

Right Off: The Attack on Human Rights in Australia



Human Rights Working Group

Federation of
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HUMAN RIGHTS WORKING GROUP – FEDERATION OF COMMUNITY LEGAL CENTRES (VIC)

The Human Rights Working Group (HRWG) of the Federation of Community Legal Centres (Vic) Inc. was established in August 2001. The membership of the HRWG comprises interested workers and volunteers in Community Legal Centres in Victoria, Australia. The purpose of the HRWG is to:

communicate, develop greater understanding and encourage the practical use of - within and outside the CLC sector - the principles and laws relating to fundamental human rights and freedoms, as expressed in international Conventions, Covenants and Declarations, in order to advance the cause of social justice.

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SUMMARY

Right Off: The Attack on Human Rights in Australia documents the failures and mixed record of successive Australian governments in respecting, implementing and protecting human rights and fundamental human freedoms.

Now, and in the past, the human rights practices of Australian governments have been right off. In the past, even as human rights were not realised in Australia, governments maintained an international rhetorical commitment to human rights. However, successive Australian governments have knowingly and vigorously pursued a practice of violating human rights, and have actively disengaged from and attacked the UN human rights treaty monitoring system, in response to legitimate and expert criticisms of Australia's human rights record. And now, much of the international rhetoric of the Australian Government is right off.

This report documents the way in which rights are "off" the current government agenda, and have been "off" from the early 1990s onwards. The report discusses treaty body reports and current human rights violations in relation to the six major human rights treaties to which Australia is a party: the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. It begins by explaining human rights, human rights treaties and the UN human rights treaty system; and moves on to outline the ways in and extent to which human rights are incorporated in Australian law and policy. The bulk of the report discusses the six treaties with regard to the substantive rights they protect, and the procedural mechanisms for complaint and remedy; and Australia's history of implementing, and reporting on, human rights and freedoms in Australia in accordance with its obligations under these treaties.

Australia's recent withdrawal from the UN human rights treaty system is also examined. *Right Off* asserts that the actions of successive Governments in taking rights off the agenda has had significant consequences:

- it denies historical and current human rights violations in Australia
- it denies the foundational and ongoing racism of the Australian legal system
- it perpetuates the practice of denying the humanity of people in Australia, which began with the dispossession of Indigenous Australians, continued through the foundational racism of the Constitution and the White Australia policy, and is given expression in current times with the detention without charge of non-citizens in Immigration Detention Centres and of citizens David Hicks and Mamdouh Habib in Guantanamo Bay
- it denies the failure of successive Australian governments to incorporate human rights into Australia or provide comprehensive legal protection of human rights in Australia
- it challenges the legitimacy of the universal system of human rights by creating a hierarchy of "real" human rights violators and unfairly maligned Western countries which, in the words of Daryl Williams, have human rights breaches which are "minor, marginal issues"
- it marginalises the domestic and international voices who speak out against human rights violations.

The final section of *Right Off* addresses key themes by first giving an overview of Australia's history of involvement in the UN treaty system, and then focusing particularly on the contemporary Australian context, and considering the ramifications of the increased Australian disengagement from the UN system, when that is being combined with increasing and flagrant human rights abuses. *Right Off* concludes with a strong call to peoples in Australia to inform themselves about and promote human rights, both within the nation and elsewhere; and to pressure our Government to honour its obligations.

CHAPTER ONE - HUMAN RIGHTS: AN INTRODUCTION

What are human rights?

In order for any human being to live a life with dignity certain needs must be met. For example, we need to have the ability to access food, water, shelter and other material conditions to maintain our physical, intellectual, psychological and spiritual wellbeing. Because we are human, we need the capacity to form, articulate and share our ideas and beliefs. Because we live in communities, we need to respect others' needs and ideas, in the same way that we demand respect for ours. While the expression of and significance given to these needs differ between the diverse communities of the world, the basic requirements for human survival, and for each person to live a life with dignity and equality, are common to all peoples, everywhere.

In the 1940's, after World War Two, the international community discussed, and agreed to, giving formal written expression to the rights and fundamental freedoms needed by, and belonging to, every human being on the Earth.

These human rights and fundamental freedoms are not "granted" by the international community, nor by the state,¹ – they exist because we are human. They exist regardless of whether a country has agreed to be legally bound by a human rights treaty. They also

exist where a country has agreed to be legally bound by a human rights treaty, but decides not to abide by its terms. They exist regardless of where we find ourselves geographically, and irrespective of our age, race, gender, sexual orientation, religious or political beliefs: we have human rights because as humans we seek to live with dignity and respect for each other.

The development of an international system of human rights and freedoms was an attempt to protect and promote already existing rights, by defining them and encouraging members of the international community to agree to respect them. Some of the rights and freedoms in this system exist to protect us as individuals, some exist to protect us as communities. States that agree to be bound by the system of universal human rights have a legal obligation to ensure that human rights are realised for all people in their territories. They also have a moral obligation to support the existing human rights system at the international level, and to support the development of a vibrant, effective and expert human rights system - through respectful engagement in the politico-legal processes for the elaboration of human rights standards.

To give these rights legal expression the international community adopted the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR was negotiated by member States of the United Nations (UN), largely in response to the genocide committed by anti-Semitic Christians against Jewish people, by white supremacists against people of any other colour, by fascists against gay men and lesbians, and anyone else who was otherwise "different" from, and did not conform to, the "ideal" as expressed in fascist ideology. Yet, even as member States expressed their outrage at the occurrences of

¹ In the context of this report, the state is the governmental entity which has responsibility for a particular territorial area. We refer to State Parties to a treaty (those countries who have agreed to be bound by particular human rights obligations) and Member States of the UN. In a domestic context, we refer to particular federal governments. We will also at times refer to the practices of various state governments. Thus, there are a series of distinguishable usages: State, State Party, federal government, state government.

World War Two and contributed to the establishment of an international human rights system, their own government laws and policies were violating human rights at home.

Nonetheless, the articulation of an international system of human rights has been a vital tool in the work towards the achievement of human rights. While we may argue as to whether or not, philosophically, human rights and freedoms are “inherent”, it is the responsibility of each state to elaborate and give effect to the rights and freedoms expressed in the UDHR. Only through their recognition and implementation by each State, can a standard be established by which human rights, and humanity itself, be judged and found wanting. The fundamental rights and freedoms expressed in the UDHR are:

- the right to be free and equal in dignity and rights
- right to live free from discrimination
- right to life, liberty and security of person
- no slavery
- no torture, cruel, inhuman or degrading treatment or punishment
- right to protection from the law
- equality before the law
- remedy for human rights violation
- no arbitrary arrest, detention or exile
- fair trials and procedural fairness
- presumption of innocence
- privacy rights
- freedom of movement
- right to seek asylum
- right to nationality
- right to family life
- right to own property
- right to freedom of thought, conscience and religion
- right to freedom of opinion and expression
- right to freedom of peaceful assembly and association

- right to political participation
- right to social security
- right to work
- right to rest and leisure
- right to an adequate standard of living
- right to education
- right to cultural expression.

What are human rights treaties?

To give the rights articulated in the UDHR a legally cognisable form within different States, the international community adopted a series of human rights treaties. These documents represent an “international bottom line” when it comes to ensuring the protection of human rights. Treaties function as contracts between governments and other member States of the UN.

The first two treaties adopted were the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Together with the UDHR they are known as the “International Bill of Human Rights”.

The international community also recognised that other rights needed to be protected. One of the significant rights expressed in the UDHR is the right to be and live free from discrimination. This right is a paramount principle across all human rights treaties. To help ensure that the right and principle of non-discrimination is protected, the UN adopted a series of additional human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination Against Women. In addition, as a means of particularly addressing torture, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment was developed.

The human rights treaties set out a series of rights that must be realised in each country that signs on to the treaty. In theory, successive Australian governments have agreed to become party to the majority of the human rights “contracts”:²

- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the International Covenant on Civil and Political Rights (ICCPR)
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- the International Convention on the Elimination of Racial Discrimination (ICERD)
- the Convention on the Rights of the Child (CRC)
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT)

The Human Rights and Equal Opportunity Commission (HREOC) has suggested that by agreeing to the terms of the human rights treaty, states voluntarily undertake to:

- respect the human rights contained in the treaty (for example, in Australia, the ICCPR requires that there be legal systems to remedy injustices)
- refrain from violating those human rights (for example, in Australia, the CAT requires that state officers not conduct torture)
- protect those human rights from violation by others (for example, in Australia, CEDAW requires that there be mechanisms in place to prohibit and prevent domestic violence)
- ensure the enjoyment of those human rights, without discrimination of any kind (for

² For an overview of the legal terms used to denote the legal process of becoming party to the treaties, see Appendix A.

example, in Australia, ICERD requires that Indigenous people should not be discriminated against in education, housing, health care, the law or any other area).

State parties are obliged to ensure that non-state actors, for example, individuals, organisations and enterprises, refrain from violating human rights treaty obligations.³

How does the UN monitor implementation of human rights treaties?

States that have ratified human rights treaties are required to report to expert committees at the UN on a regular basis. These periodic reports are meant to address the measures they have taken to implement the treaty-specific human rights, and also address areas of concern. In response, the expert committee engages in a process of “constructive dialogue” with the State Party, identifying positive actions and putting forward areas of concern, and recommendations to remedy the situation. Each State Party goes through this review.

There are legitimate calls for reform of the UN human rights treaty system. For example, the recommendation to establish a single treaty body, put forward five years ago by Australian Professor Philip Alston when he was commissioned by the Secretary General of the UN to conduct a review of the treaty system. And while the Howard/Coalition Government has funded a workshop on reform, its systematic disavowal of the UN human rights treaty system seriously compromises the integrity of such an agenda.

³ This report does not detail the failures of successive Australian Governments in ensuring that the corporate sector does not violate human rights and freedoms. However, corporate HR violations are implied in examples concerning private Prisons and Immigration Detention Centres.

Situating human rights in Australia

The divergence between rhetoric and practice with respect to human rights – or perhaps more accurately, between public internationalist rhetoric on the one hand and domestic rhetoric and most practice on the other - has its roots in the colonial history of Australia.

The Australian nation today is the product of both colonialist history and geographical location, interpreted through current government policy. The island continent was “settled” as a penal colony through British invasion and violence: murder and dispossession of Indigenous people and a brutal regime of convict transportation and incarceration.

Racist persecution was a practice in Australia from the moment the British asserted colonial power over Indigenous people and their land. As different (largely non-white and non-Christian) migrants became perceived as a threat to the homogenous white Anglo community, racist and xenophobic practices were used to marginalise and persecute them. These practices were enshrined in the White Australia Policy. They also underpinned the denial of Indigenous people’s humanity by regarding them as “flora and fauna”, stealing their land and decimating their families, communities and cultures by taking their children - in other words, cultural genocide. Today, such practices are also manifested in laws and policies to exclude refugees or mandatorily detain asylum-seekers in “worse than prison” conditions in remote and inhospitable locations.

Racism and discrimination were founding principles of the Australian nation.

In 1788, the British sent to the Australian penal colony those who, stricken by poverty, stole bread or committed other petty offences. In 2002, the Australian Government sends young Indigenous people to prison for stealing pencils and towels. Racism and other human rights violations are a legacy with which we now struggle.

In the lead up to federation in 1901, the various British colonies (that is, the future states) expressed concern about giving the Commonwealth exclusive legislative power in relation to people of racial minorities, particularly Chinese immigrants. The colonies themselves wanted the exclusive right to exclude and remove Chinese immigrants. The Commonwealth obtained the agreement of the states for it to have this exclusive legislative power because it agreed to enact the *Immigration Restriction Act (C’th)* 1901. This gave the Commonwealth the power to exclude Chinese immigrants, and so the states were placated. Thus, the establishment of Australia as a federated nation was deeply informed by competing claims for the right to exclude, and to institute racist, xenophobic and white supremacist laws and policies. Moreover, such a discourse of competitiveness and hostility defined State-Commonwealth relations and placed such relations above, and contrary to, any concept that the people of Australia had any substantive individual rights or freedoms.⁴

A more recent variation on this theme is illustrated in the *Hindmarsh Island* case.⁵ The Commonwealth Government now has exclusive legislative power under the Constitution to make laws for people of particular races. There is a strong view in the Australian community that this

⁴ H Charlesworth (2002) *Writing in Rights: Australia and the Protection of Human Rights* UNSW Press, Sydney at 25.

⁵ *Kartinyeri v Commonwealth* (the *Hindmarsh Island* Case) (1997) 152 ALR 140. See also H Charlesworth (2002) *Writing in Rights: Australia and the Protection of Human Rights* UNSW Press, Sydney at 33.

power should always and only be used for the benefit and the betterment of minority groups. However the High Court of Australia recently decided that the power does not have to be used in this way. This raises two problems. The first is that we do not have an entrenched and overriding guarantee against racial discrimination. The second reveals weaknesses in judicial interpretation of the Constitution, because of the judiciary's failure to take account of international human rights principles and treaties in this process. With respect, this must change.

Other areas of international law demonstrate the divergence between Australian public internationalist rhetorical commitment to human rights, and the actual practice. Australia ratified the Genocide Convention in 1951 at a time when it was practicing cultural genocide. As yet, there are no domestic provisions for its enactment, nor have there been reparations or an apology to Indigenous Australians for the harms perpetrated. Australia has ratified the Refugee Convention and its Protocol, yet its day-to-day practice is in direct contravention of the letter and spirit of its provisions.

How are human rights provisions incorporated in Australian law and policy?

Constitution

There are very limited rights outlined in the Constitution. They include freedom of religion, a right to vote (though some question whether this is really guaranteed), a right to commerce between the states, and an implied freedom of expression and an implied guarantee restricting Commonwealth powers. Section 109 gives Commonwealth laws primacy over state laws, where the state laws are inconsistent with the

former.

Compare this to the list of rights and freedoms articulated in the Universal Declaration of Human Rights. It becomes clear that people living in Australia do not have a strong constitutional basis for the protection of their human rights and freedoms.

Legislative mechanisms

In order for people in Australia to be able to claim the rights contained in any of the human rights treaties to which we have become party, those rights must be incorporated into domestic legislative provisions. This is called "direct implementation." Once this has occurred, people living in Australia can claim these rights through the country's legal processes.

None of the treaties that Australia has signed are fully incorporated in domestic legislation.

Instead, some of the treaties have been partially incorporated:

- the *Racial Discrimination Act (RDA)* and the *Sex Discrimination Act (SDA)* either adopt or adapt definitions of race and sex discrimination as contained in the ICERD and CEDAW respectively
- elements of the ICERD are incorporated in the *Racial Hatred Act (Cth)* 1995.
- the *Disability Discrimination Act (Cth)* 1992 (*DDA*) draws on provisions of the Declaration on the Rights of Disabled Persons and Declaration on the Rights of Mentally Retarded Persons
- elements of the ICCPR are incorporated in the *Privacy Act (Cth)* 1988 and the *Evidence Act (Cth)* 1995
- elements of the CAT are incorporated in the *Crimes (Torture) Act (Cth)* 1992.⁶

⁶ Catholic Commission for Justice, Development and Peace 2002

Some of the treaties have been scheduled to the *Human Rights and Equal Opportunity Commission Act (Cth)* 1986. This means that HREOC can consider the treaty provisions in complaints it receives, and that it can conduct an inquiry if it considers that the acts or practices of the Commonwealth or Territories breach the rights contained in the treaty. The following treaties are scheduled to the *HREOC Act*: the ICCPR and CROC. CEDAW is scheduled to the *SDA*, and ICERD is scheduled to the *RDA*. The International Covenant on Economic, Social and Cultural Rights has not been incorporated in or scheduled to any legislation.

Policy measures

The provisions of a treaty can also be incorporated indirectly through policy measures. Policy is the domain of the Executive arm of government.⁷ The limitation of this approach is that if the government of the day decides to abolish a particular program, there is no mechanism for judicial review: people living in Australia cannot use the previous existence of policies and programs supporting a particular human right to argue in court that the government should continue to realise that particular human right.

Judicial system

International human rights laws may be applied in Australian law in four main ways.⁸

⁷ The Westminster system of government is characterised by three discrete arms of "government": the Parliament (all elected state or federal representatives, regardless of political party), the Judiciary (independent judges in Courts) and the Executive (the appointed Ministers of the political party in power).

⁸ For a more detailed discussion of the ways in which human rights can (and should) be applied in Australian law see: Eastman, K and Ronalds, C "Using human rights laws in litigation: the practitioner's perspective" in Kinley, D. (ed) *Human Rights in Australian Law* (1998)

Statutory Interpretation

There are five ways in which human rights treaties may be used in the interpretation of statutory law. One such way, is where a statute incorporates or refers (in whole or in part) a provision of an international human rights treaty, it must be given the same meaning as that provision has in the treaty.⁹ So, for example, the definition of racial discrimination in the *Racial Discrimination Act (Cth)* 1975 should be interpreted in accordance with the definition contained in the ICERD and with its interpretation by CERD.

Common Law

There are six ways in which human rights treaties may influence the common law. For example, human rights treaties can help to identify fundamental rights in the common law, especially where individual human rights complaints procedures, such as the First Optional Protocol of the ICCPR or Art.14 of ICERD, exist to provide a remedy for violations of such rights.¹⁰

Administrative Law

There are two ways in which human rights treaties are relevant to administrative decisions. Firstly, decisions by the Executive arm of Government can (and do) violate or be inconsistent with substantive human rights. Secondly human rights treaties to which Australia is a party give rise to procedural rights, such as a legitimate expectation that an administrative decision maker will make decisions that are

The Federation Press, Sydney at pp 319-342. All the information in this section is taken from this source.

⁹ Ibid, at p.321. Eastman and Ronalds cite *De L v Director General, NSW Department of Community Services* (1996) 187 CLR 640 as authority for this.

¹⁰ Ibid, at p.328. The authors cite Kirby J in *R v Sawfield; Pavic v The Queen* (1998) 151 ALR 98 at 136-7.

consistent with the provisions of human rights treaties.¹¹

Constitutional Interpretation

The High Court of Australia has not yet reached the point where it is prepared to interpret the Constitution consistently with human rights treaties. We submit that this is not beyond the realms of possibility.

¹¹ Eg, the *Teoh* Case – cited and discussed later in this report. Note that currently, administrative decisions by Commonwealth and State governments, particularly in areas involving housing, welfare, refugees and asylum seekers, prisoners people with disabilities, young people and people of culturally and linguistically diverse backgrounds, regularly and consistently fail to take account of relevant human rights treaties and obligations.

Australia and the UN human rights treaty system

Even as Australia signed the human rights treaties, human rights violations were being perpetrated:

| Year | Government | Action | Human Rights Issues | |
|------|----------------------|-------------------------|---|------------------|
| 1966 | Holt/Liberal Party | Signed ICERD | Indigenous children being forcibly removed from their families Indigenous people denied the vote Racially discriminatory provisions in immigration policies | ICERD violations |
| 1972 | Whitlam/ALP | Signed ICESCR | Women with intellectual and physical disabilities being forcibly sterilised | ICESCR violation |
| 1972 | Whitlam/ALP | Signed ICCPR | Non-complier conscientious objectors to the Vietnam War imprisoned. | ICCPR violation |
| 1975 | Fraser/Liberal Party | Ratified ICESCR | No legal provision for the right to housing, education or health | ICESCR violation |
| 1975 | Whitlam/ALP | Ratified ICERD | Indigenous people being denied land rights | ICERD violation |
| 1980 | Fraser/Liberal Party | Ratified ICCPR | Gay men discriminated against on the grounds of sexual orientation in Tasmania | ICCPR violation |
| 1980 | Fraser/Liberal Party | Signed CEDAW | Women earning 79% of men's wage | CEDAW violation |
| 1984 | Hawke/ALP | Ratified CEDAW | No compulsory provision of paid maternity leave for women in Australia | CEDAW violation |
| 1985 | Hawke/ALP | Signed CAT | Lack of appropriate legislative framework to ensure implementation of CAT | CAT violation |
| 1989 | Hawke/ALP | Ratified CAT | Strip searching in prisons, constituting cruel, inhuman, or degrading treatment | CAT violation |
| 1990 | Hawke/ALP | Signed and Ratified CRC | In the late 1980s when HREOC conducted an inquiry into youth homelessness they found that 25,000 children were homeless | CRC Violation |
| 1991 | Hawke/ALP | Communication to HRC | Mandatory detention of asylum seekers | ICCPR Violation |
| 1993 | Keating/ALP | Communication to CAT | Mandatory detention of asylum seekers | CAT violation |
| 1993 | Keating/ALP | Communication to CERD | Indigenous land justice not achieved | CERD violation |

An ambivalent relationship with international law and human rights

It is in the context of a very mixed past record that Australia's recent withdrawal from the UN human rights treaty system is examined. While Australian practice never matched public internationalist rhetoric, previous Australian governments seemed to consider it important to engage respectfully with the UN human rights treaty system. They were recognised for their constructive contribution to the development of international human rights standards.

However, of late, when UN expert bodies have criticised Australia, rather than accept the criticism Australia has chosen instead to undermine the international system of human rights. Rather than acknowledging that human rights monitoring mechanisms are about achieving the best possible outcomes for everyone in society, the Australian Government has chosen to represent the process as being about "who is doing worse than us":

"If we are comparing [Australia's record] with arbitrary arrests and executions and having your arms chopped off, the problems in Australia pale into insignificance..."¹²

The Government misses the point: the purpose of the review is not to compare Australia to other countries, but to compare the Australian situation to the treaty principles, and to identify ways to make sure that all people who live in Australia have the human rights and freedoms guaranteed by that treaty.

