February 1988, Reps Deb 1988, 369; Question on Notice No 1550, 13 April 1989, Reps Deb 1989, 1679; Questions No 169 and 170, 11 October 1990, Reps Deb 1990, 2795; Question on Notice No 388, 12 February 1991, Reps Deb 1991, 409; Question on Notice No 442, 12 February 1991, 417; Question No 564, 11 April 1991, Reps Deb 1991, 2542.

51 Interview with Gough Whitlam, 8 December 2003.

52 Interview with former officer, Human Rights Branch, Attorney-General's Department, 27 November 2003; Interview with Gough Whitlam, 8 December 2003.

the Commonwealth government in 1983.[53] The Commonwealth and States broadly agreed as follows:

(i) The States will be informed in all cases and at an early stage of any treaty discussions Australia has decided to join.
(ii) The Commonwealth will consult with the States before deciding whether or not to legislate to adopt or implement a treaty that affects a legislative area traditionally regarded as being within the responsibilities of the States. In such areas, the States have the first opportunity of implementing the treaty provisions by their own legislation. Detailed consultation on these matters will usually take place in the appropriate inter-governmental ministerial body.
(iii) In appropriate cases, the Commonwealth will include State representatives in its delegations to international conferences which deal with State subjects, to enable the States to be informed and to offer a point of view to the Commonwealth, rather than to enable them to share in the making of policy decisions for Australia.
(iv) The Commonwealth will consider seeking federal clauses in individual treaties involving matters governed by State law.
(v) The Commonwealth will not become a party to a treaty containing a federal clause until the laws of all States conform with the mandatory provisions of the treaty. [54]

In accordance with these guidelines, accession to the Optional Protocol involved extensive consultation with State representatives. The issue of accession to the Optional Protocol was initially discussed at the Ministerial Meetings on Human Rights, held as an adjunct to meetings of SCAG on 14 December 1984, 2 May 1985 and 25 July 1985. Thereafter, a decision was taken to discontinue Ministerial Meetings on Human Rights, and to make human rights issues a separate agenda item for meetings of SCAG.[55] In retrospect, many have regretted the delay resulting from this change in process, whereupon human rights became just another agenda item encompassing discussion on a raft of matters including the drafting, signature, ratification and implementation of human rights treaties, and legislative amendments relevant to human rights. Over the time period during which the Optional Protocol was under consideration, a number of other treaties were being considered by SCAG, including the Convention on the Rights of the Child, the Additional Protocols to the Geneva Conventions and the question as to whether Australia should make a declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination to allow individual complaints to be made for alleged violations of that treaty. Mr Whitlam

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53 The current version of these principles dates from the Council of Australian Governments (COAG) meeting of 14 June 1996.
54 Transcript, Press Conference by Prime Minister, 21 October 1977.
55 Question on Notice No 1550, 13 April 1989, Rep Debates 1989, 1679.

suggests that one human rights instrument at most was discussed at each meeting.[56] Certainly, the Convention on the Rights of the Child and the Additional Protocols created considerably more controversy than the Optional Protocol.[57] In March 1991, Parliament established a Human Rights Sub-Committee in recognition of the fact that scant or at best haphazard attention had been given to human rights and mandating the Sub-Committee to examine Australia's approach to human rights. In its first report in December 1992, the Sub-Committee criticised the process by which Australia decided to enter into human rights treaties:

> Consultation takes place through the Standing Committee on Attorneys-General (SCAG). It has a regular agenda item on human rights where reports are made on the new instruments that are being developed, on UN meetings that have been held, on our reporting obligations and the need for inputs from the States. The process has proved to be woefully slow, lapses of decades occurring in some cases. It would seem that Federal Governments have been as culpable as the States in their willingness to let inertia prevail.[58]

The significant delay in the move to accession of the Optional Protocol is also reflected in Hansard. On 18 February 1988, over three years after the matter had first been transmitted to the States, Mr Hayden, the then-Foreign Affairs Minister, reported that, while the government supported accession to the Optional Protocol, the States remained unable to agree:

> Since the co-operation of the States is regarded as necessary for the effective operation of both the Optional Protocol and Article 14, the question of accession to the Protocol and the making of a declaration under Article 14 has been under discussion with the States in the Standing Committee of Attorneys-General. As yet, agreement has not been reached with all States.[59]

Further questioning by Mr Hollis in Parliament the following year revealed that only the Labor Attorneys-General from New South Wales, Victoria and South Australia had agreed to Australia acceding to the Optional Protocol.[60] However, a

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56 Interview with Gough Whitlam, 8 December 2003.

57 Interview with former officer, Human Rights Branch, Attorney-General's Department, 27 November 2003; Interview with Michael Duffy, former Commonwealth Attorney-General, 6 April 2004. Even the retrospective inquiry by the Joint Standing Committee on Treaties into Australia's ratification on the Convention on the Rights of the Child (JSCOT, *UN Convention on the Rights of the Child*, 17th Report, August 1998) attracted submissions from an unprecedented number of interested parties (764, compared to 252 in the case of the Rome Statute of the International Criminal Court).

