
Third Optional Protocol to Convention on the Rights of the Child

Attorney General's Department

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Acknowledgement

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Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Attorney General's Department (AGD) in relation to its inquiry into Australia's possible ratification of the Third Optional Protocol to the Convention on the Rights of the Child (CROC).
2. The Law Council supports Australia's signature and ratification of the Third Optional Protocol.

The Key Features of the Third Optional Protocol

3. The text of the Third Optional Protocol was adopted by the UN General Assembly in December 2011. It adds significant procedural mechanisms which will facilitate the effective operation of the CROC. It does not create any new rights but rather provides a redress mechanism for violations of rights under the CROC and its First and Second Protocols.
4. The Third Optional Protocol provides for three separate procedures:
 - an 'individual communication procedure', where individuals and groups of individuals may submit a complaint of an alleged violation of any of the rights contained in the CROC or the First or Second Optional Protocol;¹
 - an 'Inter-State complaints procedure', which allows the CROC Committee to consider communications from one State party alleging that another State party is not fulfilling its obligations under the CROC or its Optional Protocols;² and
 - an inquiry procedure, which allows the CROC Committee, upon receipt of reliable information, to initiate inquiries into grave or systemic violations by a State party of any of the rights contained in the CROC or its Optional Protocols.³

Previous Consideration of Australia's Ratification of the Third Optional Protocol

5. In October 2010, the AGD sought comments on Australia's approach to the draft Third Optional Protocol.
6. On 23 November 2010, the Law Council made a submission to the AGD in support of the draft Third Optional Protocol.⁴

¹ Third Optional Protocol to the Convention on the Rights of the Child Article 5. The text of the Third Optional Protocol may be found at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/66/L.66

² Ibid, Article 12.

³ Ibid, Article 13.

⁴ The Law Council's 2010 Submission may be found on the Law Council website at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=85AE494F-CB00-9F50-EFC1-

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7. In April 2011 the AGD again sought comments on the draft Third Optional Protocol and stakeholder views in advance of the United Nations' (UN) consideration of the draft Protocol. The Law Council once again provided comments in support of the draft Third Optional Protocol.
 8. The Third Optional Protocol was adopted by the UN on 19 December 2011 and opened for signature on 28 February 2012.
 9. The Third Optional Protocol shall come into force upon its tenth ratification. To date, no country has ratified the Optional Protocol but there are 20 signatories.
 10. On 1 March 2012, the Law Council provided preliminary comments to the AGD in support of Australia's ratification of the Third Optional Protocol, having belatedly become aware that the AGD had sought comments in relation to ratification by 6 January 2012. The Law Council notes that the consultation period was then extended to 10 April 2012 and provides this submission in light of the extended consultation period.⁵

Benefits of Ratification of the Third Optional Protocol

11. *International Leadership:* The Law Council notes that Australia has played an important role in the development of the Third Optional Protocol, and has assisted in garnishing international support for its key objectives. Signing and ratifying the Third Optional Protocol will help secure Australia's role as an international leader in promoting and protecting children's rights. It will also re-affirm Australia's positive and constructive engagement with the UN treaty body system, in line with commitments made under Australia's Human Rights Framework.⁶ Furthermore, as the Optional Protocol will enter into force on the tenth ratification, the Law Council considers it important for Australia to be part of this first group of States.
12. *Equate Children's Rights with Rights Protected under other Treaties:* Accepting the individual communications components of the Protocol will also ensure that children's rights are given the same recognition in Australia as that provided to other internationally recognised rights, such as those under the International Covenant on Civil and Political Rights⁷ and the Convention Against Torture⁸, in relation to which Australia has signed and ratified similar Optional Protocols^{9,10}.
13. *Respond to Concerns and Prepare for 2012 Review:* Signing and ratifying the Optional Protocol also provides an opportunity for the Australian Government to

[DDE0CBC95048&siteName=lca](#) The Law Council notes that the final text of the Third Optional Protocol adopted by the UN in December 2011 differs from that proposed in the drafts circulated for comment during 2010 and 2011. In particular, the Law Council notes that the collective complaints procedure that was included in earlier drafts of the Third Optional Protocol is no longer included.

⁵ See <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Humanrights.aspx#convention>

⁶ See

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx>

⁷ Convention may be found at <http://www2.ohchr.org/english/law/ccpr.htm>.