There is a history of human rights violations in Australia that continues into the present. For so long as these violations remain, there will be

¹² Attorney General, Daryl Williams, BBC News, 29 August 2000

strong and legitimate grounds for Australia to be criticised. Frequently, rights are "off" in terms of their protection and promotion in this country. The mature response would be to consider the views of the international expert system on human rights. However, the Howard/Coalition Government has responded to legitimate criticisms with polemic and vitriol, accusing the UN treaty system and its personnel of a multitude of sins. Rights are then "off" for the present Government in the sense of not being on the table for reasoned examination and discussion. The Government's attack was "right off" in 2000, and is **right off, right now**.

The systematic disengagement with the human rights treaty system is not the only example of the Howard/Coalition Government undermining the international legal system. With respect to environmental law, the refusal to ratify the Kyoto Protocol to the Convention on Climate Change has been a watershed. The approach of the Howard/Coalition Government to human rights and environmental law is in direct contrast to their engagement with other areas of international law, such as trade law and criminal law.

For instance, in March 2002 it was announced by a Government official that a rules-based multilateral trading system was in the Australian national interest, as was the "establishment of international regimes to combat criminal activity which does not respect national borders, including terrorism."¹³ Likewise, the Government relies on the legitimacy of the UN Security Council to advance its support for George W. Bush's plans to attack Iraq. The Government has failed to grasp that it is not possible to maintain a functioning and effective international legal

¹³ Secretary of the Department of Foreign Affairs and Trade 2002. Secretary's Speech: Australia's Current Priorities for International Treaty Negotiations. http://www.dfat.gov.au/media/speeches/departments/020313_sec_treaties.html [Accessed 28 August 2002]

regime if one set of policies seeks to undermine it, while another set of policies seeks to bolster it.

The contradictory stance of the Howard/Coalition Government is further illustrated by the fact that while it rejects the expert bodies, it is still keen to export its views on human rights through international political forums. For example, the Australian Government is a new member of the Commission on Human Rights. Yet, even within the political environments, the attack on the treaty system is perpetuated, as evidenced at the UN General Assembly Special Session on Children in 2002. Again, this shows that its rhetoric in the international arena pays lip service to human rights principles, while its words and actions in Australia are very different.

The 2000 “dummy spit” - the framework for withdrawal

Following a series of critical reports from UN human rights treaty bodies, in March 2000 the Australian Government indicated that it would conduct a closed review of its participation in the system.¹⁴ No public submissions were called for, and the review document has never been made public. Moreover, the closed review undermined a pre-existing publicly accessible review by the Joint Standing Committee on Treaties into Australia's post-Cold War relationship with the UN, which included consideration of the UN human rights treaty system.¹⁵

A three-page press release has been the extent of transparency in the review. The press release outlined a series of “measures” that would be

¹⁴ Minister for Foreign Affairs and Trade. 2000. *Government to Review UN Treaty Committees*. http://www.dfat.gov.au/media/releases/foreign/2000/fa024_2000.html [Accessed 28 August 2002].

¹⁵ Joint Standing Committee on Foreign Affairs Defence and Trade (June 2001) *Australia's Role in United Nations Reform, AGPS, Canberra*

adopted by the Howard/Coalition Government.¹⁶ The Government would:

- take a more “economical and selective” approach to reporting to the UN Human Rights committees (no indication was given of how “economic and selective” would be defined)
- reject unwarranted requests from treaty bodies to delay removal of unsuccessful asylum seekers
- deny women living in Australia the right to petition the UN using the CEDAW Optional Protocol
- only agree to visits of UN representatives when there was “a compelling reason to do so” (though no guidance was provided as to what a “compelling” reason might be)
- reassert the primacy of Government information over NGO information
- review the operation of the UN refugee system
- engage in a process of “reform” at the UN

Validating the system as a political expediency

While the practice of human rights in Australia has never lived up to the obligations entailed in the treaties, Australia did not always have a negative relationship with the UN human rights treaty system. In 1992, the Human Rights Committee received an individual communication from Nicholas Toonen. He argued that Tasmania's prohibition of consensual homosexual acts in private was a breach of the privacy rights in the International Covenant on Civil and Political Rights. The Committee agreed with him. In response, the Keating/ALP Government adopted

¹⁶ Joint Ministerial Statement. 2000. *Improving the effectiveness of the United Nations Committees*. http://www.dfat.gov.au/media/releases/foreign/2000/fa097_2000.html [Accessed 16 August 2002]

(albeit limited) legislation that required the Tasmanian Government to amend its laws.

However, the Keating/ALP Government only respected the UN standards when it suited it. In 1995, the High Court ruled that individuals could reasonably expect the government to apply international treaty obligations in administrative decision-making processes, whether or not that treaty had been incorporated into domestic law (the *Teoh* case¹⁷). In response, the Keating/ALP Government issued a statement which undermined the effect of the High Court ruling, and argued that ratification of a treaty did not create a "legitimate expectation" that the provisions would be applied in Australian administrative decision-making. The Howard/Coalition Government also supported this position.

Moreover, throughout the period of the Hawke and Keating/ALP Governments reports were consistently submitted years after they were due. Very little was done to publicise the outcomes, promote civil society engagement with the process, or more broadly to support human rights education initiatives.

Historical revisionism - misinformation and propaganda

Before and since World War Two, education in Australia has been deeply guided by misinformation and propaganda - to the extent that we may label it a whitewash. Such strategies continue today, along with another practice that often glosses over the realities of oppression: historical revisionism.

Historical revisionism tends to retell and recast history from the point of view of the powerful. This is evident in the example of asylum seekers and

refugees. Generally, refugees and asylum seekers have escaped often unspeakable atrocities in their home lands, and like other human beings they do what they can to flee and seek protection in other countries, for themselves and their children. Australia is obliged to recognise that people have a human right to seek refuge. Since 1992, successive Australian governments have recast the story of refugees and Australia's obligations towards them as a story of border protection. Instead of focusing on human needs and rights, the scenario presented is one of "defending" the "Australian way of life" from implied hordes of "queue-jumpers".¹⁸

This is assisted by the use of misinformation, propaganda and downright lies. For example, the description of asylum seekers as "illegals" is an attempt to criminalise and so delegitimise them. Asylum seekers are not criminals, and they have done nothing contrary to international law, regardless of the fact that technically they may be in breach of domestic law. Such a domestic law is in itself a breach of international law. The almost complete lack of media access to the realities of detention centre conditions, and the deliberate government lies about scandals such as the "children overboard" myth, along with overt Government appeals to racism and xenophobia, as we saw in the 2001 federal election, contribute to this ultra-conservative "new story".

Knowingly violating international standards

Australia's disengagement extends beyond the marginalisation of international legal principles

¹⁸ Of course, the same is not said about, for example, the influx of white South Africans (mostly to WA) or the Zimbabwean farmers now being encouraged to migrate to Australia. Nor about white, Christian people from England, New Zealand or Northern Europe who arrive by plane on a tourist visa and end up living "illegally" in Australia for years.

¹⁷ *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273.

and Australian laws and policies; to the practice of knowingly violating international legal obligations and aggressively advocating such practices internationally, as with the promotion of Australia's asylum-seeker detention model in Europe.

This has been clearly evidenced in Australia's treatment of asylum-seekers since the early 1990s. In 1992, the Keating/ALP Government introduced the mandatory detention of asylum seekers, in direct contravention of articles 7, 9 and 10 of the ICCPR.¹⁹ The Human Rights Committee found Australia in breach of the ICCPR in the 1997 ruling, but the Howard/Coalition Government stated that it did not agree with the interpretation put forward in the views.²⁰

The blatant disregard for international human rights obligations was also manifestly evident in 2001, when the Howard/Coalition Government, with the support of the Beazley/ALP Opposition, passed a raft of amendments to the *Migration Act (Cth)* 1958 Provisions adopted included the excision of Australian territories from the refugee determination process (contrary to Art. 40 of the Refugee Convention).

Exporting human rights violations

Moreover, when the Howard/Coalition Government refused entry to asylum seekers, and entered into arrangements with the Governments of Nauru and Papua New Guinea to have the asylum seekers' claims processed on their territories, it forced the governments of those

¹⁹ See HREOC, 1998, *Those Who've Come Across the Sea: Detention of unauthorised arrivals*, p. 37. http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf [Accessed 26 July 2002]

²⁰ Eve Lester. 1997. "Arbitrary detention of boat people," Uniya Focus, <http://www.austlii.edu.au/au/other/ahric/uniya/1997/7.html> [Accessed 27 August 2002].

countries to violate their own constitutional provisions that provided protection against detention without trial.

Undermining the development of the human rights system

In recent times, the stance of the Howard/Coalition Government towards the UN human rights treaty system has extended to actively working against the further development of international human rights mechanisms. In July, the Howard/Coalition Government voted against the adoption of an Optional Protocol to the Convention Against Torture. A spokesman for the Department of Foreign Affairs initially stated that Australia voted against the Protocol because it would enable the UN to make unannounced visits to Immigration Detention Centres.²¹ The Foreign Minister, Alexander Downer later clarified that the government had voted against the Protocol because it would allow unannounced visits, and that there was no link between detention centres and asylum seekers.²²

Undermining the legitimacy of the human rights system

Since 2000, the Howard/Coalition Government has blatantly undermined the UN human rights treaty system. While there is no doubt that this system, is not working as effectively as it could, many other governments have sought to reform the system through constructive engagement with the treaty process, expressing their concerns while at the same time continuing to act in a way that supports the credibility of the system.

²¹ http://www.abc.net.au/news/politics/2002/07/item20020726203230_1.htm

²² http://www.abc.net.au/news/politics/2002/07/item20020726203230_1.htm

In contrast, successive Australian governments have systematically undermined the expertise and credibility of the system and the importance of human rights in Australia, beginning with the *Teoh* ruling in 1995. This Report documents the ways in which this occurred, including more recent actions:

- the postponement of a visit from the Special Rapporteur on Racism and the Arbitrary Detention Working Group
- dismissal of the report of the Special Rapporteur on Racism
- dismissal of the report into the Immigration Detention Centres of the UN High Commissioner for Human Rights Special Envoy, Justice P N Bhagwati.

In rejecting the views of UN specialists, the Howard/Coalition Government has resorted to the language of asserting the sovereign right of Australia to act as it chooses in its own territory, without any regard for the system mandated by the international community to protect human rights.

This report documents the systematic disengagement from, and more recent antipathy towards, the UN human rights treaty system, by successive Australian Governments.

It examines Australia's record in the field of racial discrimination; sex discrimination; children's rights; economic, social and cultural rights; civil and political rights; and the right to be free from torture and other cruel, inhuman or degrading treatment or punishment.

Notes on Documentation

The report has been constrained by the lack of easily accessible information on the Australian record of reporting to the UN. Limitations have been encountered both at the domestic and

international level. While the UN High Commissioner for Human Rights provides a comprehensive on-line collection from the mid-1990s, it is not possible for members of the general public to access on-line material prior to this period. Moreover, the different level of resourcing available to each treaty body, and the priorities of the treaty body and its chair, determine the type of material that may be available. In some sections, the dossier has been enhanced by recourse to Summary Records (accounts of the Government-Committee dialogue on the implementation of a treaty in a particular country). This has not been possible for all treaties; for example, CEDAW does not publish Summary Records.

The process has also been made difficult by the failure of the Howard/Coalition Government to publish reports prior to their election. Moreover, there are no links to Concluding Comments on Government websites, despite recommendations from the Committee that the Concluding Comments be widely distributed.

CHAPTER TWO - INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

What is the ICERD?

The International Convention on the Elimination of All forms of Racial Discrimination (ICERD) was adopted by the UN General Assembly on 21 December 1965 and came into force on 4 January 1969 (except Art. 14, which came into force on 4 December 1982).

The ICERD is the primary UN human rights treaty on racial discrimination. Racial discrimination is defined as “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin”. The rights and freedoms expressed in the ICERD include:

- equality before the law
- security of person
- political rights
- freedom of movement
- the right to nationality
- property ownership
- the right to freedom of thought, conscience, religion, and expression
- peaceful assembly and association
- the right to work
- housing
- public health
- social security and social services
- education and training, and
- equal participation in cultural activities

The ICERD requires that such rights and freedoms not be violated (a negative obligation) and that positive measures be taken to ensure that rights and freedoms be protected and enjoyed by people in Australia. Moreover, the ICERD requires that if rights are violated, or freedoms impermissibly infringed, there be effective remedies available to the individuals concerned.

Review and monitoring mechanisms

States who are party to ICERD are reviewed and monitored by the Committee on the Elimination of Racial Discrimination (CERD), which comprises eighteen experts. Four main mechanisms are used:

- periodic reporting – State Parties are required to submit comprehensive reports every two years and brief updating reports at the request of the CERD
- requests for further information (eg early warning/urgent action procedure)
- individual communications (where an individual or group of individuals may lodge a complaint with the CERD if they consider that their rights have been breached and they have been unable to gain a satisfactory outcome through domestic processes)
- State-to-State complaints.

Australia and the ICERD

Domestic implementation

On 13 October 1966, the Holt/Liberal Government signed the ICERD and on 30 September 1975, the Whitlam/ALP Government ratified it with a reservation to Art. 4(a). The ICERD came into force for Australia on 30 October 1975. In 1993, the Keating/ALP Government recognised the competence of the ICERD Committee (CERD) to receive individual communications. Australia's reservation to Art. 4(a)²³ is still in place in 2002.

The *Racial Discrimination Act (Cth) 1975 (RDA)*, which makes discrimination on the basis of race, colour, descent or national and ethnic origin unlawful, incorporates the definition of racial discrimination expressed in the ICERD, and in particular, proscribes discrimination in respect of all the rights and freedoms expressed in Art. 5 of the ICERD.²⁴ It is an indictment of Australian judicial and quasi-judicial interpretation of these incorporated provisions, that *RDA* has not been read and applied in accordance with the general comments and interpretation of the ICERD.

Australia's reports to the CERD

Australia has presented twelve reports to the Committee on the Elimination of Racial Discrimination (CERD). Australia's Periodic Reports are due on 30 October every 2 years. The 1st Periodic Report, due in October 1975, was submitted during the term of the Fraser/Liberal Government in November 1976. The 2nd Periodic Report, due in October 1978, was submitted by the Fraser/Coalition Government in April 1979. The 3rd Periodic Report, due in October 1980, was submitted by the Fraser/Coalition Government in July 1981.

The 4th Periodic Report, due in October 1982, was submitted by the Hawke/ALP Government in March 1983.²⁵ The 5th Periodic Report, due in October 1984, was submitted by the Hawke/ALP Government, in July 1985. The 6th Periodic Report, due in October 1986 during the term of the Hawke/ALP Government, was submitted by that Government in June 1989, along with the 7th and 8th Periodic Reports. The 7th Periodic Report was due in October 1988. The 8th Periodic Report was due in October 1990 and therefore submitted early (this, in effect, meant that Australia did not report on the period between June 1989 and October 1990). The 9th Periodic Report, due in October 1992 during the term of the Keating/ALP Government, was submitted in September 1993 by that Government.

²³ Art. 4(a) states that parties to ICERD: "[s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".

Australia's 1975 reservation to Art. 4(a) "...declares that Australia is not at present in a position to specifically treat as offences all the matters covered by article 4(a) of the Convention. Acts of that kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a)." Twenty-two years later, the people are still waiting for the Australian Government to determine that "first suitable moment".

²⁴ The ICERD is scheduled to the *RDA* for this purpose.

²⁵ The report was submitted on 30 March 1983. The ALP, under Bob Hawke, won the federal election on 11 March 1983.

The 10th Periodic Report, due in October 1994 during the term of the Keating/ALP Government, was submitted by the Howard/Coalition Government in July 1999, along with the 11th and 12th Periodic Reports. The 11th Periodic Report was due in October 1996, and the 12th Periodic Report was due in October 1998 during the term of the Howard/Coalition Government. The 13th Periodic Report, due on 30 October 2000, has not been submitted by the Howard/Coalition Government. The 14th Periodic Report is due in October 2002.

In addition to periodic reporting requirements, Australia was also the subject of an urgent action procedure in 1998. The issues which were the subject of the procedure were considered by the Committee in 1999 and 2000.

Ninth periodic report - 1993

Government report

The 9th Periodic Report was submitted by the Keating/ALP Government in September 1993.²⁶ The Report discussed, among other issues:

- continuation of strategies and initiatives to implement the *National Agenda for Multicultural Australia* (1989)
- the 1992 evaluation of the *Access and Equity Strategy* (1985)
- the introduction of the *Disability Services Program* to meet the needs of Non-English Speaking Background/Migrant and Indigenous people with disabilities and special needs
- the implementation of the *Community Relations Strategy* commencing April 1991 and its evaluation in 1993
- the Report of the *National Inquiry into Racist Violence*, conducted by the Race Discrimination Commissioner (HREOC 1991)
- the Report of the Australian Law Reform Commission, *Multiculturalism and the Law* (1992)
- Australia's reservation to Art. 4(a) of the ICERD
- the amendments to the *RDA*, incorporating a prohibition on indirect discrimination (s 9 (1A))
- the tabling of the Final Report of the Royal Commission into Aboriginal Deaths In Custody (RCIADIC) and responses of the federal and state/territory governments
- the establishment of the office of the ATSI Social Justice Commissioner in HREOC in response to recommendations of the RCIADIC
- the establishment of the Council for Aboriginal Reconciliation
- the establishment of the legislative framework governing native title, following the decision of the High Court in *Mabo v Queensland [No.2]* (1992).²⁷

Government-Committee dialogue

The CERD considered Australia's Report at its 45th Session in August 1994. Australia's delegation consisted of two federal Ministers, Mr Robert Tickner (Minister for Aboriginal Affairs) and Mr Ralph Willis

²⁶ CERD/C/223/Add.1.

²⁷ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1

(Treasurer), and, in a highly unusual (but much praised) initiative, Mr Michael Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC.

The issues raised during the dialogue included:²⁸

- the 1992 *Mabo* decision, in which the majority of the High Court held that the common law of Australia recognises a form of native title²⁹
- the *Native Title Act (Cth) 1993 (NTA)* and the National Aboriginal and Torres Strait Islander Land Fund
- the maltreatment of Indigenous people by police and the implementation of recommendations to prevent deaths in custody of Indigenous people³⁰
- the extremely high levels of discrimination against Indigenous people in employment and training³¹
- the political participation of Indigenous people in decision-making³²
- the detention and treatment of immigrants and asylum seekers who had arrived in Australia by boat from countries in the south-east Asian region³³
- the extent to which police officers were trained in the provisions of the ICERD³⁴
- the consistency of legal decisions between the federal and various state/territory anti-discrimination jurisdictions³⁵
- the justification for Australia's continued reservation to Art. 4(a) of the ICERD, particularly in light of its recognition of the competence of the CERD to receive individual communications under Art. 14³⁶
- the extent to which HREOC determinations were enforced in the Federal Court of Australia³⁷
- the ICERD protections available to people living on Christmas Island and the Cocos (Keeling) Islands³⁸
- policies on granting of entry visas to people of African origin³⁹
- the status of the ICERD in Australia's federal legal system⁴⁰
- the lack of information on Australia's migrant and ethnic communities.⁴¹

The following are some of the responses given by the Australian delegation to these issues:

Native Title Act (Cth) 1993 (NTA) - The ATSI Social Justice Commissioner expressed serious concerns that provisions of the *NTA* were inconsistent with the *RDA* and thus with the ICERD. For example, s 7(b) prohibited the use of the *RDA* to challenge the validity of existing title to land. He also expressed doubts

²⁸ Summary Record of the 1059th meeting: Australia. 18/8/94. CERD/C/SR.1059.

²⁹ Ibid, para 21. Native title exists in accordance with the laws and customs of Indigenous people where those people have maintained their traditional connection with the land; and their title has not been "extinguished" by a legislative or other act of government. In legislative response, and after some Indigenous leaders reached a compromise with the Government, the Commonwealth Parliament passed the Native Title Act (C'th)1993, which set out a framework for the management of native title within Australia.

³⁰ Ibid, para 20

³¹ Ibid, paras 16,20,22

³² Ibid, para 4

³³ Ibid, para 7

³⁴ Ibid, para 9

³⁵ Ibid.

³⁶ Ibid, paras 12 and 83

³⁷ Ibid, para 13

³⁸ Ibid, para 15

³⁹ Ibid, para 18

⁴⁰ Ibid, para 23

⁴¹ Ibid, paras 9, 14, 85

about the provision that native title might be held corporately or in trust, as this may be inconsistent with the ICERD and the ICCPR.

Recommendations of the Royal Commission into Aboriginal Deaths in Custody - Two-thirds of the Commission's recommendations were directed towards State/Territory Governments. The Commonwealth Government had limited capacity to enforce compliance with, and implementation of, those recommendations, but it would use the national forums of police and prisons' ministers for the purpose of ensuring States and Territories implemented the recommendations.⁴²

Indigenous political participation - There was evidence of increased enrolment and participation of Indigenous people in elections, and their increased voting power would encourage political parties to respond to Indigenous aspirations.⁴³

Detention and treatment of asylum seekers - Australia's intake of refugees was one of the highest in the world, and in 1992-1993, people from over 60 nationalities had been admitted to Australia, testifying to Australia's non-discriminatory response to the refugee program. There was a fierce public debate concerning the acceptance of "boat people", with some sectors of the Australian population fearing they were given preferential treatment. Changes to immigration policy in July 1993 permitted applicants for refugee status to seek judicial review in the Federal Court from decisions of the Refugee Review Tribunal, on specific grounds.⁴⁴

Training of police in the ICERD - Police received full training in observance of the law and broader issues relating to Indigenous people.⁴⁵

Consistency of jurisprudence in federal and state anti-discrimination laws - The Federal and High Courts have jurisdiction across the whole country and are able to ensure uniformity of the law in key areas. Those Courts could, and did, overturn decisions of State and Territory judiciaries if they were inconsistent with Commonwealth law, the Constitution or judicial precedent.⁴⁶

Reservation to Art. 4(a) of the ICERD - The enactment of proposed national legislation on racial vilification would make it easier for Australia to abandon its reservation to Art. 4(a), but it is not the only factor which has to be taken into account in taking such action.⁴⁷

Migration of people from Africa - Although Australian policy had been discriminatory in the past, the Government is now proud of its non-discriminatory policy on immigration.⁴⁸

⁴² Ibid, para 29, Mr Tickner in reply.