58 Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (December 1992), 30 [3.12].

59 Question on Notice No 248, 18 February 1988, Rep Debates 1988, 369.

60 Question on Notice No 1550, 13 April 1989, Rep Debates 1989, 1679.

series of State elections bringing opposition parties to power saw shifts in approach to the Optional Protocol along party lines. In 1988, New South Wales expressed its opposition to accession following elections installing a new Coalition government.[61] In 1989, victory to the Labor party in State elections in Tasmania and Queensland saw these States come out in favour of accession.[62]

The resistance of those States opposed to accession was due to a number of factors, including (1) fear of the potential impact of international scrutiny on the direction of State policy in areas traditionally considered subject to their exclusive jurisdiction; (2) the difficulty of aligning their laws and practice with the treaty obligations; and (3) the costs they might face in defending themselves against complaints lodged with the various human rights committees. These anxieties were articulated by the former Attorney-General of NSW, John Dowd QC:

> I oppose, on behalf of the State, the signature of the Optional Protocol, primarily for the reason that the States are the deliverers of breaches of human rights. It [sic] has to defend itself against allegations. The cost of preparing a case against the State is quite massive and it is all very well for the Commonwealth to sign treaties. It does not have to fund the defence ... That can be a massive hole in a tiny budget. ... The High Court would uphold Federal legislation under our treaties power to overturn State legislation. That, however, attacks the very nature of the constitutional compact. It was one of my concerns about all international treaties, that federations are uncomfortable with international treaties.[63]

Certain States such as Western Australia were also concerned about the impact of accession on specific policy areas. Western Australia was a consistent opponent of Australia's accession to the Optional Protocol. In a speech launching Amnesty International week in Fremantle in 1991, Gough Whitlam described the Western Australian Attorney-General, Joe Berinson, as 'the most inveterate and implacable exponent of State rights and opponent of international conventions'.[64] Western Australia was concerned in particular about the impact of the Optional Protocol on indigenous land rights issues and prison facilities. Western Australia believed it had established the best system for dealing with these issues, and was hostile to the notion that an international committee might be able to meddle in its policy

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61 Question on Notice No 170, 11 October 1990, Rep Debates 1990, 2795.

62 Question on Notice No 1386, 22 December 1989, Senate Debates 1989, 5212; Question on Notice No 170, 11 October 1990, Rep Debates 1990, 2795.

63 Evidence to Human Rights Sub-Committee of Joint Committee on Foreign Affairs, Defence and Trade quoted in *A Review of Australia's Efforts to Promote and Protect Human Rights* (December 1992), 29.

64 Gough Whitlam, 'WA Obstruction to Human Rights Conventions', Speech at launching of Amnesty International Week, Fremantle, 12 October 1991, 3.

choices.[65] In relation to prison facilities, it saw serious financial and staffing consequences arising from provisions in the ICCPR such as the requirement that juvenile offenders be separated from adults.[66] The funding was not available to build separate juvenile prison facilities in Kununurra and other outback locations.

3 *The Duffy Era: Commonwealth Decisiveness*

Michael Duffy replaced Lionel Bowen as Commonwealth Attorney-General on 4 April 1990. Upon assuming office, one of the early pieces of correspondence Mr Duffy received was from Gareth Evans, then Minister for Foreign Affairs, who wrote regarding the delay in Australia's accession to the Optional Protocol. Mr Evans explained that the issue had first been addressed when he was Attorney-General in 1983–84.[67] Mr Evans wrote:

> In my view, the Government's commitment to the protection and promotion of human rights, and the active stance taken by Australia in support of human rights internationally, requires that Australia become a party to the First Optional Protocol. The credibility of our human rights policy both within Australia and internationally could legitimately be questioned by the fact that Australia has not yet formally accepted the obligations imposed by the Protocol.[68]

From early in 1990, the government made concentrated efforts to seek agreement to accession to the First Optional Protocol.[69] Mr Duffy's style was different to that of his predecessors. For example, in his dealings with the States, Mr Duffy was described as 'more decisive' than Mr Bowen,[70] and did not see the Commonwealth government as necessarily subject to the timetable of the States for agreement:

> Three times a year, there are meetings of the Standing Committee of Attorneys-General. I write to all of the Attorneys-General. I send them a paper, the Commonwealth paper, on all the pending conventions. And you [the States] never write back. I put them on the agenda of the SCAG meetings and you do not speak to them. So, am I to take it that you have a veto, or am I to say that I've sought all the opportunities for consultation and you do not take them in correspondence or at a total meeting of all the ministers around Australia?[71]

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65 Interview with Gough Whitlam, 8 December 2003.