⁸ Convention may be found at <http://www.hrweb.org/legal/cat.html>.

⁹ Optional Protocol to the International Covenant on Civil and Political Rights may be found at

<http://www2.ohchr.org/english/law/ccpr-one.htm>.

¹⁰ Optional Protocol to the Convention Against Torture may be found at <http://www2.ohchr.org/english/law/cat-one.htm>.

confirm its strong commitment to protecting and promoting the rights of children at the domestic level, and to respond to concerns expressed during the 2009 National Human Rights Consultation that more could be done to enhance public awareness and respect for these rights at home.¹¹ Ratification would also be timely ahead of the review of Australia's compliance with CROC by the UN Committee on the Rights of the Child in May 2012.

14. *Complement and Strengthen Existing Mechanisms:* The Third Optional Protocol will complement and strengthen existing mechanisms by providing another procedure by which children can access a remedy when domestic measures fail. The Law Council also notes that the Optional Protocol has minimum implementation obligations and can therefore be implemented without difficulty in Australia's existing political and legal structures.

Cost Implications

15. Ratification can be undertaken with little cost implications for the Australian Government. Any costs involved in ratifying the Third Optional Protocol are highly likely to be more than offset by the benefits that would flow from ratification. For example, ratification would complement and strengthen existing domestic mechanisms designed to protect and promote children's rights, and foster the development of strategies to protect against rights abuses in Australia. This process would have the beneficial effect of minimising the costs associated with addressing instances of violations of children's rights, which can include health and social services costs, as well as direct costs of litigation and compensation payments. Enhancing the protection of children's rights in Australia would also reduce the mental and financial harm or loss that is often experienced by families of children whose rights have been breached.

Steps to Fulfil the Obligations under CROC and the Third Optional Protocol

16. In ratifying the Third Optional Protocol, Australia will need to ensure that its laws and policies comply with its obligations under the CROC and its First and Second Optional Protocols. To do this, the Law Council recommends that Australia will need to:
 - (a) Review its laws and policies to ensure that they fully comply with and promote the rights protected under CROC or its First or Second Optional Protocols;
 - (b) Ensure that children or those acting on their behalf and in their best interests have access to effective remedies for violations of their rights under CROC or its First or Second Optional Protocols;
 - (c) Undertake to respect the jurisdiction of the CROC Committee to hear complaints and to initiate inquiries;

¹¹ The Report of the 2009 National Human Rights Consultation can be found at <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>.

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- (d) Commit to responding to any observations or recommendations of the CROC Committee within three months; and
- (e) Allocate resources at the national level to ensure that Australians (and in particular Australian children) are aware of Australia's obligations under the CROC and its Protocols.
17. The Law Council also supports the establishment of a Commonwealth Children's Commissioner¹² as a mechanism to enhance protections for children's rights in Australia, and as a way to coordinate existing efforts to protect and promote children's rights.
18. The Law Council notes that the Government has been deliberating on the role of a Children's Commissioner since the approval of the 2009 Council of Australian Governments' *National Framework for Protecting Australia's Children*.¹³
19. The establishment of a Commonwealth Children's Commissioner has also been considered recently by the Senate Committee on Legal and Constitutional Affairs in the context of the private member's *Commonwealth Commissioner for Children and Young People Bill 2010*, introduced by Senator Hanson Young.¹⁴
20. Consideration of a Children's Commissioner is also included in the Commonwealth Government's draft National Human Rights Action Plan.¹⁵
21. The Law Council is of the view that Australia's ratification and implementation of the Third Optional Protocol would provide an important opportunity to prioritise the Commonwealth Government's consideration of the establishment of this important office.
22. The Law Council also acknowledges that State and Territory laws, as well as Commonwealth laws, are relevant to children's rights. A review of these laws and policies for compliance with CROC obligations and those obligations arising from the First and Second Protocol would also be greatly beneficial as part of Australia's ratification of the Third Optional Protocol.
23. The Law Council notes that in some jurisdictions, considerable effort has already been made to consider how State or Territory laws currently protect and promote children's rights, and to identify any gaps in these protections. For example, the Law Institute of Victoria (LIV), one of the Law Council's constituent bodies, has identified the following recent reviews of Victorian laws and policies:
- The Victorian Scrutiny of Acts and Regulation Committee's *Inquiry and Review of the Charter of Human Rights and Responsibilities Act 2006* ("the SARC Review"). The LIV called for the Charter to be amended to provide for the full

¹² Law Council submission on the *Commonwealth Commissioner for Children and Young People Bill 2011*; and also Law Council letter to Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon. Jenny Macklin MP, 10 June 2011. Submission may be found on the Law Council's Website at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/international.cfm>.