⁴³ Ibid, para 30, Mr Tickner in reply.

⁴⁴ Ibid, para 65

⁴⁵ Ibid, para 66, Mr Tickner struggling to answer a question as to whether police are given effective human rights training. State/territory police commonly, and often seriously, violate people's human rights everyday in Australia. It is the responsibility of state/territory governments to ensure this does not happen and to provide an effective remedy when it does. We are still waiting for effective protection from our state/territory governments...

⁴⁶ Ibid, paras 39 and 51. Provided a complainant had the resources to initiate appeal proceedings in the Federal or High Courts, that is. As at 16 August 2002, the High Court had considered just 4 cases concerning the operation of state anti-discrimination/equal opportunity laws with regard to racial discrimination. All 4 cases originated in NSW.

⁴⁷ Ibid, para 45.

Concluding Comments

The CERD's Concluding Comments⁴⁹ covered positive aspects, as well as areas of concern and recommendations for change.

Positive - The Committee praised Australia for the quality of its report and the comprehensiveness of its additional information, as well as "its regularity in fulfilling its reporting obligations and for the seriousness with which it takes its obligations under the Convention". The Committee also highly commended the composition of the delegation, describing it as "an example to be followed by other reporting States"; and appreciated the "readiness of the Commonwealth Government to show leadership in securing a better implementation of the Convention".

The CERD noted with satisfaction Government efforts to establish multiculturalism and national programs and strategies, as well as laws, to achieve this. It expressed appreciation for the Australian judiciary's attention to the ICERD in *Mabo v Queensland [No. 2]*.

The Committee raised the following principal subjects of **concern** -

Implementation of the ICERD provisions by state & territory governments - The CERD expressed concern that the implementation of the human rights and freedoms expressed in the ICERD required the active participation of state and territory governments, because those governments have almost exclusive jurisdiction over many of the areas covered by the treaty. The Committee noted that state and territory governments could not be compelled to change their laws to ensure that they are consistent with the provisions of the ICERD. The CERD noted that it would follow with concern relevant developments in the relations between governments in Australia.⁵⁰

Indigenous deaths in custody - The CERD noted with concern that the rate of Aboriginal deaths in custody was comparable to that which led to the appointment of the Royal Commission into Aboriginal Deaths in Custody. The Committee also expressed concern about the general situation of Indigenous people in Australia.⁵¹

Native title - The CERD commented on the protracted nature of legal proceedings for the recognition of native title, and the burdensome requirements to prove the continuous connection to land and that native title had survived and had not been extinguished.⁵² The issue of non-Indigenous ancestry was also regarded by the Committee as an unnecessary and unreasonable burden on native title claimants. The CERD acknowledged that only a very small percentage of the Aboriginal population would benefit under the *Native Title Act 1993*.

⁴⁸ Ibid, para 74.

⁴⁹ Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination: Australia. 19/9/94. Adopted at the 45th Session, 1067th meeting. A/49/18, paras 535-551.

⁵⁰ Ibid, para 542.

⁵¹ Ibid, para 543.

⁵² Ibid, para 544.

Serious disadvantage of Indigenous peoples - The CERD expressed concern about the serious disadvantage suffered by Indigenous people in areas such as education, employment, housing and health services; and that according to various social indicators, Indigenous people are more deeply affected by social problems such as alcoholism, drug abuse, delinquency and incarceration than any social group in the country.⁵³

Situation of non-English speaking minorities, particularly asylum seekers - The CERD noted with concern the situation of non-English speaking minorities, particularly refugees or asylum seekers, with regard to the enjoyment of their rights and freedoms under Art. 5 of the ICERD. Immigrants from African and Asian regions also appeared not to be adequately protected from discrimination.⁵⁴

The Committee made the following **recommendations** -

Stolen Generations - "The Committee recommends that Australia pursue an energetic policy of recognising Indigenous rights and furnishing adequate compensation for the discrimination and injustices of the past."⁵⁵

Protection of Indigenous rights - The CERD recommended that State and Territory governments, in particular, should fully implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody, the Human Rights and Equal Opportunity Commission and the Aboriginal and Torres Strait Islander Commission.⁵⁶

Remedies for discrimination - The Committee recommended that Australia strengthen measures to remedy discrimination experienced by people of non-English speaking minorities and Indigenous people, in violation of their rights and freedoms under the ICERD. In particular, the CERD noted that this should occur in the following areas:

- administration of justice
- education
- employment
- housing
- health services.⁵⁷

Law enforcement officials - The CERD recommended that law enforcement officials receive more effective training to ensure that in the performance of their duties they respect as well as protect human dignity, and maintain and uphold the human rights of all.⁵⁸

⁵³ Ibid, para 545.

⁵⁴ Ibid, para 546.

⁵⁵ Ibid, para 547.

⁵⁶ Ibid.

⁵⁷ Ibid, para 548. Note that these areas all fall within state/territory government jurisdiction.

⁵⁸ Ibid. Note that state/territory police are major perpetrators of racial harassment and discrimination in Australia, particularly toward young people. State/territory governments have done little to put this on their policy agendas, let alone introduce any effective accountability mechanisms for violations of human rights at the hands of police. The state of Victoria is a case in point.

Art. 4(a) - Racial hatred, violence and vilification offences - CERD recommended that Australia adopt appropriate legislation to make expressions and acts of racial violence, hatred and vilification an offence punishable by law - with a view to withdrawing its reservation to Art. 4(a) of the ICERD.⁵⁹

Early warning/urgent action procedure - 1998

Australia's tenth, eleventh and twelfth periodic reports were due on 30 October 1994, 1996 and 1998 respectively. By August 1998 none of these had been submitted, and after NGO input the Committee instituted an early warning procedure against Australia.⁶⁰

The early warning procedure is initiated where the Committee is concerned that a State is not acting in compliance with the provisions of the ICERD. Once initiated, the State remains indefinitely on the Committee's agenda for review at future sessions.

Australia is the first "western" country to be placed under an early warning. The Committee requested information on the changes recently projected or introduced to the *Native Title Act (Cth)* 1993, and on any in relation to Aboriginal land rights policy and the functions of the ATSI Social Justice Commissioner.

The Committee received many submissions from NGOs focusing on the amendments to the *NTA*, including the Aboriginal and Torres Strait Islander Commission (ATSIC), the National Indigenous Working Group on Native Title (NWIG), the acting ATSI Social Justice Commissioner, and Australians for Native Title and Reconciliation (ANTaR).

The Australian Government denied that there had been any change to the function of the ATSI Social Justice Commissioner.⁶¹ The delegates framed their explanation of changes to the *NTA* in the context of developments since *Mabo* and the passing of the original *NTA*, particularly in relation to the 1996 High Court *Wik* decision.⁶² Here, the Court found that pastoral leases did not necessarily extinguish native title, and that native title could co-exist with the interests of other parties – although where there was a conflict between the rights of the parties, pastoral rights would prevail to the extent of the inconsistency. The Government therefore argued that legislative change was necessary to clearly define rights for both native title holders and pastoralists, and a "Ten Point Plan" was released by the Prime Minister, John Howard. This eventually led to the passing of the *Native Title Amendment Act (Cth)* 1998.

⁵⁹ Ibid, para 549. Note the introduction of the Victorian Racial and Religious Tolerance Act 2001 which came into force in January 2002. It contains provisions for criminal offences. The drafting and practical utility of this legislation is, however, highly questionable. Time will tell.

⁶⁰ Decision 1 (53) on Australia: Australia. A/53/18.1, 11 August 1999, 1287th meeting of 11th August 1998.

⁶¹ CERD/C/347 of 22 January 1999. Additional information pursuant to Committee Decision 1 (53) on Australia, adopted on 11 August 1998.

⁶² *Wik Peoples v Queensland* (1996) 187 CLR 1.

Government-Committee dialogue

The Australian Government appeared before the 54th session of the CERD Committee on 12 and 15 March 1999.⁶³ The Committee found the amended *Native Title Act* to be discriminatory and raised concerns about Australia's compliance with Art. 2 and 5 of ICERD.⁶⁴ The Committee stated that the amended *NTA* seemed to create legal certainty for Governments and third parties at the expense of native title holders. The Committee noted four specific provisions that discriminate against Indigenous title holders under the newly amended Act. These are:

- the Act's "validation" provisions (validation of past invalid acts of extinguishment)
- the "confirmation of extinguishment" provisions (extending the type of land where native title rights were extinguished)
- the primary production upgrade provisions (enabling pastoralists to use the land more intensively without consulting native title holders and so also possibly producing extinguishment)
- restrictions concerning the right of Indigenous title holders to negotiate with non-Indigenous land users.

The Committee was also concerned about the lack of effective participation by Indigenous communities in the formulation of the amendments, raising questions about Australia's compliance with its obligations under Art. 5(c) of the ICERD.⁶⁵ Australia's actions were also directly contrary to the Committee's General Recommendation XXIII, which calls upon State Parties to "recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources."⁶⁶

The Committee urged the Howard/Coalition Government, as a matter of utmost urgency, to suspend implementation of the 1998 amendments and reopen discussions with the representatives of the Aboriginal and Torres Strait Islander peoples, with a view to finding acceptable solutions which would comply with Australia's obligations under the Convention.

Australian Government's response

The Australian Government disagreed with the Committee's findings, with the Attorney-General, Daryl Williams, describing the Committee's findings as "an insult to all Australians as they are unbalanced. . . and fail to understand Australia's system of democracy."⁶⁷

On invitation from Opposition senators and ATSIC, the Committee proposed to visit Australia, but the Government objected and it did not take place. On 20 July 1999, just before the 55th session of the Committee, Australia submitted its outstanding tenth, eleventh and twelfth periodic reports.

⁶³ CERD/C/SR.1323. Summary Record of the 1323rd meeting held at the Palais des Nations, Geneva, on Friday 12 March 1999; S Hoffman, "United Nations Committee on the Elimination of Racial Discrimination: Consideration of Australia under its early warning measures and urgent action procedures" (2000) 6(1) *Australian Journal of Human Rights* 13.

⁶⁴ Decision 2 (54) on Australia: CERD/C/54/Misc 40/Rev2 of 18 March 1999.

⁶⁵ Art. 5(c) states: "Political rights, in particular the right to participate in elections to vote and to stand for election on the basis of universal suffrage, to take part in Government as well as in the conduct of public affairs at any level and to have equal access to public service".

⁶⁶ S Hoffman, "United Nations Committee on the Elimination of Racial Discrimination: Consideration of Australia under its early warning measures and urgent action procedures", *Australian Journal of Human Rights* 6(1) 2000 13, at 26.

⁶⁷ Media Release, the Hon Daryl Williams, Attorney General, 19 March 1999, quoted in S Hoffman, "United Nations Committee on the Elimination of Racial Discrimination: Consideration of Australia under its early warning measures and urgent action procedures" (2000) 6(1) *Australian Journal of Human Rights* 13, at 30.

Although Australian Government representatives were present when the procedure against Australia was considered, they did not make themselves officially available for dialogue, and instead sent written comments to be attached to the Committee's annual report to the UN General Assembly, in which they contested the Committee's findings. For example:

"As a general point, the Australian Government does not believe that past discrimination against Australia's indigenous peoples in relation to their rights to land has endured."⁶⁸

The Committee views

The decisions from the 54th session were reaffirmed, with the Committee explaining them as "prompted by a serious concern that, after having observed and welcomed over a period of time a progressive implementation of the Convention in relation to the land rights of indigenous peoples in Australia, the envisaged changes of policy as to the exercise of these rights risked creating an acute impairment of the rights thus recognised to the Australian indigenous communities."⁶⁹

The Committee decided to continue consideration of the *NTA* amendments and discuss the overdue reports at its 56th session.

Tenth, eleventh & twelfth periodic reports – 1999

Government report

The combined report was submitted in July 1999 by the Howard/Coalition Government.⁷⁰ The Report discussed, among other issues:

- the ATSIC Social Justice Strategy (1995)
- the Ministerial Summit on Indigenous Deaths in Custody (1997)
- the findings of *Bringing them Home: The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (HREOC 1997) including
 - legislation in all states and territories "enacted to deal with Indigenous children in accordance with the policy of assimilation and protection [... which] was progressively repealed in the 1950s and 1960s"⁷¹
 - the racially discriminatory nature of such legislation⁷²
 - the Inquiry's 54 recommendations in relation to reparation and compensation, reunion and healing; and measures to address contemporary separation practices (in welfare and juvenile justice)⁷³
- the Howard/Coalition Government's response to the Inquiry's report in December 1997⁷⁴

⁶⁸ Australia's Comments on Decision 2 (54) of 18 March Pursuant to Article 9(2) of the Convention.

⁶⁹ Decision 2 (55) on Australia, 16 August 1999. CERD/C/55/Misc 31/Rev.3 of 16 August 1999.

⁷⁰ CERD/C/335/Add.2

⁷¹ Ibid, para 104, p.23. Such policy justification was, amongst other things, quite irrational when one considers that Indigenous people's humanity was not even recognised in Australia at that time. Note also, Indigenous people state that these practices were still occurring in some parts of Australia (eg, southern WA) throughout the 1970's.

⁷² Ibid, para 105

⁷³ Ibid, para 106

⁷⁴ Ibid, paras 107-114

- the cultural genocide of Indigenous people, and the Australian Government's position that it "does not accept that the past policies were driven by an intent to destroy Indigenous people"⁷⁵
- the non-discriminatory basis of the *Migration Act* - and the Australian Government's claim that it "does not contain any broad and unaccountable discretionary powers to refuse the grant of a visa"⁷⁶
- various state and territory legislative measures, policies and programs.

Government-Committee dialogue

The Committee considered Australia's Reports at its 56th session in March 2000. Australia's delegation consisted of one federal Minister, Mr Philip Ruddock (the Minister for Immigration and Assisting the Prime Minister on Reconciliation), and an entourage of 9 Commonwealth public servants.

Submissions from NGOs such as ATSIC and HREOC named as violations of the ICERD the amended *NTA*; the continuing high numbers of Indigenous deaths in custody; increasing rates of incarceration; mandatory sentencing; and the Government's lack of implementation of the recommendations from the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (the Stolen Generations).⁷⁷

At the same time, Philip Ruddock was suggesting to the Australian media: "It is not unreasonable to assume that mandatory sentencing will probably lead to Aboriginals being less represented in incarceration than they would have otherwise been".⁷⁸

Some of the issues raised by the Committee during the 56th session dialogue⁷⁹ included:

- the degree of over-representation of Indigenous persons in custody being over 29 times that of non-Indigenous persons and that this was above all due to the[ir] disadvantaged and unequal position in society⁸⁰
- despite the initiatives to implement the recommendations of the *Royal Commission into Aboriginal Deaths in Custody*, Indigenous deaths in custody had increased - particularly for juveniles. This was attributable to mandatory sentencing laws in WA and the NT⁸¹
- official apology: "Why was it apparently so difficult for the Australian Government to take full responsibility and apologise for the actions of its predecessors?"⁸²
- "worrying trends" in relation to native title, including the restriction of the ability of native title holders to negotiate over land use, or the replacement of the right to negotiate with a lesser right of notification and consultation⁸³
- Australia's failure to give sufficient details of how the situation of migrant communities had improved, as requested by the CERD in its Concluding Observations on the 9th Report⁸⁴

⁷⁵ Ibid, para 116, p.25

⁷⁶ Ibid, paras 119-120, p.25

⁷⁷ *Bringing Them Home*, HREOC, 1997

⁷⁸ Simon Mann, "Fewer Aborigines face jail, Ruddock tells UN", Sydney Morning Herald, <faira.org.au>, accessed 1/8/02.

⁷⁹ Summary Record of the 1393rd Meeting. CERD/C/SR.1393.

⁸⁰ Ibid, para 46

⁸¹ Ibid.

⁸² Ibid, para 53

⁸³ Ibid, para 50.

⁸⁴ Ibid, para 38.

- whether the Australian Government believed that the ICERD established a legal duty to ensure formal equality, or whether it established an obligation to achieve equality in practice⁸⁵
- the Commonwealth's ability to override the protection under the *Racial Discrimination Act 1975*, simply by passing subsequent legislation⁸⁶
- the discriminatory impact of the law in states/territories on matters for which they had primary jurisdiction (of serious concern to the CERD)⁸⁷
- the finding of a Government Committee that mandatory sentencing had a discriminatory impact on Indigenous people and was inconsistent with Art. 2 and 5 of the ICERD, and the federal Government's failure to use its power to override those state/territory laws⁸⁸
- with reference to the One Nation Party, whether Australian law required political parties to submit their charter and manifesto upon registration.⁸⁹

The meeting continued on 22 March 2000,⁹⁰ with the following issues raised:

- the insufficiency of civil penalties under the *Racial Hatred Act (Cth) 1995*, and Australia's failure to make racial hatred and vilification a criminal offence, as required under Art. 4(a)⁹¹
- implementation of the recommendations of the *National Inquiry into Racist Violence*, concerning state/territory administration of public housing⁹²
- the Australian Government's practice of extended detention of undocumented refugees, and its failure to respond to HREOC's finding that such practice constitutes violations of human rights⁹³
- the lack of existence of constitutional mechanisms to ensure that states/territories complied with international obligations.⁹⁴

The following are some of the responses given by the Australian delegation to these issues:

Native title - The amended Act contained extensive provisions that recognised the unique nature of native title rights and went beyond the requirements of mere formality, including special rights to ensure that there was consultation about mining and other activities, procedural rights, negotiated and mediated agreements, and the suspension rather than extinguishment of native title by mining leases.⁹⁵

⁸⁵ Ibid, para 40.

⁸⁶ Ibid, para 41. The *Racial Discrimination Act 1975* overrides inconsistent state/territory legislation. However, it does not override subsequent federal legislation that may be inconsistent with the *RDA*.

⁸⁷ Ibid, para 42. For example, in relation to social programs in areas such as housing and education.

⁸⁸ Ibid, para 47. See also para 12, CERD/C/SR.1394

⁸⁹ Ibid, para 63.

⁹⁰ Summary Record of the 1394th Meeting: Australia 9/2/01. CERD/C/SR.1394

⁹¹ Ibid, para 8.

⁹² Ibid, para 11. The ICERD noted the case of *Joan Martin v State Housing Commission* [1998] WASCA 98. Homeswest, WA's Housing Commission, has maintained a consistent practice for over 10 years of evicting Indigenous people under various provisions of the *Residential Tenancies Act (WA)*, including for "anti-social behaviour". The WA Court of Appeal held in this case that the use of the "nuisance" provision to evict Mrs Martin did not constitute indirect racial discrimination. We beg to differ: this was and continues to be a case of indirect racial discrimination. With respect, the decision is an example of an unnecessarily narrow and technical judicial construction of the provisions of the *Equal Opportunity Act (WA) 1984*, without sufficient regard for the ICERD and its interpretation of "racial discrimination".

⁹³ Ibid, para 21.

⁹⁴ Ibid, para 37.

⁹⁵ Ibid, para 26. Presumably, native title would be restored after all mineral deposits have been fully extracted.

In the Howard/Coalition Government's view, the four provisions noted by the CERD in Decision 2 (54) as discriminating against native title holders "had been justifiable and proportional in the particular circumstances and were not inconsistent with the Convention."⁹⁶

Multiculturalism - The Government's New Agenda for Multicultural Australia and its "living in harmony" initiative would help promote community harmony despite [sic] diversity.⁹⁷

Discriminatory impact of mandatory sentencing laws in WA and NT - The policy of mandatory sentencing was likely to decrease rather than increase the number of Indigenous people in custody. The federal Attorney General had invited state/territory Attorneys-General to review their laws.⁹⁸

Racist platforms of political parties - The Australian people had, in a referendum, disavowed the principle of banning political parties because of their ideology, preferring to leave the verdict to the ballot box. When politicians had expressed racist views after their election, they had generally been rejected by voters at the next election.⁹⁹

Detention of asylum seekers - "Australians did not view immigration as simply a movement of people, but rather in the context of the country's human rights obligations, particularly in relation to refugees."¹⁰⁰

Ninety-five percent of asylum seekers were not placed in detention centres, but were left free; only people who had arrived illegally were placed there - for health reasons and to allow the authorities to check applicants' claims and identities. Detention was also necessary in the event that asylum seekers refused to leave Australia once their application had been rejected.¹⁰¹

Concluding Comments

The CERD's Concluding Comments¹⁰² covered positive aspects, as well as areas of concern and recommendations for change.

Positive - The CERD noted with appreciation the measures adopted by Australia between 1992-1998. It welcomed legislative measures and institutional arrangements, as well as programs and policies that focus on racial discrimination, including the "New Agenda for Multicultural Australia" and the "living in harmony" initiative.¹⁰³

The CERD expressed the following Concerns and Recommendations:

⁹⁶ Ibid, para 28. Note, the term "not inconsistent" is not synonymous with "consistent"; this is a subtler expression of the Government's policy of actively minimising its obligations under the ICERD.

⁹⁷ Ibid, para 17. Note that in the Howard/Coalition Government's view, multiculturalism is reduced to "harmony *despite* diversity" rather than valuing diversity in and of itself.

⁹⁸ Para 55, CERD/C/SR.1394. Mr Ruddock in reply.

⁹⁹ Ibid, para 51, *ibid*. Note that racism and xenophobia served the Howard/Liberal Government very well in the 2001 federal election campaign.

¹⁰⁰ Para 2, CERD/C/SR.1393. Mr Ruddock. This is true of a growing number of Australians. It is highly questionable as to whether the same may be said of the Howard/Liberal Government and its policies and practices.

¹⁰¹ Ibid, para 65. CERD/C/SR.1394. Mr Ruddock in reply.

¹⁰² Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination: Australia. 19/9/94. Adopted at the 45th Session, 1067th meeting. A/49/18, paras 535-551.