66 ICCPR, art 10.

67 Interview with Michael Duffy, former Commonwealth Attorney-General, 6 April 2004.

68 Unpublished letter, 23 July 1990, quoted in Rose, above n 47.

69 Question on Notice No 388, 12 February 1991, Rep Debates 1991, 409.

70 Interview with Ernst Willheim, former Head of Justice Division, Attorney-General's Department, 5 August 2004.

71 Quoted in Whitlam, above n 44, 204.

Mr Duffy saw the situation as ludicrous, and thought that the issue had been allowed to languish for too long at the whim of the States.[72] His departmental advisers informed him that, as the obligations under the Optional Protocol did not have to be implemented in domestic legislation, it was legally open to the Commonwealth government to accede to the Optional Protocol notwithstanding the lack of agreement on the part of some States.[73] Mr Duffy wrote a letter to each of the State representatives asking them to submit their final objections to Australia's accession, explaining that, unless he received pressing objections from the States within seven days, he would go ahead with the accession.[74] Mr Duffy had all but given up on Western Australia, but an eleventh-hour change of heart on 12 December 1990 saw Joe Berinson advise Michael Duffy that his government did not wish to maintain the reservations it had expressed to accession to the Optional Protocol.[75] The reason for this about-turn can only be guessed at. Possible reasons were Mr Duffy's no-nonsense style, the fact that Carmen Lawrence had taken over as Premier of Western Australia in February 1990, and lobbying from Gough Whitlam who had written to Ms Lawrence in October 1990 asking her to reconsider her government's opposition to Australia's accession to the Optional Protocol.[76]

In April 1991, Mr Duffy told the Parliament in response to a further question on notice from Colin Hollis:

> Australian accession to the Optional Protocol is not a matter which requires agreement by the Standing Committee of Attorneys-General. Rather, the question is one for decision of the Australian Government. The Standing Committee is, however, a valuable forum for discussion and consultation with the States and Territories on such issues, and the Government will make its decision on accession in the light of that discussion and consultation.

At this stage, only New South Wales and the Northern Territory were holding out.

The final decisive push came from the Royal Commission on Aboriginal Deaths in Custody, which handed down its much-anticipated Report in May 1991. Recommendation 333 of the Report stated:[77]

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72 Interview with Michael Duffy, former Commonwealth Attorney-General, 6 April 2004.

73 Interview with Ernst Willheim, former Head of Justice Division, Attorney-General's Department, 5 August 2004.

74 Interview with Michael Duffy, former Commonwealth Attorney-General, 6 April 2004.

75 Unpublished letter from the Hon Joe Berinson MLC to the Hon Michael Duffy MP, dated 12 December 1990 referred to in Rose, above n 47, 43.

76 Interview with Gough Whitlam, 8 December 2003; Whitlam, above n 44, 199.

77 Royal Commission into Aboriginal Deaths in Custody National Report (1991), vol 5, 26.

> While noting that in no case did the Commission find a breach of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, it is recommended that the Commonwealth Government should make a declaration under Article 22 of the Convention and take all steps necessary to become a party to the Optional Protocol to the International Convention on Civil and Political Rights in order to provide a right of individual petition to the Committee Against Torture and the Human Rights Committee, respectively.

Commonwealth Ministers were well aware that the Optional Protocol would provide a forum for indigenous people to lodge complaints against State laws, and it was hoped that the accession would send a strong message to the States to bring their policies in this area into line with Australia's human rights obligations.[78] In a symbolic gesture highlighting the link between the Royal Commission Report and the ultimate decision, Australia's decision to accede to the Optional Protocol to the ICCPR was announced by Robert Tickner, the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs, at a session of the United Nations' Sub-Commission on Prevention of Discrimination and Protection of Minorities' Working Group on Indigenous Populations in Geneva on 31 July 1991.[79] On 25 September 1991, the Minister for Foreign Affairs and Trade, Senator Evans, deposited Australia's instrument of accession to the Optional Protocol to the ICCPR with the United Nations' Secretary General in New York.

There was little press coverage of the development, and no discernible public reaction. Indeed, in one of the only newspaper articles on the development, Margo Kingston announced that '[w]ith little fanfare and no outcry, Australia has got itself a de facto bill of rights, a concept derided and stymied when the Government pushed the idea directly seven years ago'.[80] The issue failed to create a stir among the general public, and there were no follow-up articles on the issue.[81]

In light of the apathy and indifference with which the accession was greeted, one wonders why it took eight years to achieve. Conversely, in light of the potential impact on Australia's human rights reputation of non-compliance with Committee decisions,[82] one wonders why there was not more controversy and debate over the

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78 Interview with Ernst Willheim, former Head of Justice Division, Attorney-General's Department, 5 August 2004.

79 Joint Media Release (Minister for Aboriginal Affairs, Acting Minister for Foreign Affairs and Trade, Attorney-General), 31 July 1991.

80 Margo Kingston, 'Australia's Back-door "Bill of Rights"', *The Age*, 5 August 1991.

81 The only other article appeared in *The Australian* (Lau, 'UN Human Rights Block Lifted', *The Australian*, 2 August 1991, p 10).