¹³ See http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf.

¹⁴ See

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Commonwealth%2BCommissioner%2Bfor%2BChildren%2Band%2BYoung%2BPeople%2BBill%2B2010%20SearchCategory_Phrase%3A%22bills%20and%20legislation%22;rec=0;resCount=Default.

¹⁵ See

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/NationalHumanRightsActionPlan.aspx>

protection of the rights of children afforded under CROC.¹⁶ However, in its response to the SARC Review on 14 March 2012,¹⁷ the Government noted that any amendments to expand the rights protected under the Charter would be limited to the *International Covenant on Civil and Political Rights*.

- The Victorian Government's Protecting Victoria's Vulnerable Children Inquiry to investigate systemic problems in Victoria's child protection system.¹⁸ The LIV made a submission to this inquiry which included concerns about a perceived failure to adhere to the best interests principles set out in the *Children, Youth and Families Act 2005* (Vic) and to Article 12 of CROC.¹⁹
- The Victorian Law Reform Committee report on the *Inquiry into Access by Donor-Conceived People to Information about Donors*.²⁰ Among the 30 recommendations made in the report is the key recommendation that the Victorian Government introduce legislation to allow all donor-conceived people to obtain identifying information about their donors. While, the LIV did not make a submission to this inquiry, past submissions on the general issue of assisted reproductive technology have emphasised the paramount interests of the child.²¹
- The Victorian State Coroner's Report into the 2008 Police shooting death of Melbourne teenager Tyler Cassidy, which was handed down on 23 November 2011.²² The Coroner, Judge Jennifer Coate, made a specific recommendation on how children and young people are dealt with by Victoria Police, suggesting that Victoria Police develop a "youth specific component" to their Operational Safety and Tactics Training. On 17 February 2012, Deputy Commissioner Kieran J Walsh APM responded to the Coroner's recommendations and confirmed that this recommendation would be implemented and the work should be completed by 1 July 2012.²³

24. The Law Council further notes that the Third Optional Protocol requires States Parties to 'opt in' to the Inter-State complaints procedure (Article 12) and also allows States Parties to 'opt out' of the inquiry procedure (Article 13). The Law Council encourages the Australian Government to commit to both of these complaints procedures. This process requires Australia to make a declaration in accordance with Article 12 that it recognizes the competence of the Committee to receive and consider communications in which a State party claims that Australia is not fulfilling its obligations under the CROC or its first two Optional Protocols.

¹⁶ See <http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Inquiry-and-Review-of-the-Charter-of-Human-Rights-.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0>.

¹⁷ See <http://www.parliament.vic.gov.au/sarc/article/1446>.

¹⁸ See <http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Inquiry-and-Review-of-the-Charter-of-Human-Rights-.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0>.

¹⁹ See <http://www.liv.asn.au/Membership/Practice-Sections/Family-Law/Submissions/Protecting-Victoria-s-Vulnerable-Children-Inquiry.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0>

²⁰ See <http://www.parliament.vic.gov.au/lawreform/inquiry/300>.

²¹ See 6 October 2008, LIV submission to the then Victorian Shadow Attorney-General on the *Assisted Reproductive Treatment Bill 2008* (Vic). Submission may be found at

<http://www.liv.asn.au/Membership/Practice-Sections/Administrative-Law---Human-Rights/Submissions/Assisted-Reproductive-Treatment-Bill-2008.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0>

²² See <http://www.coronerscourt.vic.gov.au/home/case+findings/coroners2+-+findings+-+inquest+into+the+death+of+tyler+cassidy>.

²³ Response may be found at

http://www.coronerscourt.vic.gov.au/resources/9/b/9be447804a4ff7deb5f4b77d68617f86/responsevicpol_cassidy.pdf.

Conclusion

25. The Law Council strongly urges Australia to sign and ratify the Third Optional Protocol.
26. Signing and ratifying the Third Optional Protocol will help secure Australia's role as an international leader in promoting and protecting children's rights.
27. Ratification would also be timely ahead of the review of Australia's compliance with CROC by the UN Committee on the Rights of the Child in May 2012.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.