¹⁰³ Ibid, para 5.

Lack of entrenched guarantee against racial discrimination in Australian law - The CERD expressed concern over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent federal, state and territory laws.¹⁰⁴

Use of Commonwealth powers to override state/territory laws - The CERD noted its concern regarding the failure of the Government to ensure consistent compliance of all states/territories with the ICERD. It reiterated its recommendation that the Australian Government, in accordance with Art. 27 of the Vienna Convention on the Law of Treaties,¹⁰⁵ undertake appropriate measures to ensure that the provisions of the ICERD are consistently *applied by all levels of government including states/territories and, if necessary, to use its power to override territory laws and its external affairs power with regard to state laws* (emphasis added).¹⁰⁶

Native Title - 1998 amendments - The CERD noted its concern over the continuation of discriminatory practices in relation to native title and, in particular, that the devolution of power to states and territories in relation to the "future acts" regime further reduces the protection of the rights of native title claimants. It recommended that the Australian Government ensure that the protection of rights of Indigenous peoples would not be further reduced.¹⁰⁷

Response to Early Warning/Urgent Action Procedures - The CERD expressed concern at the unsatisfactory response of the Australian Government to Decision 2 (54) and Decision 2 (55), and the continuing risk of further impairment of the rights of Indigenous communities. The CERD reiterated its recommendation that Australia should ensure effective participation by Indigenous communities in decisions affecting their land rights as required under Art. 5(c) of the ICERD and General Recommendation XXIII of the Committee, which stresses the importance of "informed consent".¹⁰⁸

Stolen Generations - The CERD expressed concern that the Government does not support a formal national apology, and that it considered inappropriate the provision of monetary compensation for those forcibly and unjustifiably removed from their families, on the ground that such practices were sanctioned by law and were intended to "assist" Indigenous people. It recommended that Australia address appropriately the extraordinary harm inflicted by these racially discriminatory practices.¹⁰⁹

ATSIC and ATSI Social Justice Commissioner - The CERD recommended that Australia reconsider proposed institutional changes so that these institutions preserved their capacity to address the full range of issues regarding the Indigenous community.¹¹⁰

¹⁰⁴ Ibid, para 6.

¹⁰⁵ Art. 27 states: "A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The Law of Treaties is the authoritative instrument on the interpretation of international treaties.

¹⁰⁶ Ibid, para 7. That is, Federalism is no excuse for the failure of state/territory governments and, in particular, the federal government to protect human rights.

¹⁰⁷ Ibid, para 8.

¹⁰⁸ Ibid, para 9.

¹⁰⁹ Ibid, para 13.

¹¹⁰ Ibid, para 11.

Criminal penalties for racial violence, hatred and vilification - Art. 4(a) - The CERD recommended that Australia continue making efforts to adopt appropriate legislation with a view to giving full effect to the provisions of, and withdrawing its reservation to, Art. 4(a) of the ICERD.¹¹¹

Reconciliation process - The CERD expressed its concern about the process of reconciliation and the apparent lack of confidence of Indigenous people in the process.¹¹²

Continuing discrimination against, and disadvantage of, Indigenous people - The CERD expressed extensive concerns about the extent to which Indigenous Australians suffered discrimination and disadvantage in the enjoyment of their social, cultural and economic rights, and the dramatic inequality between Indigenous and non-Indigenous people.¹¹³

Criminal justice system and mandatory sentencing - The CERD noted with grave concern the disproportionately high incarceration rates of Indigenous people, and recommended that the Australian Government increase its efforts to effectively address socio-economic marginalisation, the discriminatory approach to law enforcement (including the lack of training of police), and the lack of sufficient diversionary programs.¹¹⁴ Also noted was the lack of appropriate Indigenous interpreter services in the criminal justice system, from police questioning through to the hearing and determination of criminal matters in Courts.¹¹⁵

Australia's next report - The CERD recommended that Australia's next report, due October 2002, be an updating report addressing the issues raised in the Concluding Observations.

Australian government response to concluding observations

The Australian government rejected the CERD's comments:

- **Minister for Foreign Affairs, Alexander Downer, announced a review** of Australia's participation in the treaty committee system.¹¹⁶ Concerns were expressed at the "burdensome reporting requirements", the backlog of overdue reports and delays in committee consideration, and the "over- emphasis" by committees on NGO submissions. Mr Downer described the Government as "appalled at the blatantly political and partisan approach taken by the Committee", which was "little more than a polemical attack on the Government's indigenous policies." According to Mr Downer: "What we are doing here in this country to help indigenous people is not an egregious breach of human rights commensurate with Iraq or Burma or some of the other countries of the world where there's a focus on those questions."¹¹⁷ He went on to decry "people running off to the United Nations and dobbing in democratically elected institutions in this country."

¹¹¹ Ibid, para 14.

¹¹² Eg para 53, CERD/C/SR1393.

¹¹³ Ibid, para 45, and paras 10, 22, 42 CERD/C/SR.1394.

¹¹⁴ Ibid, para 15.

¹¹⁵ Eg para 57, CERD/C/SR1393, and paras 23 and 42, CERD/C/SR.1394.

¹¹⁶ Media release, Minister for Foreign Affairs, "Government to Review UN Treaty Committees", 30 March 2000.

¹¹⁷ "Government to review participation in UN treaty committee system", transcript of interview with Kerry O'Brien, 7.30 Report, ABC, 30 March 2000.

- **Attorney-General, Daryl Williams, denounced the CERD**

The CERD's comments were "an unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs," and the Committee's international credibility was "in question unless it takes a more balanced perspective in the future."¹¹⁸

- **Prime Minister, John Howard, expressed a Sovereign Island view**

"Ultimately these things have to be resolved by Australian Parliaments elected by Australians, and not by foreign committees."¹¹⁹ The Attorney-General did the same: "This report will have no influence whatever on what the Government does on pretty well any of the issues in the report."¹²⁰

Australia requested that its rejection of the Committee's comments be included in the annual report of the Committee to the United Nations General Assembly. Australia's comments included being "very disappointed that the Committee's concluding observations ignored the progress Australia has made in addressing indigenous issues, gave undue weight to NGO submissions, and strayed from its legitimate mandate."¹²¹

Visit by Special Rapporteur on Racism (2001)

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr Maurice Glele-Ahanhanzo, reports annually to the United Nations Commission on Human Rights (CHR) - the primary advisory body on human rights in the United Nations system. Mr Maurice Glele-Ahanhanzo visited Australia in 2001 at the invitation of the Australian government, "to enable the Special Rapporteur to evaluate the impact... of legislation and governmental policy in the area of action to combat racism, racial discrimination and xenophobia." Particular emphasis was placed on the situation of Indigenous people, due to concerns brought to the Rapporteur's attention in relation to native title, mandatory sentencing and the stalled progress of reconciliation, as well as the findings of the CERD.

The report to the 58th session of CHR was released in late March 2002,¹²² and largely confirmed the unfinished business between Australia and the Committee:

"The increasingly frequent [Australian Government] reactions against reference to the misdeeds of colonization... are causing concern to many interlocutors, who wonder whether this attitude is not prejudicial to genuine reconciliation between Indigenous and non-Indigenous inhabitants."¹²³

"For the Aboriginals [sic], despite the democratic foundations of the Australian State and its desire to incorporate all its ethnic components on an egalitarian basis, (the) State is a manifestation of colonization whose consequences remain to this day."¹²⁴

¹¹⁸ Media release from Attorney-General, "CERD report unbalanced", 26 March 2000.

¹¹⁹ Prime Minister, Transcript of interview with Philip Clark, 2BL, 28 March 2000, p9.

¹²⁰ Attorney-General, Transcript of interview, 11am, 25 March 2000, Tangney Electoral Office, Perth, <http://www.law.gov.au> p5.

¹²¹ Annex X in Report of the Committee on the Elimination of Racial Discrimination, UN Doc: A/55/18. (Sessional/Annual Report of Committee), 17/10/2000.

¹²² The Addendum to the report details his mission to Australia undertaken from 22 April to 10 May 2001 (UN Doc: E/CN.4/2002/24/Add.1).

¹²³ Para 52.

Australian Government's response

Both the Minister for Foreign Affairs and the Minister for Immigration and Multicultural and Indigenous Affairs described the report as having no credibility, and suggested that the "poor quality of the report" again underlined "the need for reform to strengthen the effectiveness and credibility of the UN human rights mechanisms."¹²⁵

Australia has still not submitted its 13th periodic report, due on 30 October 2000, and which was requested by the CERD as an updated response to its 56th session findings of breaches.

Individual communications under Art. 14, the ICERD

To date, 4 communications alleging Australian violations of the ICERD have been decided by CERD:

- | | |
|---------------------------------------|--|
| 1. Z.U.B.S v Australia ¹²⁶ | Admissible: Decision in favour of Australia ¹²⁷ |
| 2. Barbaro v Australia ¹²⁸ | Inadmissible |
| 3. BMS v Australia ¹²⁹ | Admissible: Decision in favour of Australia ¹³⁰ |
| 4. Barbaro v Australia ¹³¹ | Inadmissible |

It should be noted that people in Australia, especially Indigenous people, have scarcely used this process. This is largely due to the lack of accessible information about human rights and freedoms expressed in the ICERD and the associated complaints mechanisms under Art.14. In addition, the fact that the recommendations of the CERD are not legally binding on Australia, nor legally enforceable by successful complainants, may contribute to the reluctance to devote resources to such a process.

¹²⁴ Para 133.

¹²⁵ Joint Media Release, Minister for Immigration and Multicultural and Indigenous Affairs and Minister for Foreign Affairs, "UN report has no credibility", 22 March 2002.

¹²⁶ Communication No.6/1995. CERD/C/55/D/6/1995.

¹²⁷ No violation found. However, pursuant to Art.14 para 7(b), CERD did recommend that Australia take certain actions to ensure that the problems, which were the subject of the communication, were rectified.

¹²⁸ Communication No.7/1995. CERD/C/51/D/7/1995.

¹²⁹ Communication No.8/1996. CERD/C/54/D/8/1996.

¹³⁰ See n 105.

¹³¹ Communication No.12/1998. CERD/C/57/D/12/1998. This was a new submission from Mr Barbaro concerning the same facts as his 1995 communication.

Racial discrimination complaints to HREOC: 1996-2001

The following tables show racial discrimination and racial hatred complaints to HREOC. They are included to demonstrate the under-utilisation of domestic laws and remedies for human rights violations:

| Year | No. Received* | ATSI** | NESB** |
|-----------|---------------|--------|--------|
| 2000-2001 | 149 | 60 | 154 |
| 1999-2000 | 224 | 63 | 164 |
| 1998-1999 | 702 | 508 | 143 |
| 1997-1998 | 274 | *** | *** |
| 1996-1997 | 403 | *** | *** |

* Excluding Racial Hatred complaints (on available statistics)

** These figures include Racial Hatred complaints

*** Problematic data for these years. Refer to source for further information.

Source: HREOC Annual Reports 1996-2001

Racial hatred complaints to HREOC: 1996-2001

| Year | No. Received |
|-----------|--------------|
| 2000-2001 | 118 |
| 1999-2000 | 75 |
| 1998-1999 | 82 |
| 1997-1998 | 94 |
| 1996-1997 | 186 |

Source: HREOC Annual Reports 1996-2001

CASE STUDIES

JAILED FOR STEALING CORDIAL –

INDIGENOUS AUSTRALIAN CITIZENS DENIED THE RIGHT TO JUSTICE, PROPORTIONATE AND REVIEWABLE SENTENCING

Mandatory sentencing has resulted in arbitrary sentencing practice, as demonstrated by the North Australian Aboriginal Legal Aid Service submission to the Senate Legal and Constitutional Committee [Inquiry into the Human Rights \(Mandatory Sentencing of Juvenile Offenders\) Bill 1999](#)¹³².

| <i>Facts</i> | <i>Result</i> |
|--|--|
| Man stole biscuits, cordial worth \$3.00 | 12 months imprisonment |
| Second man stole the same \$3.00 worth | 90 days imprisonment |
| Homeless Darwin man stole beach towel | 12 months imprisonment |
| 17 yr old stole \$4.00 petrol for sniffing | 90 days imprisonment |
| Man broke car aerial after an argument | 14 days imprisonment |
| 18yr old stole drink can at school, \$1.50 | 14 days imprisonment |
| 16yr old borrowed stolen bike to ride | Turned 17 served 28 days in adult's gaol |

THE YORTA YORTA NATIVE TITLE CLAIM –

DENIED LAND RIGHTS AND THE RIGHT TO CULTURE¹³³

In 1994 the Yorta Yorta people of northern Victoria and southern New South Wales lodged a native title claim over their traditional lands and waters, in order to exercise custodianship and confront environmental problems. The claim is only over public (Crown) areas, which include timber and mining leases, and agricultural and food-processing industries.

National Native Title Tribunal (NNTT) mediation failed, and a Federal Court trial began in 1996. The claim was opposed by 500 parties, including three State Governments. In 1998 Justice Olney ruled that native title had been extinguished because the "tide of history" had washed it away - as the claimants had failed to show continuing connection with the land and observation of traditional customs.

The Yorta Yorta appealed to the Federal Court in 1999, arguing that Justice Olney's test for native title determination was too stringent. He had also required claimants' way of life to be frozen in time; prioritised history written by a white squatter over extensive oral testimony by Yorta Yorta elders; and used evidence of Yorta Yorta oppression by colonialism against their claim of a continuing connection.

¹³² Senate Legal and Constitutional Committee. 1999. [Inquiry into the Human Rights \(Mandatory Sentencing of Juvenile Offenders\) Bill 1999](http://www.aph.gov.au/senate/committee/legcon_ctte/mandatory/Mandatory%20Chapter5.doc). http://www.aph.gov.au/senate/committee/legcon_ctte/mandatory/Mandatory%20Chapter5.doc [Accessed 10 August 2002]. Submission No. 25, North Australian Aboriginal Legal Aid Service, vol. 2, p. 262.

¹³³ With thanks to Wayne Atkinson, Yorta Yorta elder.

The majority denied the Appeal in February 2001, although Chief Justice Black supported a retrial. In May 2002, Yorta Yorta appealed to the High Court, and were opposed primarily by the Victorian State Government. The decision is reserved. So far it has taken the Yorta Yorta eight exhausting and expensive years.

Justice Olney's ruling is a violation of Indigenous human rights under the ICERD, articles 5(a) (right to equal treatment before organs administering justice - equality before the law), 5(d) (v) (right to own property), and 5(d) (vii) (right to freedom of thought, conscience and religion); and ICCPR, articles 26 (anti-discrimination) and 27 (enjoyment of culture by minorities, and practice of religion and use of language).

The case also suggests the fate of other native title claims in more "settled" areas of Australia. New claims will also have the major hurdle of the amended Native Title Act, which reduces even further the power of traditional owners to control and access their land.

RACE DISCRIMINATION IN FORCED EVICTIONS –

DENIED THE RIGHT TO HOUSING

Homeswest placed four Aboriginals in homes along a 200 metre street; two of those homes belong to two of my children. A woman living in the same street went to work and was instrumental in getting them evicted. Her only reason being Aboriginals should not be allowed to live among white people. Racism in Homeswest is thriving but don't forget despite the millions of dollars put into Homeswest through ATSIC for the purpose of housing the homeless...my two daughters with their eight kids, and another to arrive shortly, are still homeless.¹³⁴

In 1998 Indigenous people constituted approximately 18% of Homeswest tenants. Homeswest's Indigenous population disproportionately received one third of all eviction notices and accounted for more than half of those eventually evicted.¹³⁵

A 1991 report of the Centre for Aboriginal Economic Policy at the Australian National University indicated that at that time over half of the homeless families seeking housing were Aboriginal and the proportion of Aboriginal families in housing was almost seven times that of non-Aboriginal families.¹³⁶ The Australian Bureau of Statistics states that "given the larger size of indigenous households, it is probable that housing stress affects more Indigenous households than non-Indigenous households."¹³⁷ Evelyn Scott, former Chairperson of the Council for Aboriginal Reconciliation stated:

"The housing inequity suffered by Indigenous people is so clearly one of the key problems that must be solved before this nation can achieve true and lasting reconciliation."¹³⁸

¹³⁴ Testimony of Joan Martin to the First Australian Tribunal on Women's Human Rights, 1999. On file with authors.

¹³⁵ Hannah McGlade and Jeannine Purdy. 1998. "From theory to practice: Or what is a homeless Yamatji grandmother anyway? *Joan Martin v Homeswest*" *Australian Feminist Law Journal*, 11:140.

¹³⁶ *Ibid*, 151.

¹³⁷ Australian Bureau of Statistics. 1999. *Yearbook*. (ABS: Canberra), 109.

¹³⁸ Taken from a speech given by Evelyn Scott, Chairperson of the Council for Aboriginal Reconciliation at the National Indigenous Community Housing Conference, Brisbane, 25 November 1998.

Mrs Martin's case illustrates that housing policies are often designed without regard for racial or cultural differences among tenants or to discourage racially or culturally diverse practices amongst tenants.¹³⁹ The ABS cites that indigenous households are more likely to be multi-family households than any other: in 1996, 6.2% of Indigenous households and only 1.2% of all households nationally contained two or more families, while indigenous households were 45% of households with three or more families. Extended familial relations and sharing households is part of Aboriginal culture. Homeswest's policy of evicting tenants for "overcrowding" failed to consider Mrs Martin's cultural and maternal obligations to accommodate her children and grandchildren who were homeless (after having themselves been evicted by Homeswest!). As such, Homeswest policy has a discriminatory effect. The Committee on Economic, Social and Cultural Rights, United Nations, General Comment No 4 on the Right to Housing makes it clear that the enjoyment of the right to adequate housing must not be subject to any form of discrimination. The Committee also notes that under international law, in order for housing to be adequate it must be culturally suitable: the way housing is constructed, the building materials used, and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.

¹³⁹ As in the guidelines established in the Committee on Economic, Social and Cultural Rights, General Comment on Housing.

CHAPTER THREE - INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND THE FIRST OPTIONAL PROTOCOL (FOP)

What is the ICCPR?

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly 16 December 1966. The ICCPR details and clarifies many of the human rights and fundamental freedoms referred to in the UN Declaration of Human Rights (1948), including:

- the right to life
- a prohibition on torture and slavery
- the right to liberty and security of person
- humane treatment for those deprived of their liberty
- freedom of movement
- recognition of rights in respect of criminal law
- freedom from arbitrary interference with privacy
- the freedom of thought, conscience, religion and expression
- the right to peaceful assembly
- freedom of association
- protection of the family

It also prohibits discrimination in any of these areas, and protects equality before the law, and the rights of children and minorities.

The ICCPR requires that such rights not be violated (a negative obligation), and that positive measures be taken to ensure that rights and freedoms be protected and enjoyed by people in Australia. Moreover, the ICCPR requires that if the rights are violated, or freedoms impermissibly infringed, there be effective remedies to rectify the situation.

Monitoring of the ICCPR

States that are party to the ICCPR are reviewed and monitored by the Human Rights Committee (HRC) comprising eighteen experts, through 3 main mechanisms:

- periodic reporting – State parties are required to submit comprehensive reports every four years
- individual communications (if the State Party has also signed the First Optional Protocol to the ICCPR, an individual may lodge a complaint with the HRC if they consider that their rights have been violated, and they have been unable to gain a satisfactory outcome through domestic processes)
- State-to-State complaints.

Australia and the ICCPR

Domestic Implementation

On 18 December 1972, the Whitlam/ALP Government signed the ICCPR and in August 1980, the Fraser/Coalition Government ratified it, with several declarations and reservations. The ICCPR came into force for Australia in November 1980.

In 1984, under the Hawke/ALP Government, Australia withdrew several reservations and declarations. However, the following reservations remain in place in 2002:

- Art. 10 paragraphs 2(a), 2(b) and 3¹⁴⁰
- Art. 14 paragraph 6¹⁴¹
- Art. 20¹⁴²

On 10 December 1986, the Hawke/ALP Government scheduled the ICCPR to the *HREOC Act* 1986. This provided a remedy for violations of civil and political rights and freedoms; although the effectiveness, in substance, of such a "remedy" is highly questionable.

Some provisions of the ICCPR find expression both in the Australian Constitution and in legislative mechanisms. The Constitution sanctions the separation of powers, creating an independent judiciary (Art. 14); s 24 is understood to provide the vote (Art. 25), though the franchise was not extended to Indigenous people until 1967 and women in 1902; and s 116 guarantees freedom of religion (Art. 18).

Moreover, the High Court of Australia has found an implied freedom of expression (Art. 19) and equality before the law (Art. 14).¹⁴³ The ICCPR has been scheduled to the *HREOC Act* and elements are incorporated through the *Privacy Act (Cth)* 1988, the *Disability Discrimination Act (Cth)* 1992, the *Human Rights (Sexual Conduct) Act (Cth)* 1994 and the *Evidence Act (Cth)* 1995.

In 1991, the Hawke/ALP Government recognised the competence of the Human Rights Committee, under Art. 41 of the ICCPR, to receive individual communications under the First Optional Protocol (FOP). Three

¹⁴⁰ Art. 10, para 2(a) states: "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons".

Para 2(b) states: "Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication".

Para 3 states: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

¹⁴¹ Art. 14 para 6, states: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

¹⁴² Art. 20, para 1, states: "Any propaganda for war shall be prohibited by law." Para 2 states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

¹⁴³ This information has been drawn from work prepared by the Catholic Commission for Peace, Justice and Development, Melbourne.

months later, the FOP came into force in Australia (25/12/91) and the ALP Government came under the leadership of Paul Keating.¹⁴⁴

Australia's reports to the HRC

Australia has presented four reports to the Human Rights Committee (HRC). The 1st Periodic Report was due in 1981 and submitted during the term of Fraser/Coalition Government in that same year. The 2nd Periodic Report was due in 1986, during the term of the Hawke/ALP Government, and submitted in 1987 by that same Government after they won the federal election in 1986. The 3rd Periodic Report was due in 1991, during the term of the Hawke/ALP Government. Although the ALP remained in Government until 1996, and Australia's report on the ICCPR had been finalised before the federal election in March 1996, the report was not submitted to the HRC at that time. The 3rd Report was submitted in 1998, during the term of the Howard/Coalition Government, along with the 4th Report, and covers the period during the Keating/ALP Government: 1987 to December 1995.