82 See, for example, reports such as Human Rights Watch, 'Australia Undermining Global Human Rights', 31 August 2000, http://hrw.org/english/docs/2000/08/31/austra721.htm; Amnesty International, *Amnesty International Report 2001*, and

issue. The next section will examine the factors contributing to the delay in accession, and the factors underpinning Australia's failure to foresee and prevent the subsequent damage to its international reputation resulting from its antipathetic relationship with the Committee.

IV PROBLEMS WITH TREATY-MAKING PROCESS: PAST, PRESENT AND FUTURE

An analysis of the decision-making process leading to Australia's accession to the Optional Protocol against the backdrop of Australia's subsequent relationship with the UN Human Rights Committee reveals five main problems:

(i) Unreasonable delay in the negotiations between Commonwealth and State governments;
(ii) Lack of a broad and public consultation process;
(iii) Undue impact of partisan attitudes to international law and human rights on Australia's accession to and compliance with treaty obligations;
(iv) Inattention to domestic implementation;
(v) Demonstrated failure to take international obligations seriously.

(i) Unreasonable Delay in Commonwealth/State Negotiation

Australia's ability to commit to international obligations is complicated by its federal structure. The federal system has presented particular problems for the incorporation of human rights into the domestic legal system.[83] Of course, in a federal system, State cooperation must be encouraged rather than discouraged in any decisions relating to Australia's assumption of additional international obligations. Particularly in matters of human rights, it is largely the States that will be responsible for implementing the obligations at ground level. Understandably, this will delay the process of ratification, as explained by Mr John Broome, the then First Assistant Secretary of the Civil Law Division:

> Particularly in the area of human rights, the Government has taken the view that we should not take the step of ratification until we are satisfied that domestic law in practice is in accordance with the requirements of the treaty. That has led to substantial delay while States go through a process of

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media articles such as BBC News, 'Australia attacked over Aborigine treatment', 21 July 2000, http://news.bbc.co.uk/2/hi/asia-pacific/845400.stm (regarding CERD Committee report) and CNN, 'UN again slams Woomera conditions', 31 July 2002, http://archives.cnn.com/2002/WORLD/asiapcf/auspac/07/31/australia.woomera/.

83 For example, a Bill of Rights has been described as inimical to the federal system: see discussion in Hilary Charlesworth, 'The Australian Reluctance About Rights' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) 21, 33.

> satisfying themselves that their relevant laws and practices are in conformity or, if they are not, to what extent they have to be changed.[84]

However, in the decision-making process relating to accession to the Optional Protocol, consultation went beyond what was necessary to ensure the States were in a position to comply with the international obligations being acceded to. Instead, federalism became an excuse for inefficiency and unreasonable delay. The Commonwealth became a reticent hostage to State reluctance to incur the additional obligations that would flow from Australia's commitment to human rights.

This was reflected in the first report of the Human Rights Sub-Committee to the Joint Committee on Foreign Affairs, Defence and Trade discussed above. The first report of the Committee was handed down in December 1992, and focussed on the failure of successive Australian governments over a very long period fully to ratify the human rights treaties to which Australia was a party. The Sub-Committee noted that the arguments used to defend the delay were usually 'questions of States' rights and the length of the consultative process with the states'.[85] The Sub-Committee further noted that the process of consultation through SCAG, 'has proved to be woefully slow, lapses of decades occurring in some cases'.[86] In conclusion, the Sub-Committee found:

> It would seem that federal governments in their desire not to upset the states have been as culpable as the states in their willingness to let inertia prevail. ... The Committee believes that the arguments which have been put to it concerning States' rights carry less weight than those which stress the need for Australia to speak with one voice, to uphold its principles on human rights, to work to upgrade our practice and standards on human rights as a whole nation. If that requires federal legislation to ensure that our treaty obligations are met, it should be passed. The power and responsibility of the Federal Government in respect to treaties is clear since it was upheld by the Franklin Dam case and the Koowarta case. The Committee believes that States' rights and the consultative process, which have been used as delaying tactics, must no longer impede the ratification of outstanding articles on our international human rights treaties.[87]

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84 Evidence to the Joint Committee on Foreign Affairs, Defence and Trade, 14 May 1992, 630.

85 Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (December 1992), xxvii.

86 Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (December 1992), 30 [3.12].

87 Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Promote and Protect Human Rights* (December 1992), xxvii.

(ii) Democratic Deficit: Lack of an Appropriate Deliberative Process

Remarkably absent from the process of accession to the Optional Protocol was any form of public voice. Leaving aside the extensive discussions with the States, the Commonwealth's decision to accede to the Optional Protocol attracted very little opposition or comment on issues apart from the impact on the States and Territories. The issue went to Cabinet which is reported to have seen no problem with the proposed accession.[88] Since no enacting legislation was required, there was no role for Parliament.[89] As stated previously, the only discussion in Parliament was a series of questions on notice from Colin Hollis,[90] who was seeking information on behalf of a non-Parliamentarian, Gough Whitlam, a former Prime Minister who had been responsible for signing the ICCPR. The Commonwealth did not seek submissions from interested parties in the lead-up to accession nor was there at that stage any Parliamentary committee process. The government made no approach to non-government experts in human rights such as Elizabeth Evatt (later nominated to the UN Human Rights Committee) for their views on Australia's accession to the Optional Protocol.[91] Detailed consideration was given to the issue by members of the Human Rights Branch of the Commonwealth Attorney-General's department, however documents produced by this branch were not made widely available. Indeed, very little public information was available on the decision-making process. Moreover, there was no discernible interest or pressure from any network of non-governmental organisations or lobby groups, and media attention was negligible.

Certainly, the politicians involved cannot be held solely to blame for this situation. This was an era of public apathy on the question of human rights. This apathy, which Gareth Evans and his colleagues saw as verging at times on positive hostility, created a political culture wary of human rights. This most notably manifested itself in the failure to enact a bill of rights to implement the International Covenant on Civil and Political Rights. As Hilary Charlesworth remarked as late as 1994:

> Australians are complacent about the protection of human rights in their country. In national and international fora we proclaim the satisfactory nature of our legal system in securing the rights of individuals. Occasionally we acknowledge that some groups, particularly the Australian Aborigines, may have legitimate complaints that the legal system does not go far enough in

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88 Interview with Michael Duffy, former Commonwealth Attorney-General, 6 April 2004.

89 Interview with former officer, Human Rights Branch, Attorney-General's Department, 27 November 2003.

90 Above n 57.

91 Interview with Elizabeth Evatt, 5 April 2004.

> defending their rights. But we believe that problems can be resolved by tinkering at the edges of an otherwise admirable human rights legal regime.[92]

Whatever the reason, the failure to engender public awareness on the Optional Protocol, and to educate the public on the nature of Australia's relationship with the Human Rights Committee, has detracted in the long-term from the perception of the Committee as a legitimate assessor of Australia's human rights violations. Later governments have been able to exploit this perceived illegitimacy by painting the international human rights framework as an unjustifiable intervention in Australia's domestic affairs.[93] This is an unfortunate consequence, which has had both international and domestic implications. Internationally, it has detracted from Australia's reputation, impacting upon our credibility in the region and the strength of our influence in relation to human rights matters.[94] Domestically, it has undermined the key purpose of the Committee's decisions in so far as the Australian population is concerned, namely to contribute to domestic debate on human rights issues.

Subsequent reform of the treaty-making process has led to a significant improvement in the level of consultation. Increasing dissatisfaction with Parliament's desultory role in the process, and the need to overcome the perceived 'democratic deficit' therein,[95] led to a 1995 Senate inquiry into the treaty-making power and the external affairs power.[96] In 1996, the new Coalition government implemented many of the reforms recommended by the Senate, introducing five key reforms to Australia's treaty-making process:

(1) The tabling in Parliament of all treaty actions proposed by the government in Parliament for at least 15 sitting days before binding action is taken.
(2) The preparation of a National Interest Analysis (NIA) for each treaty, outlining information including the obligations contained in the treaty and the benefits for

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92 H Charlesworth, above n 83, 21.

93 See, for example, ABC Radio, 'The Hon John Howard MP, Radio Interview with Sally Sara', *AM Programme*, 18 February 2000, http://www.pm.gov.au/news/interviews/2000/AM1802.htm; Lincoln Wright, 'Howard Softens Stand on UN', *The Canberra Times*, 3 April 2000; ABC Television, 'Australia Headed for Bottom of the Human Rights Barrel', *7.30 Report*, 31 March 2000, http://www.abc.net.au/7.30/stories/s115193.htm.

94 See, for example, Human Rights Watch, 'Australia: Set Example as New Chair of Human Rights Body', 19 January 2004, http://www.hrw.org/english/docs/2004/01/19/ austra6963.htm.

95 Minister for Foreign Affairs and the Attorney-General, 'Government Announces Reform of Treaty-Making', (Media Release FA-29, 2 May 1996).

96 Senate Legal and Constitutional References Committee, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995), para 0.1.

Australia of entering into the treaty. The NIA is tabled in Parliament and published on the Internet.

(3) The establishment of the parliamentary Joint Standing Committee on Treaties (JSCOT), comprising 16 members from government, opposition and minority parties, to inquire into and make recommendations in relation to Australia's entry into treaties.

(4) The establishment of the Treaties Council comprising the Prime Minister, Premiers and Chief Ministers and an enhanced role for the Commonwealth/ State and Territory Standing Committee on Treaties to improve the quality of state and territory participation in the treaty-making process.

(5) The establishment on the Internet of the Australian Treaties Library.[97]

The major achievement of the reforms was the significant improvement in consultation procedures, providing a forum for the Parliament, the public, interested groups, opposition and minority parties, and State and territory governments to express their views. The implementation of a considered treaty-making process has also considerably increased the efficiency of treaty-making. The 'Principles and Procedures for Commonwealth/State Consultation on Treaties' adopted in June 1996 by the Council of Australian Governments specifically provides in its first paragraph:

> These principles and procedures are adopted subject to their operation not being allowed to result in unreasonable delays in the negotiating, joining or implementing of treaties by Australia.[98]

The problems encountered in the aftermath of Australia's accession to the Optional Protocol emphasise the need for these reforms enabling public consultation to be maintained and, where possible, strengthened.