The 4th Report was due in 1996 and was submitted in 1998, during the term of the Howard/Coalition Government. This report covered the period from 1 January to 31 December 1996 (ie following the federal election in 1996) and purported to present "significant policy developments" in Australia in that period. Australia's 5th Periodic Report is due 31 July 2005.

Third and fourth periodic report

Government-Committee dialogue

Following the submission of the 3rd and 4th Reports, the Human Rights Committee (HRC) released a List of Issues,¹⁴⁵ to be addressed by the Australian delegation in the HRC-State Party dialogue in July 2000. The major themes of the issues were:

- status of ICCPR rights and implementation of HRC Views (under the FOP) under Arts. 2 and 50 (3 issues)
- right to self-determination and rights of persons belonging to minorities under Arts. 1 and 27 (5 issues)
- discrimination and equality before the law; fair trial and rights of children under Arts. 3, 26, 14 and 24 (4 issues)
- right to life and prevention of torture and degrading treatment under Art. 6, 7 (3 issues)
- liberty and security of person
- treatment of prisoners and other detainees; freedom of movement and rights of aliens under Arts. 7, 9, 10, 12, 13 (4 issues) and
- freedom of religion and prohibition on discrimination under Arts. 18 and 26 (1 issue)
- dissemination of information about the ICCPR under Art. 2 (1 issue).

In July 2000, a senior delegation¹⁴⁶ from Australia attended the 1856th meeting of the HRC to discuss the 3rd and 4th Periodic Reports with particular reference to the issues raised by the HRC.

¹⁴⁴ Keating was the Treasurer in the Hawke/ALP Government until 20/12/91, when he became Prime Minister.

¹⁴⁵ List of Issues: Australia 25/4/00. CCPR/C/69/L/AUS

The following are some of the responses of the Australian delegation to these issues.¹⁴⁷

Status of ICCPR rights and implementation of views under the FOP - There is no single law in Australia that gives effect to the ICCPR. The states and territories administer significant elements of the legal system and therefore exercise responsibility for many areas relevant to the ICCPR.¹⁴⁸

Federal Government did not consider that Art. 50¹⁴⁹ - imposed an obligation on it to enact overriding legislation on all occasions where state and territory action was potentially in violation of the ICCPR.¹⁵⁰

Self-Determination and rights of minorities - Australia preferred the term 'self-management' to 'self-determination.' Australia "could not accept the inclusion [in the "Draft Declaration on the Rights of Indigenous Peoples"] of a specific right of indigenous self-determination, because that would have implications of separate nations and laws".¹⁵¹ The government also suggested that ATSIC is equivalent to a government department. We note that ATSIC is an Independent Commission, therefore not subject to the same Executive control as standard "government departments". Compare the Human Rights and Equal Opportunity Commission and the Australian Competition and Consumer Commission.

Removal of Indigenous children from their families - the federal Government considered that financial compensation was not the best way to deal with complex long-term cultural and social effects of the practice of separation.

Native Title Act amendments of 1998, had been subject to international scrutiny by the Committee on the Elimination of Racial Discrimination, among others. The international bodies had unfortunately failed to take note of the benefits accruing from the amendments.¹⁵²

Discrimination and equality before the law; fair trial; rights of children - The Federal Government was not aware of any official reports referring to race as a determining factor in the imprisonment and sentencing of juveniles: Australian laws applied to everyone regardless of race.¹⁵³

The states and territories were responsible for implementing criminal law and the Government recognised the competence of WA and NT governments to introduce mandatory sentencing as a means of addressing recidivism.¹⁵⁴ Such laws were intended for general application; it was likely that any disproportionate impact

¹⁴⁶ The delegation did not include a Minister of the Howard/Coalition Government, or any other elected representative of the Government, unlike the delegation to the Committee on the Elimination of Racial Discrimination, also in July 2000.

¹⁴⁷ Summary Record of the 1856th meeting: Australia 28/7/2000. CCPR/C/SR.1856

¹⁴⁸ For example, mandatory sentencing in WA; but more generally in areas of the criminal and juvenile justice systems, police, prisons and child welfare in all states and territories of Australia.

¹⁴⁹ Art. 50 states: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions".

¹⁵⁰ Ibid, para 18,. One would think that precisely because many ICCPR violations occur at the hands of state/territory instrumentalities (notably police and prisons) the case for direct Federal intervention would be strengthened, not diminished.

¹⁵¹ Ibid, para 19.

¹⁵² Ibid, para 35. Possibly because Indigenous people themselves did not believe there were any benefits accruing to them.

¹⁵³ Ibid, 44.

¹⁵⁴ Ibid, para 45.

on Indigenous juveniles reflected the over-representation of Indigenous people in the criminal justice system as a whole.¹⁵⁵

Juvenile mandatory sentencing had no effect on a person's right to have a conviction and sentence reviewed by a higher tribunal in accordance with Art. 14, para 5.¹⁵⁶ Mandatory sentencing laws did not discriminate against any group of people in ways that related to Arts. 24 and 26.¹⁵⁷

Right to life and prevention of torture and degrading treatment - Successive Australian Governments had considered that acts amounting to genocide would constitute offences under existing laws, for example the laws on murder or assault. It was therefore not true today that genocide was not prohibited under Australian law.¹⁵⁸

Liberty and security of person; treatment of prisoners and other detainees - The Federal Government interprets "lawfulness" of a person's detention under as Art. 9, para 4, as being its lawfulness under domestic law, not international human rights law.¹⁵⁹

In Australia's interpretation of Art. 9, the Federal Government was not required to inform [detained asylum seekers] of any legal procedures available to them.¹⁶⁰

Restrictions on contacts between people detained as illegal immigrants, and external organisations, were consistent with Art. 17 and 19. The measures were justified by the Government's sovereign right to control its borders, ensure the integrity of its migration programme and maintain order in detention centres.¹⁶¹

Concluding Comments

The HRC commented on the quality of Australia's reports and the extensive oral and written information provided to the HRC by Australia during its consideration of the Report. The HRC stated that it regretted the delayed submission of the 3rd Report, which was received 10 years after consideration of the 2nd periodic Report.

The HRC welcomed the following positive measures:

¹⁵⁵ Ibid, para 46. Laws that are generally applicable but which have a discriminatory impact on particular minority groups are, by definition, discriminatory. The Federal government does not appear to recognise the concept of indirect discrimination in Australian law.

¹⁵⁶ Ibid, para 47. The Senate Legal and Constitutional Committee (March, 2000) report of the "Inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1997*" found that mandatory sentencing did breach Art.14(5) of the ICCPR; Art.5(a) of the ICERD, in addition to several violations of the rights of children under the CROC. It left open the question of violations under CEDAW: see Ch 5 and 6 of Report. The Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission, in their Report of the *National Inquiry into Children and the Legal Process* (1997) also concluded that mandatory sentencing laws were in breach of the ICCPR and the CROC.

¹⁵⁷ Ibid. Art. 26 is similar in terms to Art. 5(a) of ICERD, found by the Senate Legal and Constitutional Committee to be breached by mandatory sentencing laws.

¹⁵⁸ Summary Record of 1858th meeting: Australia 27/7/2000. CCPR/C/SR.1858: p.2. Note that the Howard/Coalition Government advocates the opposite view in relation to specific laws against "terrorism". The Government claims that existing offences such as murder, conspiracy or assault are not sufficient in the case of terrorism.

¹⁵⁹ Ibid, para 3.

¹⁶⁰ Ibid.

¹⁶¹ Ibid, para 3, p3.

- Australia's accession to the 1st Optional Protocol to the ICCPR in 1991 and the action taken by the Keating/ALP Government to enact legislation giving effect to the views of the HRC expressed in the case of *Toonen v Australia*¹⁶²
- the introduction of anti-discrimination legislation in all states and territories and the inclusion of disability discrimination as a prohibited ground
- the establishment of the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner in 1993
- the general improvement in the status of women in Australia, and initiatives to ensure equal access to legal services, including in rural areas, and the strengthening of the *Sex Discrimination Act* (Cth) 1984

The HRC noted the following **concerns and recommendations**:

Indigenous self-determination - the HRC noted that the Howard/Coalition Government preferred to use the term 'self-management' or 'self-empowerment' rather than the term in used in the ICCPR 'self-determination'. The HRC expressed concern that insufficient action had been taken by Australia to ensure Indigenous peoples exercised meaningful control over their affairs, as required under Art. 1 of ICCPR.¹⁶³

Indigenous land rights and interests - the HRC, while noting positive judicial¹⁶⁴ and legislative¹⁶⁵ developments recognising Indigenous land rights, the HRC expressed concern that the native title amendments of 1998 "limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use and affects their interests in native title lands, particularly pastoral lands." It recommended that Australia take further steps to secure the rights of its Indigenous population under Art. 27 of the ICCPR, and do so with some urgency given the high level of exclusion and poverty of Indigenous people.

The HRC stated that under Art. 27,¹⁶⁶ Australia must secure the continuation and sustainability of traditional forms of economy of Indigenous minorities (hunting, fishing, gathering); and protect sites of religious or cultural significance to indigenous minorities – but that these had not always been major factors in the arrangements made for the determination of Indigenous land use.

The HRC recommended that Australia:

- give sufficient weight to the values expressed through Art 27 in finalising the legislation intended to replace the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984
- take the necessary steps to restore and protect the titles and interests of indigenous persons in their native lands, including the consideration of amending anew the *NTA*, taking into account these concerns

¹⁶² Communication No.488/1992

¹⁶³ Art. 1 states: "All peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

¹⁶⁴ *Mabo v Queensland* [No.2] 1992; *Wik Peoples v Commonwealth* 1996

¹⁶⁵ *Native Title Act* (Cth) 1993

¹⁶⁶ Art 27, ICCPR states: "In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Forced removal of Indigenous children - HRC expressed concern about the continuing effects of previous policy of removing Indigenous children from their families and recommended that Australia intensify its efforts to ensure that the victims and their families themselves consider that they have been afforded a proper remedy.¹⁶⁷

Australian Constitution and laws - the HRC stated that, in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the ICCPR, "there remain lacunae in the protection of Covenant rights" in the legal system. It noted that there are still areas in which the Australian legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated. This is a requirement under Art.2(2) and (3) of the ICCPR.¹⁶⁸ The HRC recommended that Australia take measures to give effect to ICCPR rights and freedoms and to ensure that there is an effective remedy for persons whose rights and freedoms have been violated.

Art. 50 - the HRC stressed that the legal and political arrangements occurring in the federal system cannot relieve Australia of its obligation to ensure that ICCPR rights and freedoms are respected, protected and enjoyed *in all parts of its territories without any limitations or exceptions*. The HRC also reminded Australia that such federal arrangements could not be relied upon to "condone [impermissible] restrictions on ICCPR rights".

Effect of human rights treaties in Australian law: *Teoh* Bill - HRC noted that in 1995, the High Court of Australia, decided that Australia's ratification of international human rights treaties created a legitimate expectation in the community that Government officials will use their discretion in a manner consistent with the treaty provisions.¹⁶⁹ The HRC stated that proposed legislation¹⁷⁰ to override High Court's decision "would be incompatible with [Australia's] obligations under Art. 2" and it urged the Howard/Coalition Government to withdraw it.

Access of asylum-seekers to courts - the HRC expressed concern regarding Australia's rejection of the HRC's interpretation of the ICCPR as reflected in its decision in *A v Australia*.¹⁷¹ The HRC reminded Australia that its position "undermines [Australia's] recognition of the Committee's competence under the 1st Optional Protocol to the ICCPR", to which Australia acceded on 25 December 1991, and recommended that Australia reconsider its interpretation with a view to implementing the HRC's interpretation.

¹⁶⁷ This recommendation draws on Art. 2, 17, 24, ICCPR.

¹⁶⁸ Art 2(2) states: "Where not already provided for by existing legislative or other measures, [Australia undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant."

Art 2(3) states that Australia is required:

" (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities [...] and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted."

¹⁶⁹ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273

¹⁷⁰ *Administrative Decisions (Effect of Instruments)* Bill 1999, was introduced by the Keating/ALP Government in 1995 immediately following the decision of the High Court. The bill lapsed in 1996 when the federal election was called. It was redrafted/reintroduced several times, the last being in 1999. It remains the responsibility of the Attorney-General, Daryl Williams.

¹⁷¹ Communication No. 560/1993, ICCPR. See below "Individual Communications" for discussion of this case.

Mandatory (arbitrary) detention of asylum seekers – the HRC stated that the policy and laws under which asylum seekers (among others) “raises questions of compliance with Art. 9(1)”¹⁷² and expressed particular concern about the Australian Government’s failure to inform detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees to inform them of this right.

It urged the Howard/Coalition Government to “reconsider its policy of mandatory detention [...] with a view to instituting alternative mechanisms of maintaining an orderly immigration process”; and recommended that the Government “inform detainees of their legal rights, including their legal right to seek legal Counsel.”

Mandatory sentencing laws: WA and NT - the HRC noted that the legislation in WA and the NT “raises serious issues of compliance with various Articles of the ICCPR and urged the Howard/Coalition Government to reassess the legislation in WA and the NT so as to ensure that all ICCPR rights are respected”

The HRC noted the inconsistency between such legislation (which leads to the “imposition of punishments that are disproportionate to the seriousness of the crimes committed”) and the efforts made to reduce the overrepresentation of indigenous persons in the criminal justice system.

Finally the HRC requested that its Concluding Comments and the next Periodic Report be widely disseminated among the public, including civil society and NGO’s in Australia.

Australian Government Response

The response of the government to the HRC was subsumed in the closed treaty review process.

First Optional Protocol

The First Optional Protocol (FOP) to the ICCPR came into effect, internationally, on 23 March 1976. The Hawke/ALP Government acceded to the FOP on 25 September 1991, and it came into force in Australia 3 months later on 25 December 1991. The FOP allows individuals in Australia to make written complaints, or communications, alleging human rights violations under the ICCPR, to the HRC. The HRC then decides whether a communication has satisfied certain formal criteria. These are called the “admissibility” criteria. If these criteria are not satisfied then the HRC cannot consider the merits of the complaint, nor make a decision about whether a person’s human rights have been violated. (See Appendix B for further information on admissibility criteria.)

¹⁷² Art. 9(1) states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

Individual communications

To date, 24 complaints alleging that Australia has violated human rights under ICCPR have been decided by the HRC. Of these, 6 communications were considered on their merits, that is, the HRC considered the substance of the allegations and made a decision. Of these 6, the HRC found that Australia had violated human rights in 4 cases. These cases were: *Toonen v Australia*¹⁷³, *A v Australia*¹⁷⁴, *Rogerson v Australia*¹⁷⁵ and *Winata & Li v Australia*.¹⁷⁶ Summaries of each case follow.

In the other two cases, the HRC found that Australia had not violated human rights as expressed in the ICCPR.¹⁷⁷

The HRC did not consider the merits of the allegations in 20 cases because it decided that the communications were inadmissible, that is, they did not satisfy certain formal criteria. (See Appendix C for a list of these cases.)

Toonen's Case

Sections 122 and 123 of Tasmania's Criminal Code criminalised all forms of sexual contact between consenting adult gay men in private. In 1993, Toonen complained that this was a violation Art. 2, Art. 17 and Art. 26 of the ICCPR. The HRC found that such laws were a violation of Toonen's right to be free from arbitrary interference with his privacy (Art.17) and recommended that Australia remedy the violation by taking action to repeal the offending criminal provisions.¹⁷⁸ Because the HRC found a violation of Art. 17 it did not proceed to consider whether the provisions also violated Art. 2 and Art. 26. However, in obiter remarks in the course of the decision, it is suggested that the laws may also have violated Toonen's right to be free from discrimination (Art. 26).¹⁷⁹ This was not the case in respect of Art. 2.

A's Case

A was a Cambodian asylum seeker who, upon arrival by boat in Australia in 1989, was mandatorily detained as a result of legislation introduced by the Hawke/ALP Government.¹⁸⁰ A was kept in various detention facilities (NSW, NT & WA) for a period of over 4 years. Following repeated attempts by the Executive to override, undermine and frustrate judicial review rights and processes available under the law, the Keating/ALP Government introduced legislation preventing Courts from releasing detained persons and

¹⁷³ Communication No. 488/1992: Australia 4/4/94. CCPR/C/50/D/488/1992

¹⁷⁴ Communication No. 560/1993: Australia 30/4/97. CCPR/C/59/D/560/1993. This case is considered in more detail below.

¹⁷⁵ Communication No. 802/1998 Australia 3/4/2002. CCPR/C/74/D/802/1998.

¹⁷⁶ Communication No. 930/2000 Australia 16/8/2001. CCPR/C/72/D/930/2000.

¹⁷⁷ *ARJ v Australia*, Communication No. 692/1996: Australia 8/11/97. CCPR/C/60/D.692/1996 and *GT(on behalf of T) v Australia* Communication No.706/1996: Australia 4/12/97. CCPR/C/61/D/706/1996. .

¹⁷⁸ *Human Rights (Sexual Conduct) Act* 1994 was introduced by the Keating/ALP Government to override Tasmania's criminal laws.

¹⁷⁹ Note the individual opinion of Mr Wennergren who decided that the laws did breach Art.26, but not Art.2.

¹⁸⁰ Nick Bolkus was the Minister for Immigration under the Hawke/ALP Government and responsible for the introduction of the legislation and immigration detention policies designed to 'stem the flood of boat people' in the late 1980's/early 1990's. Such policies continued to be pursued by Gerry Hand, Minister for Immigration under the Keating/ALP Government. The baton was handed to Phillip Ruddock, and the Howard/Coalition Government, in 1996.

limiting compensation for unlawful detention to \$1/day.¹⁸¹ In 1993, A complained to the HRC that the Australian Government had violated his rights under Art. 9 paras 1, 4 and 5 and Art. 14 paras 1 and 3 and Art. 2 of the ICCPR. The HRC found that A had been arbitrarily detained in violation of his rights under Art. 9, para1; that the Government's proscription against the judicial review of A's detention and of ordering any release from detention, constituted a violation of his rights under Art. 9 para 4, and that A's right to an effective and enforceable remedy under Art. 2 para 3 was also violated. Because of these findings the HRC did not proceed to consider whether Art. 14 had been breached. It recommended that Australia provide compensation to A and that it report back to the HRC on steps taken within 90 days. To date, Australia has not complied with either recommendation.

Winata's Case

Winata, and his partner, Li, were Indonesian nationals who had lived in Australia for around 14 years following the expiry of their visas. They had a son, Barry, who was born in Australia in 1988. Barry was an Australian citizen. Winata and Li applied for several visas to remain in Australia, but these were refused and they were to be deported. As a last resort they appealed to the Minister for Immigration, Phillip Ruddock, to exercise his discretion to permit them to stay on compassionate grounds. In their communication to the HRC, Winata and Li alleged that Australia would violate their ICCPR rights and freedoms under paragraphs 1 of Art. 17 (interference with privacy), 23 (protection of the family) and 24 (protection of a minor) if they were deported. The HRC found¹⁸² that if Australia were to proceed with deportation, it would violate their rights to be free from arbitrary interference with their privacy and with their family life. The HRC also found that Australia would violate Barry's right to be provided with protection as a minor under Art.24. The HRC recommended that Australia refrain from removing Winata and Li before their application for a parent visa was considered in light of Barry's status as a minor. The HRC requested Australia to provide information as to its compliance with the HRC's recommendation within 90 days.

Rogerson's Case

Rogerson was a solicitor and barrister of the Supreme Court of the Northern Territory. Following a dispute with a corporate client, he was found guilty of contempt of court, fined and lost his practicing certificate. In his communication about the Supreme Court and Court of Appeal proceedings, in particular about rulings on evidence and procedure, he alleged that his human rights under Art. 2, 14, 15, 17 and 26 had been violated. Of these, the HRC found violations of Art. 14, paragraph 3 (c)¹⁸³ because of a 2 year delay between the time the Court of Appeal drafted its decision in the case and the time of delivering that decision. No other violation was found. The HRC decided that its finding, in itself, was sufficient remedy and did not recommend any particular action be taken by Australia (except the usual request to report back to the HRC within 90 days on the measures taken to give effect to its views).

¹⁸¹ *Migration Amendment Act 1992*, Division 4B, s.54R and s54RA respectively.

¹⁸² Note that this was not a unanimous finding. Four members of the HRC disagreed with the majority's finding that Australia violated the ICCPR. The minority dissenting opinion is included in the published decision.

¹⁸³ Art. 14 para 3 (c) states: "In the determination of any criminal charge against him [sic], everyone shall be entitled to the following minimum guarantees, in full equality: ... (c) To be tried without undue delay".

Complaints to HREOC alleging ICCPR Violations: 1996-2001

This table is included to show how under-utilised the current domestic mechanisms are for complaints alleging human rights violations under the ICCPR, by federal and state governments in Australia. It is submitted that the main reason for the under-utilisation of this complaints mechanism lies in its ineffectiveness as a remedy for human rights violations.

The vast majority of the complaints made to HREOC concern treatment of prisoners and immigration.

| Year | No. of HREOCA* complaints alleging ICCPR violations | % of HREOCA* complaints alleging ICCPR violations |
|-----------|---|---|
| 2000-2001 | 81 | 34% |
| 1999-2000 | 97 | 39% |
| 1998-1999 | 90 | 29% |
| 1997-1998 | 42 | Not available |
| 1996-1997 | 134 | Not available |

* *Human Rights and Equal Opportunity Commission Act (Cth) 1986*

Source: HREOC Annual Reports 1996-2001

CASE STUDY

WORLD ECONOMIC FORUM PROTESTS, MELBOURNE, 11-13 SEPTEMBER 2000 – DENIAL OF RIGHTS TO PEACEFUL ASSEMBLY, POLITICAL EXPRESSION & FREEDOM OF ASSOCIATION

Over 3 days between 11 and 13 September 2000, protestors from around Australia, and some from overseas, converged to blockade the perimeter of the Crown Casino, the site at which the World Economic Forum¹⁸⁴ was to meet.

The protesters were partially successful, causing much delay and disruption on the first day, Monday 11 September, by preventing WEF delegates from entering the building, using (for the most part) peaceful and non-violent techniques. The WEF delegates, however, annoyed at the inconvenience, levelled harsh criticism at the Bracks/ALP government for not doing enough to disperse and deal with the protesters.

Very early on a bitterly cold Tuesday morning, the mood at the Crown Casino changed dramatically. A woman, a mother representing her young family at the protest, was hosed at full pressure with a fire hose, by police, at around 2am while she was walking home quietly and peacefully.

At about 7.10am hundreds of police in full riot gear, without warning, jumped the barricade and with batons raised above their heads, trampled a large group of protesters (who were sitting peacefully on the road) with their boots and hit them indiscriminately with their batons. Many people were bashed in the head, face, arms, legs and back. They were also verbally abused, harassed and threatened in the course of the charge. Many people could not flee the scene because they were either pinned to the ground, or were surrounded by police.

Almost all police officers had removed their identification badges, following a direction by senior police. This prevented protesters from being able to identify individual police, as was required in order for a complaint to the Ombudsman to be substantiated.

On Wednesday 13 September, a police car driven at speed into a crowd of protesters knocked over a young woman. Her leg was pinned under the car tyre. Protesters tried, unsuccessfully, to move the car to free the woman, before the police revved the engine and sped off.

Over 50 people were hospitalized during the 3 days of protests, and over 100 people were injured by batons and boots and/or traumatised by the level of police violence and aggression.

The Minister of Police, Andre Haermeyer, said in response:

"I want to highlight the professionalism and dedication of Victorian Police who have performed their duty to the very highest standards the community has come to expect of these dedicated men and women".¹⁸⁵

The next day the Minister gave the WEF police an additional day off.¹⁸⁶

The Ombudsman subsequently vindicated police actions.

¹⁸⁴ The World Economic Forum (WEF) is a private organisation comprising elite business and government leaders who meet to discuss trade, finance and economic interests and policies.

¹⁸⁵ "Police do Victoria proud at WEF", Tuesday September 12, http://www.dpc.vic.gov.au/domino/web_notes/newmedia.nsf/173e11affff3ad3a4a2568850083acda/df947174b753f4034a256959000a52ad?OpenDocument [accessed: 28/8/02]

¹⁸⁶ "Police given World Economic Forum Days Leave " Wednesday, September 13, 2000 http://www.dpc.vic.gov.au/domino/web_notes/newmedia.nsf/173e11affff3ad3a4a2568850083acda/ed53c0f8471959e54a256959007999e8?OpenDocument

CHAPTER FOUR - INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

What is the ICESCR?

The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸⁷ outlines a series of economic, social and cultural rights, including the:

- right to work and to just and favourable conditions of work, and to form trade unions
- right to social security
- protection of the family
- right to an adequate standard of living, including food, housing and clothing
- right to health
- right to education (including compulsory primary education)
- rights to culture and science.

To aid the implementation of economic, social and cultural rights (ESCR), the CESCR adopted General Comment 3, which addressed the issues of progressive realisation and the availability of resources, as well as developing the concept of a 'minimum core obligation' "to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights", asserting that:

*... a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. ... If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être.*¹⁸⁸

The General Comment further notes that where the minimum core standards are not realised, resource constraints should be considered within the context of the State Party having allocated "all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."¹⁸⁹ Moreover, the CESCR noted that a lack of resources does not remove the obligation to strive for implementation of ESCR or to monitor the actual extent of implementation.¹⁹⁰ A meeting of civil society experts in 1997 codified this interpretation, when a document entitled the Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) was developed. The Maastricht Guidelines also discuss the concept of a margin of discretion, the argument that "as in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations."¹⁹¹ Through domestic adjudication of ESCR, and through the adoption of Concluding Observations and General Comments, the CESCR and domestic jurisdictions have developed a clearer understanding of the ways in which the

¹⁸⁷ United Nations. 1966. *International Covenant on Economic, Social and Cultural Rights*. General Assembly resolution 2200A (XXI), adopted 16 December 1966. Art. 6.

¹⁸⁸ United Nations. Committee on Economic, Social and Cultural Rights. 1990. *General Comment Three*.

¹⁸⁹ Ibid, para. 10.

¹⁹⁰ Ibid, para. 11.

¹⁹¹ Maastricht Guidelines, para. 8.

minimum core standards are realised in different contexts, while simultaneously asserting the universality of ESCR.

Monitoring of ICESCR

States who are parties to ICESCR are reviewed and monitored by the Committee on Economic, Social and Cultural Rights (CESCR) which comprises eighteen experts. One main mechanism is used:

- Periodic reporting – State parties are required to submit comprehensive reports every five years.¹⁹²

Australia and the ICESCR

Domestic implementation

The Whitlam Government signed ICESCR in 1972 and the Fraser Government ratified it in 1975. Australia has no reservations.

Whereas other human rights treaties have had elements incorporated into domestic legislation, or have been scheduled to the *HREOC Act*, the ICESCR has neither been scheduled to, nor incorporated into, any legislation. There are policies and programs at state and federal levels (some of which have a legislative basis) that implement the rights contained in the ICESCR. However, the issue remains that these programs can be abolished, with people living in Australia having no capacity to claim legal redress for the failure to protect those rights.

Australia's reports to the CESCR

Australia has presented three rounds of reports to the Committee on Economic, Social and Cultural Rights (CESCR). The first round of reporting involved three sections, due in 1977, 1979 and 1981 respectively, and each section was one year late. The second round of reporting commenced in 1983. The first section of the report was late, and was submitted with the second section, close to on time in 1985. The third section was due in 1987 and was submitted in 1992. The reports were considered in 1993. The third round of reporting was due in 1994 and was submitted in 1998. The report was considered in 2000. The Fourth Periodic Report is due in 2005.

The second periodic report

The second Periodic Report covered the period 1983 – 1987, though the final section of the report was not submitted until 1992.¹⁹³ The reports were considered the following year.

¹⁹² ICESCR, Art. 16.

¹⁹³ UN. Committee on Economic, Social and Cultural Rights. 1994. *Summary record: Second Periodic Report to the Committee on Economic, Social and Cultural Rights*. 13th meeting. E / 1994 / 104 / Add.22

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3e2a870b6a3f701d802565d300590cac?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3e2a870b6a3f701d802565d300590cac?Opendocument). [Accessed 27 August 2002].

Government-Committee dialogue

Three representatives of the Australian Government attended the Dialogue Session. Issues raised in the Dialogue Session included:

- education, particularly with respect to Indigenous students, people with disabilities, girls, people living in rural, regional and remote Australia, people with lower income levels (particularly in the context of “voluntary” fees), elderly people, and people from culturally and linguistically diverse backgrounds. The application of the anti-discrimination framework to education was discussed, with attention given to the exemptions for religious educational institutions¹⁹⁴
- religious freedom¹⁹⁵
- concepts of multiculturalism¹⁹⁶
- censorship¹⁹⁷
- legal redress for violations of the right to education¹⁹⁸
- levels of community interest in the report, and the report’s accessibility (to which the government representatives responded that it had mostly been academic interest)¹⁹⁹
- the cultural rights of Indigenous peoples. Some questions focused on Indigenous religion, and the Government representatives responded that “if such vestiges still existed, they were hard to find, although it was possible that Aboriginal religions had still been practised at the turn of the century. They had probably died out with the Aboriginal languages. The matter was never raised by Aboriginals themselves.”²⁰⁰
- discrimination against Indigenous peoples. Discussing the question, one Government representative noted that “in his experience it was possible to go for a month in Victoria without consciously seeing an Aboriginal. The question of discrimination therefore did not arise.”²⁰¹

Concluding Comments

The Concluding Comments acknowledged the following positive measures:

- the establishment of a national machinery to monitor compliance with the right to education, and the adoption of initiatives to address discrimination in education²⁰²
- programs to promote multiculturalism in Australia²⁰³

¹⁹⁴ Ibid, paras 6-32.

¹⁹⁵ UN. Committee on Economic, Social and Cultural Rights. 1994. *Summary record: Second Periodic Report to the Committee on Economic, Social and Cultural Rights*. 15th meeting. E/C.12/1993/SR.15 [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cd83719270df07ef802565d3005a8129?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cd83719270df07ef802565d3005a8129?Opendocument). [Accessed 27 August 2002],

para 9.

¹⁹⁶ Ibid, paras 12- 15.

¹⁹⁷ 15th Session Report, para 56.

¹⁹⁸ 13th Session Report, para 43.

¹⁹⁹ Ibid, para 50.

²⁰⁰ 15th Session Report, para 35.

²⁰¹ Ibid, para 42.

²⁰² UN. Committee on Economic, Social and Cultural Rights. 1993. *Concluding Observations of the Committee on Economic, Social and Cultural Rights : Australia*. E/C.12/1993/9.

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/862bc62422ed5bb7c12563e8005a3b00Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/862bc62422ed5bb7c12563e8005a3b00Opendocument). [Accessed 27 August 2002], para 4.

²⁰³ Ibid, para 5.

Nonetheless, the Committee also raised issues which they considered to impede implementation of the Covenant, including:

- discrepancies between states in education programs²⁰⁴
- disadvantage experienced by certain groups with regards participation in education, particularly Indigenous Australians and people with disabilities²⁰⁵
- socio-economic factors and geographic isolation as affecting the implementation of ICESCR rights for Indigenous Australians, and the lack of opportunities for Indigenous Australians to create awareness about their culture²⁰⁶
- the ramifications of government funding of private schools for the quality of education in government schools.²⁰⁷

The third periodic report

Government report

The Third Periodic Report covered the period 1990 to 1997.²⁰⁸ The report was prepared by the Department of the Attorney-General, who consulted with other Commonwealth departments, state and territory governments, and NGOs. The Government report addressed a variety of issues, including:

- structures to address non-discrimination²⁰⁹
- vocational educational training opportunities²¹⁰
- employment programs directed at people with disabilities²¹¹
- industrial relations reform, including the contribution of enterprise bargaining and workplace agreements to achieving favourable conditions of work²¹²
- the right to social security, including superannuation provisions, employment creation reforms, family support schemes²¹³
- the right to housing, specifically programs for low-income earners, Indigenous Australians
- public health strategies, including mental health, women's health, older Australians' health, health of those in rural areas, and health of Australians with a disability²¹⁴
- broad programs for the right to health at primary and tertiary levels, and among disadvantaged sectors²¹⁵

The report did not specifically address self-determination, referring CESCR members to the ICCPR report.²¹⁶

²⁰⁴ Ibid, para 6.

²⁰⁵ Ibid, paras 6 – 9.

²⁰⁶ Ibid, para 11.

²⁰⁷ Ibid, para 10.

²⁰⁸ Australia. 1997. *Australia's Third Periodic Report to the Committee on Economic, Social and Cultural Rights*. E/1994/104/Add.22. [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.1994.104.Add.22.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.1994.104.Add.22.En?OpenDocument). [Accessed 28 August 2002].

²⁰⁹ Ibid, paras 7-29.

²¹⁰ Ibid, paras 264-321.

²¹¹ Ibid, paras 40-43.

²¹² Ibid, paras 56-106.

²¹³ Ibid, paras 126-166.

²¹⁴ Ibid, paras 228-263. Though nothing on Indigenous health.

²¹⁵ Ibid paras 228-263.

²¹⁶ As such, there was no formal response to the right to self-determination in the context of rights protected in the ICSECR.

Government-Committee dialogue

The CESCR raised a number of issues prior to the government dialogue session, including:²¹⁷

- concerns that the Government Report did not address previous recommendations of the CESCR
- lack of information on the right to self-determination for Indigenous Australians in the context of ICESCR rights²¹⁸
- legal entrenchment of ICESCR rights²¹⁹
- discrimination against Indigenous Australians with respect to employment, housing, health and education²²⁰
- the rights of asylum seekers in detention, particularly with respect to access to adequate living conditions, including food and housing, health care, education and cultural life²²¹
- concerns at unemployment rates²²²
- impact of employment program reforms on the long-term unemployed, recent migrants, persons with disabilities, women and youth²²³
- concerns at the experiences of outworkers²²⁴
- concerns that industrial relations reforms had discouraged collective bargaining and restricted the right to strike²²⁵
- concerns around domestic violence²²⁶
- concerns at reports of forced evictions in the context of preparations for the Sydney Olympics²²⁷
- concerns in relation to hunger, malnutrition and lack of access to adequate food for Indigenous peoples, homeless persons, single-parent families, children, unemployed persons, low-income earners, older persons, persons with disabilities, rural people, refugees and asylum-seekers²²⁸
- the impact on funding cuts to health programs, and the continuing concerns about the health of Indigenous Australians²²⁹
- NGO concerns that funding of public education was decreasing²³⁰
- discrepancies in funding for non-Indigenous rural Australians and Indigenous rural Australians with respect to cultural activities.²³¹

There are no Summary Records available on the UNHCHR website for the 2000 CESCR reporting process.

²¹⁷ UN. Committee on Economic Social and Cultural Rights. 2000 *List of Issues: Australia 23.5.2000* E/C.12/Q?AUSTRAL/1. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)c75dd93a50c8f2b8802569060051d9a1?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)c75dd93a50c8f2b8802569060051d9a1?Opendocument). [Accessed 28 August 2002].

²¹⁸ Ibid, paras 3-4

²¹⁹ Ibid, para 7

²²⁰ Ibid, para 8

²²¹ Ibid, para 10

²²² Ibid, para 13

²²³ Ibid, para 12

²²⁴ Ibid, para 14

²²⁵ Ibid, para 15

²²⁶ Ibid, paras 18-22

²²⁷ Ibid, paras 26-27

²²⁸ Ibid, para 28

²²⁹ Ibid, para 29

²³⁰ Ibid, paras 31-34

²³¹ Ibid, para 36

NGO Reports

The Australian Social and Economic Rights Project (ASERP) was established by NGOs to produce a Parallel Report. It was the first time such a coalition had been drawn together, and included over fifty organisations from around the country. Working Groups were established in each state, with a national working group coordinating the process. The Parallel Report noted that “most of the organisations work with low-income and other disadvantaged people”²³² and that using the international legal processes was a relatively new strategy for many of those involved. ASERP had advocates present at the Committee on Economic, Social and Cultural Rights (CESCR) meeting, and lobbied individual members on specific concerns.

The ASERP report identified a series of “major human rights violations and public policy issues in Australia”²³³. These included:

- “the well-documented, systematic discrimination suffered on an ongoing basis by Australia’s Indigenous peoples with respect to every right in the Covenant”²³⁴, including:
- “the policy shift from self-determination to “self-empowerment” and “self-management”²³⁵
- reduced funding of ATSIC and HREOC²³⁶
- failure to sufficiently and adequately implement the recommendations of both the Royal Commission into Black Deaths in Custody and *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*
- the 1998 amendments to the *Native Title Act* 1993 which have impaired, and in some cases extinguished native title
- the introduction of mandatory sentencing laws in the NT and WA²³⁷
- the ongoing impact on the Indigenous communities of the removal of Indigenous children, and the failure to “use the internationally acclaimed van Boven Principles to guide compensation for atrocities endorsed by Government policies between 1885 and 1969 and found to be a gross violation of human rights and in contravention of the Convention on Genocide”²³⁸
- “extreme disadvantage in employment, housing, health and education” and the fact that Indigenous Australians “continue to suffer from the impact of historically discriminatory practices and policies”²³⁹
- the lack of effective legal remedies for violations of the ICESCR²⁴⁰
- concerns that industrial relations system changes had undermined the maintenance of minimum adequate conditions of work and remuneration, and the collective bargaining rights of workers²⁴¹
- the increased levels of homelessness in an environment of decreased public housing funding.²⁴²

²³² ASERP. 2000. Community Perspectives : Australia's Compliance with the UN Covenant on Economic, Social and Cultural Rights. ASPERP: Melbourne

²³³ Ibid, 8

²³⁴ Ibid.

²³⁵ Ibid, 10

²³⁶ Ibid, 14

²³⁷ Ibid, 15

²³⁸ Ibid, 16

²³⁹ Ibid, 22

²⁴⁰ Ibid, 19

²⁴¹ Ibid, 27-29

²⁴² Ibid, 39-42

- the persistence of poverty in Australia, and the inadequacy of social security payments, the inadequacy of the "Work for the Dole" program, the discriminatory effect of the penalty regime for "social security breaches"²⁴³
- the detrimental impact of the two-year waiting period for newly arrived migrants.²⁴⁴

In addition, the Women's Rights Action Network Australia prepared a report focusing on the implementation of the ICESCR as it related to women living in Australia. The Shadow Report noted:

- limitations with respect to discrimination against women in employment and the dismantling of legislative and programmatic measures to ensure the elimination of such discrimination
- the detrimental impact on women's right to access employment of the failure to provide maternity leave, the casualisation of the workforce, changes to the industrial relations system, and reduced child care services
- concerns about the situation of women outworkers
- that the Howard/Coalition Government reforms to the family assistance programs diminish women's financial independence and are thus inconsistent with the promotion of equality between women and men
- concerns that the privatisation of services could result in discrimination in the fields of health
- levels of violence against women
- concerns that it is difficult to monitor the realisation of Covenant rights when the provision of services which secure them are subject to commercial in-confidence clauses.²⁴⁵

Concluding Comments

The CESCR's Concluding Comments covered positive aspects, as well as areas of concern and recommendations for change.²⁴⁶

The Concluding Comments acknowledged the following positive areas:

- "[I]n general, the majority of Australians have a high standard of living"²⁴⁷
- the Howard/Coalition Government had allocated funding to Indigenous programs²⁴⁸
- various programs had been established to address domestic violence.²⁴⁹

Nonetheless, the Committee also raised issues which they considered to impede implementation of the Covenant, including:

- the lack of incorporation into domestic legislation and lack of remedies to breaches²⁵⁰

²⁴³ Ibid, 33.

²⁴⁴ Ibid, 31.

²⁴⁵ WRANA. 2000. [*Retreating from the Full Realization of the Economic, Social and Cultural Rights in Australia: A Gendered Analysis*](#). On file with authors.

²⁴⁶ UN. Committee on Economic, Social and Cultural Rights. 2000. *Concluding Observations of the Committee on Economic, Social and Cultural Rights : Australia*. E/C. 12.1.Add. 50.

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/693c56f3d2694130c12569580039a1a2?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/693c56f3d2694130c12569580039a1a2?Opendocument). [Accessed 28 August 2002].

²⁴⁷ Ibid, para 4.

²⁴⁸ Ibid, para 9.

²⁴⁹ Ibid, para 12.

²⁵⁰ Ibid, para 13.

- deep concern that “Indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education”²⁵¹
- the detrimental impact of the *Native Title Act 1993* on the process of reconciliation²⁵²
- the negative impacts of the *Workplace Relations Act 1996* on collective bargaining and terms of employment²⁵³
- the situation of outworkers in Australia²⁵⁴
- the failure to provide maternity leave²⁵⁵
- concerns that the two-year waiting period for social security assistance by new immigrants could detrimentally affect the right to an adequate standard of living²⁵⁶
- the difficulty of measuring the extent of poverty without an official poverty line²⁵⁷
- difficulties in realising the rights to housing and health within current legislative and funding frameworks.²⁵⁸

Australian Government's response

The Howard/Coalition Government announced it would downgrade its participation in the UN HRTS two days before the CESCR Concluding Observations were released. The Government has never formally acknowledged the Concluding Observations to the Third Periodic Report, and the comments are not acknowledged in any of the government websites which relate to the reporting process, despite the request of the CESCR that the Howard/Coalition Government should ensure the wide dissemination of the Concluding Observations.

Implementation of the ICESCR since 2000

Indigenous rights to self-determination

The failure to secure Indigenous self-determination, highlighted in the ASERP report, has continued. The Aboriginal and Torres Strait Islander Social Justice Commissioner noted in his 2001 report that there “has been insufficient attention by governments to processes which ensure greater Indigenous participation and control over service design and delivery as part of an overall strategy to redress Indigenous disadvantage and economic marginalisation.”²⁵⁹ ATSIC argue that the effect of this can be seen in the restriction of the debate to the:

²⁵¹ Ibid, para 15.

²⁵² Ibid, para 16.

²⁵³ Ibid, para 17.

²⁵⁴ Ibid, para 18.

²⁵⁵ Ibid, para 19.

²⁵⁶ Ibid, para 32.

²⁵⁷ Ibid, para 33.

²⁵⁸ Ibid, para 21 and 22.

²⁵⁹ HREOC. 2001. Aboriginal and Torres Strait Islander Social Justice Commissioner Social Justice Report. http://www.hreoc.gov.au/social_justice/sjreport_01/chapter3.html. Accessed 29 July 2002.

directed community services model". This model aims to provide services to Indigenous people as a category of disadvantaged Australians. Most funding is at the discretion, as well as the direction, of Commonwealth, State and Territory government agencies.²⁶⁰

As a result of this, ATSIC argues that:

Few Indigenous people can exercise any substantive jurisdictional responsibilities over matters of the most direct concern to them. They are almost totally dependent on government funding arrangements designed to deliver programs and services based on non-Indigenous models of governance. Commonwealth, state and local governments do not share any of their substantial jurisdictional responsibilities, few are prepared even to consider negotiations with Indigenous peoples.²⁶¹

Domestic incorporation of the ICESCR

Despite recommendations that the ICESCR be implemented in to domestic legislation, or that it be scheduled to the *HREOC Act*, the Howard/Coalition Government has made no such move. As such, there is no legislative basis for economic, social and cultural rights in Australia. People living in Australia may have access to programs that support economic, social and cultural rights, but there is no constitutional or legislative provision which establishes the rights to economic, social and cultural rights in Australia. As such, economic, social and cultural rights continue to be legally unenforceable in Australia: people living in Australia have no legal right to housing, social security, health or education. People have access to those rights because there are policies in place to support them, but if the government were to abolish the programs, they would not be able to use the legal system to argue that they had a right to social security, housing, education or health.