(iii) Australia's Dual Personality: Partisan Approaches to International Law

Emerging starkly from this case study is the level of partisanship on the question of accession and adherence to the Optional Protocol. While Labor governments supported accession to the Optional Protocol,[99] Coalition governments consistently opposed it. This can be seen most clearly at the State level, where a change in

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97 Minister for Foreign Affairs and Attorney–General, 'Government Announces Reform of Treaty-Making', Media Release FA–29, 2 May 1996.

98 Council of Australian Governments, 'Principles and Procedures for Commonwealth/State Consultation on Treaties', *Council of Australian Governments' Communiqué*, 14 June 1996, Attachment C, http://www.coag.gov.au/meetings/140696/attachment_c.htm.

99 An exception is the Labor government under Brian Burke in Western Australia.

government invariably signalled a change in policy towards Australia's accession to the Optional Protocol.[100]

An analysis of the approaches of successive Coalition and Labor governments to human rights instruments suggests that the central reason for the difference in attitude is the contrasting priorities accorded to federalism and internationalism by the two major parties. Coalition governments have traditionally subjugated Australia's international obligations to the concerns of the States. Conversely, Labor governments, while seeking the views of States before ratifying international treaties, have been more concerned with preserving Australia's role in the international framework.[101]

A brief review of the approach of successive governments bears this out. The Menzies government would only become a party to treaties when satisfied that all laws and practices, including predominantly State laws, accorded with the requirements of the treaty. In a speech delivered in 1969 to the Working Conference of the Australian Committee on Human Rights, Liberal Attorney-General Nigel Bowen explained that this would mean that Australia's adherence to international treaties could be held up because of one or two points of divergence in federal or State laws notwithstanding that there was overall substantial compliance with the standards laid down in the treaty in question.[102] If authorities in a State refused to rectify a law that was inconsistent with the requirements of a treaty which the federal authorities wished to ratify, this would be sufficient to prevent ratification.[103]

When the Labor government came to power in 1972, it declared its intention to ratify and implement a raft of human rights instruments, including the ICCPR, the ICESCR and the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'). The Whitlam government made it clear that State agreement was not an essential prerequisite to ratification.[104] If the States would not cooperate, the government was prepared to introduce legislation in the Commonwealth Parliament to override non-compliant State law.

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100 Above at 14.

101 Interview with Gough Whitlam, 8 December 2003; Interview with Michael Duffy, former Commonwealth Attorney-General, 6 April 2004; Whitlam, above n 44, 171.

102 Dominique de Stoop, 'Australia's Approach to International Treaties on Human Rights' (1970–1973) 5 *Australian Yearbook of International Law* 27, 30.

103 For example, Australia did not initially ratify the International Convention on the Elimination of Racial Discrimination because it was inconsistent with sections of the *Mining Act 1904-1965* (WA), *Licensing Act 1911–1965* (WA) and *Firearms and Guns Act* (WA) and the *Aborigines Act 1971* (Qld) and *Torres Strait Islanders Act 1971* (Qld): de Stoop, ibid, 27, 30.

104 de Stoop, ibid, 33.

After the Labor government lost power in 1975, the Fraser government returned to the pre-Whitlam practice of extensive consultation with the States on treaties whose implementation would touch on legislative areas traditionally regarded as being within the responsibility of the States.[105] Renewed respect for the Commonwealth-State compact was formalised at the Premiers' Conference of October 1977 discussed above.[106] Therefore, although the Fraser government was responsible for ratifying the ICCPR, the instrument of ratification was subject to a number of reservations and declarations, including a 'federal' reservation which provided that 'the implementation of those provisions of the Covenant over whose subject matter the authorities of the constitutent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities'. In the Tabling Statement, Australia's ratification of this important human rights treaty was curiously described as 'an important achievement in the area of the Government's Federalism Policy'.[107]

Even following Australia's accession to the Optional Protocol, this partisan approach can be seen to have continued in Australia's adherence to the Protocol. The Labor government responded positively to the first decision against Australia in the *Toonen* decision,[108] in spite of the political dilemma created by Tasmania's initial refusal to amend the offending statutory provisions. However, following the change to a Coalition government in 1996, Australia has failed to comply with any of the eight subsequent decisions against it. This persistent non-compliance appears to continue to stem from policy considerations. However the Coalition's rationale is no longer founded in its deference to State rights. Rather, the Coalition's traditional caution, and at times positive hostility, towards international law is presently expressed in terms of sovereignty.[109] Returning to human rights obligations specifically, the current government has greeted allegations of human rights violations with a range of media comments aimed at portraying international human rights law as un-Australian and unjustifiably interventionist. The most extreme of these comments saw Australia's Foreign Affairs Minister issue the UN Committee on the Elimination of Racial Discrimination (CERD) (the monitoring

105 Charlesworth, above n 83, 21, 42.

106 Above at 12–13.

107 Tabling Statement by the Attorney-General (5 August 1980), quoted in Charlesworth, above n 83, 21, 42.

108 *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

109 ABC Radio, 'The Hon John Howard MP, Radio Interview with Sally Sara', *AM Programme*, 18 February 2000, http://www.pm.gov.au/news/interviews/2000/AM1802.htm; Lincoln Wright, 'Howard Softens Stand on UN', *The Canberra Times*, 3 April 2000; ABC Television, 'Australia Headed for Bottom of the Human Rights Barrel', *7.30 Report*, 31 March 2000, http://www.abc.net.au/7.30/stories/s115193.htm; Lateline, 'Lines drawn in battle for ICC support', 17 June 2002, http://www.abc.net.au/lateline/stories/s584081.htm.

body for the Convention on the Elimination of Racial Discrimination) with the following thinly-veiled threat:

> If a UN Committee wants to play domestic politics here in Australia, then it will end up with a bloody nose.[110]

Similar comments were made at State level. In response to a CERD Report, the Chief Minister of the Northern Territory, Denis Burke of the Country Liberal Party, stated on ABC Radio's PM program: 'This is designed to cause embarrassment. This is designed to shame Australians. And to my mind an opportunity for Australians to tell them to bugger off.'[111]

Australia's compliance with international law, in particular human rights obligations, is presented by both sides of politics as a question of policy instead of law. An overview of past practice demonstrates that Australia's decision to enter into treaties, or not to do so, was undertaken on the basis of a policy that was either pro-internationalism, in the case of the Labor party, or pro-States' rights (and more recently sovereignty) in the case of the Coalition. In both cases, the confusion between international legal obligations and government policy is inaccurate and damaging to Australia's international reputation.

Certainly, it is appropriate (and important) for political considerations to play a role when Australia is deciding whether to enter into international obligations. The decision to enter into treaty obligations, at least obligations which are not already binding on Australia under customary international law, is largely a political decision. However, such decisions should be made having regard to the specific obligations entailed. The decision should not be based on a simplistic pro-internationalist or anti-internationalist policy. Each treaty entails its own implications for Australia and the international community of which we are a part. Both major political parties must shed the traditional attitudes that bind them, attitudes that are largely anachronistic in the increasingly complex, interdependent and far-reaching international legal order.

However, the situation is quite different after Australia has signed up to those obligations. At that point, the question as to whether or not Australia should comply with these obligations becomes a legal question on which political minds may not legitimately differ. While states may still have discretion as to the level or manner of protection where a treaty sets minimum guarantees or standards, a state cannot in good faith regard itself as entitled to violate a treaty to the extent it has agreed to be bound by it. Australia may always withdraw from treaty obligations if it follows

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110 ABC Television, 'Australia Headed for Bottom of the Human Rights Barrel', *7.30 Report*, 31 March 2000, http://www.abc.net.au/7.30/stories/s115193.htm.

111 'NT Under Fire Again for Mandatory Sentencing', *ABC Radio PM*, 21 July 2000.

the proper procedures. Australia seriously considered withdrawing from the human rights treaty body regime in 2000 in response to criticisms contained in the CERD Committee's concluding observations on Australia's periodic report.[112] However, withdrawal from treaty obligations, particularly human rights obligations, entails its own complications and detracts from the credibility, reliability and consistency of Australia's voice on the world stage.

It is for these reasons that the decision by the Executive to assume international obligations on Australia's behalf must be so carefully considered, with due process and long-term vision. Failure to enter into a treaty may have implications for Australia's international relations, but failure to comply with treaty obligations voluntarily assumed and withdrawal from treaties can be even more damaging to Australia's international image and reputation. In the case of the UN human rights treaty body regime, Australia ultimately chose to remain within the UN treaty body system, moving instead towards a commitment to assist in reform of the system. While flaws in the regime are widely recognised, blueprints for reform have been devised,[113] although state will and resources remain crucial to ensuring these reforms are effectively achieved.

(vi) Inattention to Domestic Implementation

Perhaps the greatest hurdle to the effectiveness of Australia's accession to the Optional Protocol has been the failure to implement into domestic law either obligations incumbent upon Australia under the ICCPR, or procedures for responding to negative decisions against Australia by the Human Rights Committee.

The overriding concern which ultimately motivated Australia's accession to the Optional Protocol was expressed by a member of the Human Rights branch of the Attorney-General's department, which had primary carriage of the deliberations on the Optional Protocol:

> Our failure to accede to the first Optional Protocol is embarrassing given the high profile Australia takes on human rights matters in the UN and as a member of the Commission on Human Rights.[114]

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112 ABC Television, 'The Hon John Howard MP, Television Interview with Kerry O'Brien', *7.30 Report*, 30 August 2000 http://www.pm.gov.au/news/interviews /2000/ interview428.htm.

113 See, for example, Philip Alston, 'Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System', Commission on Human Rights, 53rd session, UN Doc E/CN.4/1997/74 (27 March 1997); Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (2001).