Industrial relations

In 2000 the "third wave" of changes to industrial relations were introduced. The provisions aimed to outlaw "pattern bargaining" – the process of industry wide bargaining. While the legislation was eventually blocked, the Government has again sought to outlaw it in 2002, with the introduction of new legislation on the issue. Pattern bargaining is a legitimate form of collective bargaining. The Government's attempts to outlaw it follow in the path of previous industrial relations changes. In addition, the Government has continued to introduce legislation that has the purpose of exempting more companies from unfair dismissal laws; however, the Senate continues to block such legislation, which would constitute a breach of legal rights for employees.

Social security

The financial security of individuals on the disability support pension has been jeopardised. Budget measures were introduced which proposed a reduction in the number of hours individuals on the pension could work, forcing those who worked for more than 15 hours onto NewStart. This would not only require them to comply with the more stringent compliance requirements, but would also introduce a new level of

²⁶⁰ Ibid, iv.

²⁶¹ Ibid, 22.

income testing. People living with disabilities in Australia are already at a financial disadvantage because of the additional costs associated with the health, transport and training costs associated with their disabilities.

The practice of breaching social security recipients has continued, with deleterious effects for individuals and families. The Brotherhood of St Laurence recently campaigned against the proposal that single parents be forced into compulsory job seeking activities, arguing that the multiple responsibilities of single parents could result in a greater likelihood of single parents being “breached”. Moreover, they noted that the financial impact of having payments cut for eight weeks (currently the penalty for a third breach) would have more serious consequences for single parent families.

Social and economic rights for individuals on Temporary Protection Visas

In 1999, the Australian Government introduced a new category of visas, the temporary protection visa. The visas remove family reunion rights, travel rights, access to settlement services and the mainstream welfare system, access to the 510 hours free English Language classes offered by the Adult Multicultural Education program (AMEP), federally funded government tertiary education in public universities, or government employment training programs. In the period since the ASERP report, research and anecdotal evidence has demonstrated that individuals on TPVs have experienced discrimination in accessing employment, healthcare, housing, and education. For example, in a study conducted by Deakin University and the Victorian Arabic Social Services, nine of the fifteen participants in their study were still living in short-term accommodation between six and 12 months after their release, and none of them had received English language training, which had significantly jeopardised their access to the labour market.²⁶²

Right to health and challenges to universal health coverage

Medicare is commonly described as a universal health insurance scheme. However, the reality is different. Medicare is not available to parents of Australian citizens who hold a “parent visa”. Medicare is only available to refugees on Temporary Protection Visas once they have lodged a (permanent) Protection Visa application, which can not be processed until the TPV has been held for 30 months. An additional group of Australian citizens who do not have access to the universal health coverage scheme are prisoners. As a result, the level of medical care in prisons is below standard (for example, dental care is severely diminished), and elective surgery, accessible to others in the Australian community, is unavailable. Women prisoners face additional discrimination, for example, women prisoners who give birth may be handcuffed during delivery.

In addition, the universality of Medicare has been reduced by recent Howard/Coalition Government funding of health services. In the report to the CESCRR they noted that “health care financing and service provision are a mixture of public and private sector activity, with responsibility shared by both Commonwealth and State and Territory Governments...we have yet to achieve the optimum balance of public and private funding...”²⁶³ The failure to provide adequate funding, the diversion of public health monies into private health insurance incentive schemes, and the recent professional indemnity crisis in the medical profession

²⁶² Deakin University and the Victorian Arabic Social Services. 2002. [*Politics of Social Exclusion: Refugees on Temporary Protection Visas in Victoria*](#). Report on file with authors.

²⁶³ Third Period Report of Australia to ICESCR, para 233.

has led to anecdotal evidence that the practice of bulk billing, the cornerstone of Medicare, is being reduced.²⁶⁴ As such, the universal health coverage envisaged by Medicare is jeopardised, and the right to health established by the ICESCR is hampered.

²⁶⁴ See for example, the Australian Medical Association website which shows the increased gap between the rebate offered to GPs and the costs of running a practice. Complementing this information, the AMA has received anecdotal evidence that the number of GPs who bulk bill has reduced.
<http://domino.ama.com.au/AMASWeb/fees.nsf/e56be0e453f115984a2568dc0025ac69/146e264d228dcb0cca256a8d001f23bc?OpenDocument> Accessed 12 August 2002.

CASE STUDIES

PENALTIES PUSH SOCIAL SECURITY RECIPIENTS INTO POVERTY

DENIED THE RIGHT TO SOCIAL SECURITY

"Breaching" recipients of social security benefits is pushing unemployed people and students deep into poverty, according to a report prepared by the Australian Council of Social Services using data obtained under Freedom of Information. "Breaching" is the practice of penalising individuals for infringing social security regulations, for example being late for an interview or failing to respond to a letter. There are two grounds for being breached: failure to meet "activity test" requirements – activities associated with looking for work, and "administrative test" requirements such as those identified in the example above.

ACOSS found that the penalty for the first "Activity Test" put unemployed adults 34% below the poverty line, and penalties for the second "Activity Test" pushes kids on the youth allowance 47% below the poverty line. The penalty for a third breach is the entire withdrawal of social security payment for 8 weeks.²⁶⁵

The following case study, used with permission of the Salvation Army, come from a 2001 report, Stepping into the breach: A report on Centrelink breaching and emergency relief and illustrates the ways in which the right to social security is being violated.

Brian is a 33 year old individual on Newstart Allowance. He and his partner were struggling to support their two children, aged 6 and 4, in high cost rental accommodation in Adelaide on the income earned from a string of low paid labouring jobs and his unemployment benefit. He was advised by the State Housing Authority that he and his family could access public housing if they moved to Whyalla. They did so and Brian was promptly breached by Centrelink for unwittingly moving to an area of low employment prospects (MALEP), resulting in a complete cut to his income support. In the absence of any family or friends to turn to, Brian approached The Salvation Army's Whyalla ER centre for food vouchers and assistance with his utility bills. Brian returned to the centre a few weeks later stating that his marriage was under stress due to financial hardship, and was assisted with accessing respite child care and a referral to a relationship counsellor.²⁶⁶

UNFAIR DISMISSAL OF CASUAL WORKERS –

DENYING THE RIGHT TO FAIR CONDITIONS OF WORK

Casual workers covered by the federal system, who have not worked regularly and systematically for a period of at least one year are excluded from the unfair dismissal processes. Unfair dismissal claims are made by workers who are sacked in circumstances which are harsh, unjust or unreasonable.

²⁶⁵ Australian Council for Social Service. 2002. Media Release: New Freedom of Information data shows: \$200m in 'fines' push unemployed and students deep into poverty
http://www.acoss.org.au/media/2002/mr0805_breach.htm [Accessed 12 August 2002].

²⁶⁶ Salvation Army. 2001. Stepping into the breach: A report on Centrelink breaching and emergency relief. (Salvation Army: Melbourne).

*Casual employment is the largest growth sector in Australian employment. Between 1984 and 1997, sixty percent of the new jobs created were casual positions. Women are over-represented in casual employment.*²⁶⁷

*JobWatch data for the 2000-2001 financial year indicated that 42.1% of all casual workers who contacted the telephone advice service phoned in relation to the issue of unfair dismissal. Of those 44.4% had been employed for between 3 and 12 months and thus were excluded from unfair dismissal laws.*²⁶⁸

The failure to enable short-term casual workers to access the unfair dismissal processes results in some workers being forced to work in conditions that fall below the standards of other workers in Australia:

Julia worked as a sales assistant for a retail store on a casual full-time basis. The employer rang Julia at home when she was away ill and demanded to speak to her. Her mother answered the phone and told him Julia couldn't come to the phone because she was too sick. The next time the employer spoke to Julia he was verbally abusive to her and sacked her.

*Rob worked as a welder for a manufacturing company on a casual full-time basis. Rob's employer dismissed him without providing any valid reason. Rob got paid different amounts from week to week and his employer wasn't paying him any super.*²⁶⁹

YOUTH HOMELESSNESS –

DENIED THE RIGHT TO HOUSING

*In 2001 there were an estimated 26,060 homeless young people aged 12 to 18.*²⁷⁰ *This is a rate of 14 homeless young people per 1,000 of the youth population, an increase of 8.4 percent since 1994.*²⁷¹

*The rate of homelessness per 1000 of the youth population is particularly high in the Northern Territory where the figure is 69 homeless young people per 1000 of the youth population. Other states range from 10 in Victoria and New South Wales to 21 in Tasmania.*²⁷²

Research undertaken and compiled by the Children's Welfare Association of Victoria (CWAV) indicates that many young people leaving residential care end up homeless. It concluded that young people leaving care:

- *Experience frequent changes in accommodation, isolation and loneliness*
- *Are more likely to think about suicide or have attempted suicide*

²⁶⁷ JobWatch. 2002. Submission re: *Workplace Relations Amendment (Fair Termination) Bill* 2002. <http://www.job-watch.org.au/index.html> [Accessed 10 August 2002]

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Chamberlain, C and MacKenzie, D. 2001, *Youth Homelessness 2001* (RMIT University, Melbourne)

²⁷¹ Personal communication with Council to the Homeless Persons, 14 August 2002.

²⁷² Ibid.

- *Have low levels of education and experience high rates of unemployment. Only 10-15 percent of young people leaving care complete high school with 55 percent having only completed Year 10 or less. Twelve months after discharge 44 percent of young people are unemployed compared to 27 percent amongst 15-19 year olds in the general community.*
- *Have inadequate income and face financial difficulties²⁷³*

The following case study was provided by The Council to Homeless Persons:

Gwen, 15, was born in Vietnam. Her father is unknown and her mother committed suicide when she was three. Her grandparents who lived in the northern suburbs of Adelaide raised Gwen. As she reached adolescence, there was increasing conflict with her grandparents about "appropriate" behaviour for a young woman. Her grandparents tell her that she cannot have an Australian boyfriend and they don't like her going out in mixed groups. She is told she has "bad blood" because she is illegitimate. She suffers from depression, self-harming behaviour. She left home three weeks ago and has been staying at different friends' places.

²⁷³ Ibid.

CHAPTER FIVE - CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

What is the CEDAW?

The CEDAW is the primary UN human rights treaty on women. Sex discrimination is defined as “any distinction, exclusion or restriction made on the basis of sex...irrespective of...marital status, and on a basis of equality of men and women.”²⁷⁴ It is focused on sex discrimination experienced by women and identifies a series of human rights that may be violated if women experience such discrimination. These rights include:

- those related to issues of law, policy and prejudice
- women’s participation in political and public life (both domestically and internationally)
- citizenship
- education
- employment
- health care
- family planning
- economic and social benefits
- the particular needs of rural women
- equality before the law, including in marriage and family law.

The CEDAW requires that if the rights are breached, women in Australia have access to effective domestic remedies.²⁷⁵

Monitoring of the CEDAW

States who are party to the CEDAW are reviewed and monitored by the Committee on the Elimination of Discrimination Against Women (CEDAW), which comprises twenty-three experts, through 4 main mechanisms:

- periodic reporting – State parties are required to submit comprehensive reports every four years²⁷⁶
- individual communications – if the State Party has also signed the Optional Protocol to the CEDAW, an individual may lodge a complaint with the CEDAW Committee if they consider that their rights have been breached and they have been unable to gain a satisfactory outcome through domestic processes)²⁷⁷
- inquiries mechanism - if the State Party has also signed the Optional Protocol to the CEDAW, the CEDAW Committee may launch an inquiry into grave or systematic violations of the treaty)²⁷⁸
- State-to-State complaints.²⁷⁹

²⁷⁴ UN. CEDAW. Art. 1.

²⁷⁵ Ibid, Art. 2.

²⁷⁶ Ibid, Art. 18.

²⁷⁷ UN. 1999. Optional Protocol to CEDAW. UN Doc. A/RES/54/4.

²⁷⁸ Ibid.

²⁷⁹ CEDAW, Art. 19.

Australia and the CEDAW

Domestic implementation

The Fraser/Coalition Government signed the CEDAW in 1980 and the Hawke/ALP Government ratified the CEDAW in 1984. The Howard/Coalition Government entered two reservations - on the provision of paid maternity leave and participation in armed combat (which was amended by the Howard/Coalition Government to exclude women from direct, armed combat).

Elements of the CEDAW are implemented in Australia through the *Sex Discrimination Act (Cth)* (1984) (SDA), and through certain provisions in industrial legislation. The SDA makes it illegal to discriminate on the "basis of sex, marital status or pregnancy...prohibits sexual harassment and dismissal from employment on the basis of family responsibilities." Nonetheless, there are a number of exemptions to the SDA, including the preclusion of women who work for or study in religious schools, voluntary bodies, in labour hire arrangements, and areas of competitive sport.

Individual complaints

In August 2000 the Australian Government announced it would not ratify the Optional Protocol to the CEDAW (which would have enabled women in Australia to take an individual communication to the CEDAW Committee). The decision was made in the context of the Government's disengagement from the UN human rights treaty system. At the time of the announcement, women's organisations in Australia expressed their disappointment and opposition to the decision. One hundred and sixty organisations and 466 individual women and men signed a letter to the Prime Minister, and the three "secretariat" organisations met with senior Government members to express their concern at the decision.²⁸⁰ During the 2001 election campaign the Liberal Party of Australia and the National Party of Australia maintained their opposition to ratification of the Optional Protocol to the CEDAW. The ALP, Greens and Democrats all indicated their support for ratification.

Australia's reports to the CEDAW

Australia has presented three reports to the CEDAW Committee. The Initial Report was due in August 1984, was submitted in October 1986 and considered in 1988. The Second Periodic Report was due in August 1988, was submitted in July 1992, and was considered in 1994. The Third Periodic Report was due in August 1992, was submitted in March 1995, and was considered in 1997. The Fourth and Fifth Combined Periodic Report was due in August 2000, and at the time of writing (September 2002) the report had not been submitted.

²⁸⁰ At this time, the Office of the Status of Women funded three mainstream organisations to act as Secretariats to the women's movement: the National Council for Women of Australia, Business and Professional Women Australia, and the YWCA of Australia.

Second periodic report

The second report was considered in 1994. At the time the Committee noted the quality of the report, and that "a great deal of information had been made available in a self-critical manner."²⁸¹ The Howard/Coalition Government has not made this report available on the internet.

The Committee noted that the Australian government had shown leadership and commitment to the promotion of women's human rights at the international level, and that it had adopted a National Agenda for Women.²⁸²

In both the dialogue and the Concluding Comments, the Committee expressed concern at:

- the prevalence of violence against women²⁸³
- the lack of constitutional equality for women²⁸⁴
- continued discrimination against Indigenous women expressing particular interest in land rights for Indigenous women and that "the status of these women is significantly different from other women living in Australia. Violence, life expectancy, unemployment and the health situation among aboriginal women are remaining problems"²⁸⁵
- under representation of women in politics²⁸⁶
- the continued reservation on maternity leave and the lack of universal maternity leave in Australia²⁸⁷
- concern at state variations in abortion laws and reproductive health policies²⁸⁸
- legal bias which impacted on women's equality²⁸⁹
- the CEDAW Committee requested that the government implement special temporary measures to increase women's participation in Parliament.²⁹⁰

There was no shadow reporting process.

Third periodic report

Government report

A series of miscommunications between the Office of the Status of Women (which has responsibility for CEDAW reporting in Australia) and the Division for the Advancement of Women (the UN Secretariat for the CEDAW Committee) marred the 1997 reporting process. As a result, both the Australian government and NGOs had a very short period of time to prepare for the Government-Committee dialogue. The 1997

²⁸¹ UN. CEDAW Report of the 13th Session. UN Doc. A/49/38. <http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm> [Accessed 27 August 2002], para. 377.

²⁸² UN. CEDAW Report of the 14th Session. UN DOC. A/50/38. <http://www.un.org/esa/gopher-data/ga/cedaw/14/a50--38.en> [Accessed 27 August 2002], paras. 593 and 594.

²⁸³ 13th Session Report, paras. 381; 391, 392.

²⁸⁴ 13th Session Report, para. 384.

²⁸⁵ Ibid, para. 597, 598, 599. 13th Session Report, paras. 387, 388, 391, 392, 397, 407

²⁸⁶ 13th Session Report, para. 394.

²⁸⁷ 14th Session Report, para 596; Ibid, 389, 390

²⁸⁸ 13th Session Report, para 404-7.

²⁸⁹ Ibid, para. 408

²⁹⁰ 14th Session report, para. 601.

reporting process was further complicated by the change of government in March 1996. The Third Periodic Report had been prepared during the Keating/ALP Government term of office. The report²⁹¹ it prepared included the following issues:

- the adoption of the National Agenda for Women
- an overview of affirmative action measures
- the Women's budget process
- new approaches to address domestic violence
- action on the portrayal of women in the media
- measures to address women who experience domestic violence at the hands of partners they have emigrated to Australia to be with
- expansion of the Women at Risk refugee program
- National Program for the Education of Girls
- National Women's Health Program
- the Law Reform Commission Inquiry – *Equality Before the Law*

The Howard/Coalition Government made a series of significant changes to the legislative and programmatic measures for women, which were not reflected in the report (see issues raised below). There are no Summary Records of the Government-Committee Dialogue on the internet, however, in the Concluding Comments the CEDAW Committee observed that the Third Periodic Report did not meet the reporting guidelines, and that the lengthy oral presentation by the government impeded the dialogue between Government and the CEDAW Committee.

NGO Report

A coalition of Sydney based NGOs prepared a brief Shadow Report for the Committee, which was then lobbied for in New York. The report raised a number of concerns, including:

- the failure to fully implement the provisions of the CEDAW in domestic law, particularly when considering the exemptions to the *SDA*
- budget cuts to the Office of the Status of Women
- the abolition of compulsory reporting provisions in the *Affirmative Action Act 1986*
- shortcomings in the Women at Risk refugee program
- changes to postgraduate fee structures which could have detrimental impacts on women
- the detrimental impact of industrial relations reforms
- inadequate health systems for Indigenous women
- the introduction of two year waiting periods for newly-arrived migrants to receive social assistance
- the impact of legal aid funding cuts on women
- In addition, the Women's International League for Peace and Freedom prepared a short report, as did the Labor Caucus Status of Women Committee.

²⁹¹ *Australia. 1997. Australia. 1996. Third Period Report of Australia to CEDAW. UN Doc. CEDAW/C/AUL/3. <http://www.un.org/esa/gopher-data/ga/cedaw/17/country/Australia/C-AUL3.EN> [Accessed 27 August 2002].*

Concluding Comments

The CEDAW Committee's Concluding Comments covered positive aspects, as well as areas of concern and recommendations for change.

The CEDAW Committee noted the following positive areas: while work on violence against women has continued under the Howard/Coalition Government, many of the positive aspects identified by the CEDAW Committee were initiatives of the Hawke and Keating/ALP Governments, and had been the subject of revision (for example, funding to OSW had been cut; the Affirmative Action Agency had been disbanded; and a significant period of time elapsed between the resignation of the previous Sex Discrimination Commissioner and the appointment of a new Commissioner). Moreover, Justice Syliva Cartwright, a CEDAW member, was quoted on ABC Radio saying that the Australian presentation had been "out of date which prevented proper scrutiny of Australia's performance of protecting women."²⁹²

Areas of concern included:

- the reduction in funding and decentralisation of services and mechanisms which supported women²⁹³ – the CEDAW Committee actually stated that it was "alarmed" by changes in policy which appeared to 'slow down, or reverse Australia's progress in achieving equality between women and men'²⁹⁴
- concern that Aboriginal and Torres Strait Islander women continued to face discrimination, and were over-represented in incidents of violence²⁹⁵
- the circumstances of women brought to Australia as brides²⁹⁶
- adverse policy changes, particularly relating to housing, childcare and employment assistance²⁹⁷
- the negative impact on women of the new industrial relations legislation.²⁹⁸

The CEDAW Committee made a number of general recommendations for further action including:

- the development of a long-term strategy aimed at the full implementation of the Convention²⁹⁹
- a return to active and visible participation in international forums on women³⁰⁰
- the translation of the CEDAW and Beijing Declaration and Platform for Action for non-English speaking Australians.³⁰¹

The CEDAW Committee raised a number of specific concerns in the areas of employment, health and Indigenous women.

²⁹² Diane Stott, "Women hit out at equality policies," *Sydney Morning Herald*, p 4.

²⁹³ UN. CEDAW. 1997. *Concluding observations of the Committee on the Elimination of Discrimination Against Women: Australia*. CEDWA/C/1997/L.1/Add.8, paras. 389 and 391.

²⁹⁴ Ibid, para 389.

²⁹⁵ Ibid, paras 390, 394 and 397.

²⁹⁶ Ibid, para 395.

²⁹⁷ Ibid, para 392.

²⁹⁸ Ibid, para 396.

²⁹⁹ Ibid, para 34.

³⁰⁰ Ibid, para 43.

³⁰¹ Ibid, para 37.