114 P Thomson, above n 46, 90.

It was considered that the embarrassment of failure to accede would outweigh the potential embarrassment of negative decisions against Australia. The view upon accession was that, 'should there be legitimate concerns remaining, after an individual's domestic remedies have been exhausted, in relation to an alleged Australian violation of human rights, then it is entirely appropriate that the problem should be drawn to our attention'.[115] The view at the time of accession was that, if Australia was found to have violated the ICCPR, the government would rectify the violation, even if this involved the Commonwealth government passing legislation to override inconsistent State laws.[116]

However, while Australia's intention to comply was firm at the time of accession, this commitment to give due consideration to any negative decisions has been easy to ignore by successive governments in the absence of any domestic regulations, or even procedural safeguards, providing a process for due consideration or even publicising of Committee decisions. The possibility of future tensions in Commonwealth-State relations might sensibly have been predicted, and cooperative arrangements entered into with the States, to ensure Australia's ability to comply with negative decisions would not be hamstrung by recalcitrant States. Indeed, it appears that the Commonwealth government's strategy at the date of accession included an intention to establish such cooperative arrangements,[117] though it appears that no formal principles were ever agreed to.

In 2004, 24 years after Australia ratified the ICCPR, many of the fundamental human rights guaranteed by this instrument have still not been implemented into Australian law. Moreover, 13 years after Australia acceded to the Optional Protocol, there is still no formal mechanism for publicising the decisions of the Human Rights Committee, or the government's response to negative decisions, to contribute to public debate on human rights issues. The task of publicising the Committee's views is left largely to academic lawyers who, it must be said, speak to a relatively narrow audience. Australia continues to believe itself capable of achieving the benefits of signing up to human rights treaties, while escaping the obligation to comply on the technicality that it cannot be enforced under domestic law. This approach enables Australia to deny ownership of its international obligations voluntarily assumed, and to construe allegations of violations as incursions into Australian sovereignty. In the meantime, this wholesale rejection of the international obligations we have assumed has damaged Australia's reputation internationally, and deprives Australians of the benefits granted to them under international treaties and the ability to enforce these benefits against the government in domestic courts.

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115 Ibid 98.

116 Interview with Ernst Willheim, former Head of Justice Division, Attorney-General's Department, 5 August 2004.

117 A Rose, above n 47, 42.

(vii) Taking International Obligations Seriously: Questions of Good Faith

The issues debated during the decision-making process for accession to the Optional Protocol must be considered against the backdrop of the fact Australia had already ratified the ICCPR. Although Australia's initial instrument of ratification to the ICCPR contained a raft of reservations precluding Australia's compliance with certain obligations, most of these reservations were removed by the Labor government by a communication received by the depositary on 6 November 1984. As from this date, Australia (including its States and territories) was bound to comply with each of the human rights obligations in the ICCPR.

It is therefore curious that the majority of the issues delaying Australia's accession to the Optional Protocol concerned the ability of the States to accord certain of the human rights provided for in the ICCPR. The Optional Protocol introduced no further obligations on Australia. It merely introduced the possibility for violations of those obligations to be brought to the attention of the international community, and publicised in the domestic sphere.

One of two conclusions can be drawn from this. Either Australian governments failed to appreciate the nature of the obligations assumed under the ICCPR, or Australia entered into the ICCPR (or withdrew its reservations to it) with less than good faith as regards its intention to comply with those obligations. Either way, concerns by the States regarding their ability to comply with obligations under the ICCPR were indulged without reference to the fact the States were already bound to comply.

V CONCLUSION: AUSTRALIA'S CURRENT RELATIONSHIP WITH INTERNATIONAL LAW

Australia acceded to the Optional Protocol over a decade ago. This lapse of time brings with it valuable perspective on the effects of Australia's treaty-making process on its subsequent capacity to comply with treaty obligations entered into. Any deficiencies in the process must be catalogued and lessons learned and addressed in Australia's future relationship with the international legal order. In recognition of the fact that Australia's relationship with the Human Rights Committee has steadily deteriorated since accession, it is appropriate to consider whether the problems identified in the accession process have been tackled successfully, or whether they continue to impact upon Australia's relationship with international law.

As this analysis has shown, many problems recognised in the decision-making process leading to Australia's accession to the Optional Protocol have been addressed by reforms to Australia's treaty-making process. However, certain

problems continue to impact negatively on Australia's relationship with the international legal order. It is crucial that Australia considers with due care the international obligations it takes on, and its capacity to comply with them. The international regime is becoming increasingly complex, and can no longer be dismissed as a toothless regime based on aspirational rather than binding principles. The international legal order's enforcement machinery is still not sufficiently developed to pose a direct punitive threat to Australia in the event of non-compliance, although the potential for this is increasing in certain areas. Nevertheless, Australia would be unwise to ignore the significant indirect effects of non-compliance. Australia's credibility and influence on the world stage is an asset that must be carefully protected and bolstered if Australia is to reap the benefits to be gained from international cooperation in an increasingly interdependent world.