Employment

- New legislation on industrial relations, providing for the negotiation of individual contracts between employer and employee, which might have a disproportionately negative impact on women³⁰²
- reservation on the provision of paid maternity leave, and Australia's non-ratification of ILO Convention No. 103 concerning maternity protection³⁰³
- a possible detrimental effect of Australian Workplace Agreements on the position of women in the workforce, and the jeopardising of the achievement of pay equity.³⁰⁴

Status of Indigenous Women

- Aboriginal and Torres Strait Islander women were continually experiencing discrimination and disadvantages³⁰⁵
- major issues of concern related to maternal mortality, lower life expectancy, low access to health services, domestic violence, and high unemployment rates³⁰⁶
- the Committee encouraged the Government to collect statistical data on the participation of Aboriginal and Torres Strait Islander women in the workforce, in decision-making, in politics and administration, and in the judiciary with a view to enhancing programmes that would benefit them³⁰⁷
- it suggested that the Government might include representatives of those communities when it presented its next report to the Committee.³⁰⁸

Health

- "Assess the benefits of a continuing national women's health policy and to ensure that any further change in that policy did not lead to a decreased access by women, especially vulnerable groups of women, to comprehensive health services"³⁰⁹
- it also recommended that "data and indicators on health should be collected, disaggregated by sex, age, ethnicity, rural/urban areas and other distinctions. Data should also be collected on the impact of the shift in responsibility for health care from the federal to the state level."³¹⁰

Australian Government's response

The Minister Assisting the Prime Minister on the Status of Women, Senator Jocelyn Newman reacted angrily to the NGO Shadow Report, saying she was "sick and tired of Australians who don't like the change of government, who go overseas and bag their country."³¹¹ Senator Newman stated that the Government had fulfilled its reporting obligations to CEDAW, and Pru Goward, the First Assistant Secretary for the Status of Women defended the information prepared for the Committee.³¹²

³⁰² Ibid, para 32 and 35

³⁰³ Ibid, para 32

³⁰⁴ Ibid, para 35

³⁰⁵ Ibid, paras 13, 30, 40, 41

³⁰⁶ Ibid, 13

³⁰⁷ Ibid, 40

³⁰⁸ Ibid.

³⁰⁹ Ibid, 36

³¹⁰ Ibid, 36

³¹¹ The Age, "Report to UN starts women's role row," *The Age*, 21 July 1997

³¹² Christopher Dore, "Coalition admits to gender equality lag," *The Australian*, 22 July 1997, p. 2.

The Government did not release an official response to the Concluding Comments, nor does the OSW website contain any reference to the Concluding Comments or a hypertext link to them. This is despite the recommendation of the CEDAW Committee that the Concluding Comments be disseminated widely. Moreover, by characterising the process as one of disaffected ALP voters “bagging” the government in an international forum, the 1997 CEDAW reporting can be seen as the start of the Howard/Coalition Government’s strategy of undermining the legitimacy of the treaty bodies, particularly by blaming negative comments on NGO participation in the process, rather than accepting them as legitimate criticisms.

In the draft Fourth and Fifth Periodic Report the Government did not specifically address the areas of concern raised by the Committee. In a submission prepared by the Women’s Rights Action Network in 1999, it was noted that a number of the areas of concern had not been acted upon.³¹³

Implementation of the CEDAW since 1997

While there have been some positive steps for women in the period since 1997 (including the Honouring Women initiative, some of the domestic violence programs, and an increase in the participation of women and girls in education and training), a number of issues have undermined implementation of the CEDAW in Australia.

Indigenous Women - The educational and health rights of Indigenous Women are still not being appropriately addressed by either the State or Federal Governments. As a result, recent research indicates that education levels for Indigenous Australians in rural and remote areas are significantly below those of non-Indigenous Australians,³¹⁴ and Indigenous women in Australia have a life expectancy rate twenty years less than that of non-Indigenous women, and have a higher incidence of contraction of several health disorders.

The rates of violence against Indigenous women are a cause of shame, and adequate measures have not been taken to remedy the situation. In addition, the continuing practice of mandatory sentencing in WA is of grave concern where women are increasingly being jailed for fine defaults. Research on mandatory sentencing in NT reveals the significant and detrimental impact of mandatory sentencing on women.³¹⁵

Diminished institutional mechanisms for women - Optional Protocol to the CEDAW - While the Government has argued that the decision not to ratify the OP to CEDAW is in large measure due to the robust sex discrimination mechanisms in Australia, recent efforts to amend the *Sex Discrimination Act* have demonstrated the fragility of the protections afforded women living in Australia.

³¹³ Women’s Rights Action Network Australia, *Submission to OSW*, (Melbourne, WRANA: 1999).

³¹⁴ This data relates to the Northern Territory; see Independent Inquiry conducted by former Senator Bob Collins into Rural and Remote education for Aboriginal Australians in the Northern Territory.

³¹⁵ Jenny Hardy and the Women’s Rights Action Network Australia, *Gender and Mandatory Sentencing*, (Melbourne: WRANA, 2000).

Diminished institutional mechanisms for women - Proposed amendments to the SDA - In August 2000, the Federal Court of Australia found that Victorian legislation, which prohibits single women and lesbians from accessing assisted reproductive technologies, was inconsistent with provisions of the SDA. In response, the Howard/Coalition Government introduced amendments to the SDA which would allow States to discriminate against women on the basis of their marital status and sexuality in the provision of assisted reproductive technology services. The legislation goes against the findings of a parliamentary committee that the amendments are contrary to the aims of the CEDAW.³¹⁶

Refugee women - The provisions of the *Migration Legislation Amendment Act No.6 (Cth)* 2001 diminished the capacity of the refugee determination system to respond to gender-based persecution. The “test” for persecution as “serious harm” could have the effect of precluding gender-based persecution. The 1951 Refugee Convention makes no mention of gender-based persecution. However, in practice it has become widely acknowledged that there are specific forms of discrimination experienced differently, or uniquely, by women, as per the Gender Guidelines applied by Department of Immigration, Indigenous and Multicultural Affairs. Throughout the world a legitimate jurisprudence is developing which addresses the way in which women applicants successfully demonstrate gender based membership of a particular social group for which they are persecuted. Narrowing the definition of persecution would further deny the legitimate claims of women refugees and asylum seekers with gender-based claims of persecution. Mr Ruddock, the Minister, has spoken out against women being granted asylum for reasons of domestic violence, stating:

“... I'm one of those who takes the view that we need to be able to look after those people being persecuted before we start thinking about whether we're able to look after battered wives using the Refugee Convention.”³¹⁷

As a result, the Minister, undermining his own department's Gender Guidelines, appeals cases that recognise domestic violence as a form of gender-based persecution. As such, both policies and practices of the Australian Government have come to constitute a form of discrimination against asylum seeker women.

Furthermore, the mandatory detention of asylum seekers can have a detrimental impact on women, both in terms of their access to appropriate maternal and child health care during detention, and the level of health care available to individuals who hold Temporary Protection Visas. The Kids in Detention Story noted for example, that “When women and teenagers need sanitary napkins they have to go through a tedious process of filling in a form including the date and time, besides other personal details and submitting these to a particular person at a particular time. Each time they are given 10 pads. If by some chance they need any extra, the nurse does a thorough physical check before they are issued.”³¹⁸

“Baby Bonus”/Maternity leave - A growing number of women's organisations have identified the failure to provide paid maternity leave as a significant issue for women living in Australia. The majority of women

³¹⁶ Senate Legal and Constitutional Committee. 2001. [*Inquiry into the Provisions of the Sex Discrimination Amendment Bill \(No.1\) 2000*](#) *Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000*, 5.8.

³¹⁷ ABC Radio. “Ruddock takes hardline to conference” 13/12/01. <http://www.abc.net.au/am/s439265.htm>

³¹⁸ KIDS (Kids in Detention Story). 2002. Submission to the Human Rights and Equal Opportunity Commission National Inquiry into Children in Immigration Detention by the KIDS (Kids in Detention Story) Working Group.

<http://members.ozemail.com.au/~burnside/hreoc-submission.pdf> [Accessed 27 August 2002], 32.

employed in Australia do not have access to maternity leave, particularly if they work in the private sector or in small business. The introduction of a baby bonus by the Howard/Coalition Government is problematic for a number of reasons: it applies only to a first child; it disadvantages those on a lower income level in so much as the payment is predicated on the tax paid in the 12 months prior to the birth of the child; and it necessitates women staying out of the workforce of a minimum period of twelve months for payment to be received.

Outworkers - There has been an increased awareness of the prevalence of "outworkers" who are subject to sub-standard labour practices. The majority of outworkers in Australia are women.³¹⁹ The Government's refusal to address the rights of outworkers under Australia's industrial legislation puts them beyond the remit of formal protection. The Government has also failed to sign the Outworkers Convention.

The Women's Rights Action Network Australia has indicated that it will coordinate a Shadow Reporting process for the Combined Fourth and Fifth Periodic Reports.

³¹⁹ *Women's Rights Action Network Australia, Findings on the First Australian Tribunal on Women's Human Rights and their Relationship to the Australian Government Implementation of the Beijing Platform for Action, (Melbourne: WRANA, 2000).*

CASE STUDIES

WOMEN OUTWORKERS -

DENIED THE RIGHT TO EQUALITY IN EMPLOYMENT, AND FAIR AND SAFE WORKING CONDITIONS

It has been estimated that there are 329,000 outworkers in Australia,³²⁰ and a majority of these outworkers in the textile industry are non-English speaking migrant women, with very little knowledge of their proper rights and entitlements. The Australian outworking industry exploits the vulnerability of these women and thrives on it.

The Australian Government's policy of withholding all welfare benefits from newly arrived migrants for two years after arrival has meant that many have no source of income. Thus outworking – a home-based occupation which does not require one to have state recognised status in order to be employed, has become an accessible and immediate way to pay the rent and feed families. Girl children are also affected pointing to a further failure of the government to implement the International Labour Organisation Convention of Child Labour. As one woman describes:

"I am 20 years old. I came to Australia when I was 11. From that time I have worked with my mother and sister as outworkers... us children were working 3 to 5 hours after school and most weekends we would work all day. This was the only income my family could get and this is how we built our lives in Australia as outworkers.... For myself and my sister we are working constantly. I feel we have lost our childhoods. Work has stolen time for play, time for the family to relax"³²¹

Successive Australian Governments have failed to enact legislation to recognise outworkers as employees under national industrial legislation, and the Howard Government has not ratified the Homeworkers Code of Practice 1996.

³²⁰ Fairwear. No date. Campaign Kit: Background Information.

³²¹ Testimony of Dung to the First Australian Tribunal on Women's Human Rights, 1999. On file with authors.

HEATHER OSLAND –

DENIED EQUALITY BEFORE THE LAW³²²

Heather Osland was subjected to continuous and extreme violence by her husband for 13 years, including being beaten, raped, held under water, and threatened with death using a rifle. Frank Osland also physically, sexually and psychologically abused the children, and forced them to watch him beating, starving and killing family pets. Heather tried to leave Frank Osland eight times. She regularly sought help from the police, but he was never charged and there were no intervention orders.

Heather and her adult son David were charged with murder for the killing of Frank Osland. David struck the blow which killed him. Heather and David were initially tried together. On 2 October 1996, Heather was sentenced to 14 and a half years' imprisonment for murder. David was eventually acquitted in a separate trial, on the grounds of self-defence. He argued that he acted to protect both his and his mother's lives. The children have subsequently received crimes compensation for witnessing the violence against Heather and for the abuse they experienced from Frank Osland.

Not all of the evidence of the abuse was heard in court, due to the failure of the police to document their visits, and legal rules about hearsay. Heather's trauma also meant that she was unable to recall or recount in court some of the details of Frank Osland's violence prior to his death. However, this was not taken into account despite this evidence being crucial to her defence. Heather's case rested on both self-defence and provocation issues, but the evidence of planning was viewed as an insurmountable hurdle. This interpretation discriminates against women who are victims of long-term domestic violence, and who research has shown frequently take steps to survive. Heather's conviction is inconsistent with David's acquittal as they acted together.

An appeal to the High Court (which Heather was not allowed to attend) was dismissed by a 3:2 majority. The dissenting judgment argued for a retrial on the grounds of inconsistent verdicts. A Petition of Mercy on Heather's behalf to the Victorian Attorney-General, Rob Hulls, was denied. The reasons are still being sought. Heather's case seems a breach of articles 2 and 15 of CEDAW, but she is unable to submit an individual communication to the Committee on the Elimination of Discrimination Against Women, because Australia refused to ratify the Optional Protocol. She remains in prison.

³²² With thanks to Heather Osland and Debbie Kirkwood.

CHAPTER SIX - CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CAT)

What is the CAT?

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines and prohibits behaviours that constitute torture or cruel, inhuman or degrading (CID) treatment or punishment. The treaty stipulates that there is never any circumstance in which torture may be practised.³²³ While cruel and inhuman treatment is addressed in the ICCPR, the existence of the CAT highlights the pervasiveness of torture and the need for more stringent measures to prevent, deter, investigate and punish torture.

The CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”³²⁴

State Parties are required to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”³²⁵ At the fore are measures that prevent torture, and investigate and prosecute any acts of torture that do occur.

The treaty also contains provisions, in Art. 3, which preclude State Parties from returning refugees or asylum seekers to their country of origin, if they fear torture on their return.³²⁶

Monitoring of the CAT

States that are party to CAT are reviewed and monitored by the Committee Against Torture (CAT Committee), comprising ten experts, through 4 mechanisms:

- inquiries procedure – the CAT Committee can investigate allegations of systematic torture in the territory of a State Party³²⁷
- individual communications – if the State Party has also recognised the competence of the CAT Committee to receive individual communications, an individual may lodge a complaint with the CAT

³²³ United Nations. 1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. General Assembly resolution 39/46, adopted 10 December 1984. Articles 2.2 and 2.3

³²⁴ Article 1.

³²⁵ Article 2.1.

³²⁶ Article 3.

³²⁷ Article 20.

Committee if they consider that their rights have been breached and they have been unable to gain a satisfactory outcome through domestic processes³²⁸

- State-to-state complaints³²⁹
- periodic reporting – State parties are required to submit comprehensive reports every five years.³³⁰

Australia and the CAT

Domestic implementation

The Hawke/ALP Government signed the CAT in 1985 and ratified the CAT in 1989. The Keating/ALP Government recognised the competence of Committee to receive communications in January 1993. Australia has no reservations.

Elements of the CAT are incorporated into Australian legislation through the *Crimes (Torture) Act (Cth)* 1998.

Australia's reports to the CAT

Australia has presented two reports to the CAT Committee. The Initial Report was due in 1990 and was submitted in 1991. The Second Periodic Report was due in 1994, was submitted in 1999 and was considered in 2000. The Third Periodic Report is due in 2004.

The second periodic report

Government report

The Howard/Coalition Government prepared the second periodic report.³³¹ The report covered the following issues:

- the existence of legislative mechanisms to outlaw torture and cruel, inhuman and degrading treatment or punishment³³²
- mechanisms for scrutiny of public officials, including Commissions of Inquiry – listing the *Royal Commission into Aboriginal Deaths in Custody*, *National Inquiry into the Human Rights of People with Mental Illness*, and the Federal Parliamentary *Inquiry into Asylum, Border Control and Detention*, and the *Royal Commission into the New South Wales Police Service*³³³

³²⁸ Article 22.

³²⁹ Article 21.

³³⁰ Article 19.

³³¹ Australia's report to the Committee Against Torture. CAT/C/25/Add.11.

[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f4d1f28cb7cc358ec12569840045d580/\\$FILE/G0042122.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f4d1f28cb7cc358ec12569840045d580/$FILE/G0042122.pdf) Accessed 25 August 2002.

³³² Ibid, paras. 7-9; 46-50. The Government report notes the High Court judgment in *Teoh*, yet does not include information on the memoranda issued by both the Keating/ALP Government and Howard/Coalition Government that sought to undermine the High Court judgment (para 7).

³³³ Ibid, paras. 10-37.

- practices of expulsion, refolement and extradition and their relation to CAT obligations³³⁴
- preventative measures in relation to police officers, prison officers, military personnel, immigration officers,³³⁵ customs officers, public medical officers, residential carers, public school teachers³³⁶
- mechanisms to investigate complaints of torture and CID treatment or punishment, including reference to police complaints – particularly investigations into the conduct of the Victorian police at Richmond Secondary College, an alleged assault of a man in custody in South Australia – processes for complaints against prison officers, military personnel, immigration officers, customs officers, public medical officers, residential carers, public school teachers³³⁷
- compensation for acts of torture and CID treatment or punishment³³⁸
- the establishment of rehabilitation services for survivors of torture or those who have “been tortured or suffered traumatic experiences associated with organised violence in other countries”.³³⁹

Government-Committee dialogue

The Government-Committee dialogue occurred in November 2000. At the outset, the Committee thanked the Howard/Coalition Government delegation for their report. However, they noted that recent reporting on the new policy had been “causing anxiety in human rights circles and giving comfort to certain States seeking to defend the stance of their own regimes.”³⁴⁰

Moreover, the Committee noted that although Australia “had a healthy respect for fundamental rights and freedoms, no country was perfect.”³⁴¹

All issues addressed in the report were raised in the first instance by the Australian delegation to the CAT Committee.³⁴² With respect to the issue of mandatory sentencing the Howard/Coalition Government delegation noted that such provisions had been developed in response to “community concern about repeat and property offences. While the Australian Government did not believe that the provisions were in breach of the Convention, it was concerned about the potential impact of the laws on juveniles, and had therefore

³³⁴ Ibid, paras. 51-61.

³³⁵ Ibid, paras. 65-85. With respect to immigration officers the report notes the intention to privatise immigration detention. The report notes that “The successful detention service provider will have to deliver detention services in accordance with Immigration Detention Standards to be developed by the Department of Immigration and Multicultural Affairs in consultation with the Federal Ombudsman’s Office. These Standards will set out the Government’s obligations to meet the individual needs of detainees in a culturally appropriate way while at the same time providing safe and secure detention. They will specify the distinctive nature of services that are required in an immigration detention environment, and will emphasise the need for sensitive treatment of the detainee populations which might include torture and trauma sufferers, family groups, children and the elderly, persons with a fear of authority and persons who are seeking to engage Australia’s protection obligations under the Refugee Convention.” (para 76) The report notes that “although the Government intends to contract out the delivery of detention services, it will continue to have a duty of care towards detainees.” (para 77). While the report has been written within the context of CAT, it does not specifically refer to the CAT in the development of the Immigration Detention Standards.

³³⁶ Ibid.

³³⁷ Ibid, paras. 86-126.

³³⁸ Ibid, paras. 127-136.

³³⁹ Ibid, para. 138.

³⁴⁰ Summary record of the first part (public) of the 444th meeting: Australia. 21/11/2000. CAT/C/SR.444. Para. 25.

³⁴¹ Ibid, para 26.

³⁴² Ibid, paras. 3-24.

committed 5 million dollars per annum to the Northern Territory for measures including special diversionary programmes for juveniles and the establishment of indigenous interpreter services.”³⁴³

In addition, with respect to non-refoulment provisions, the delegation noted that:

*“The Australian Government was however concerned about increasing resort to the communication mechanism under article 22 by failed asylum-seekers, apparently in an effort to delay their removal from Australia. Australia had been notified of 17 such communications, and the Committee had requested non-binding interim measures in each case. In nearly all cases such people had had their claims under the Refugee Convention, the Torture Convention and the International Covenant on Civil and Political Rights exhaustively considered by domestic processes, and had utilised multiple layers of review. It was also of concern that most people would remain in detention while their communication was under consideration. Following a review by the Australian Government of its interaction with the United Nations treaty body system, the decision had been taken to closely examine each request for interim measures rather than automatically complying with such requests. That did not mean that Australia would refuse such requests, but it would more closely examine the circumstances of the individual. In the meantime, the person concerned would be allowed to stay in Australia.”*³⁴⁴

In response the CAT Committee noted that “before requesting interim measures, the Committee made certain that there was good reason for doing so”.³⁴⁵

The CAT Committee also raised concerns relating to:

- mandatory sentencing – which they noted resulted in “unusually harsh” sentences³⁴⁶
- concern at treatment of Indigenous peoples³⁴⁷
- allegations of police mistreatment (in reference to NGO reports)³⁴⁸
- concerns at detention of asylum seekers³⁴⁹
- concerns at allegations of mistreatment in prisons (in reference to NGO reports)³⁵⁰
- gender-related torture or CID treatment or punishment.³⁵¹

NGO engagement with the process

The second periodic report galvanised NGOs in Australia around CAT and the Australian non-compliance. The Western Australia Deaths in Custody Watch Committee prepared a report that alleged, and provided documents for, individual and systemic violations of CAT in WA. In addition ATSIC provided a national

³⁴³ Ibid, para 8

³⁴⁴ Ibid, paras. 16-17

³⁴⁵ Ibid, para. 29

³⁴⁶ Ibid, para. 33

³⁴⁷ Ibid, paras. 36, 52, 59

³⁴⁸ Ibid, paras. 41, 47

³⁴⁹ Ibid, paras. 40, 51, 61

³⁵⁰ Ibid, paras. 37, 46-50, 58

³⁵¹ Ibid, para. 60

analysis and particularised violations of CAT about treatment of Aboriginal and Torres Strait Islander Peoples in the Australian Criminal Justice System.

The CAT Committee referred to the NGO materials in the dialogue session, but nonetheless noted that NGO “information was not accepted uncritically, but was drawn to the attention of the States parties for their response.”³⁵² The CAT Committee noted that they had received “many reports from NGOs alleging that some acts of torture were not included in Australian legislation.” However the NGOs did not provide any examples of a person allegedly violating Art. 1, but going unpunished because national legislation failed to qualify the acts as torture.³⁵³ The CAT Committee strongly encouraged NGOs to exhaust domestic remedies and to lodge individual communications.³⁵⁴

The Western Australian Deaths in Custody Watch Committee Submission to the CAT Committee focused particularly on prisons in WA, especially noting:

- the High levels of prisoner grievances about abuses and poor conditions in overcrowded prisons
- the world’s highest rate of incarceration of Indigenous people
- Australia’s highest rate of deaths in custody per population
- an imprisonment double the national average for women, and a rate of 57.3% of Indigenous women imprisoned for fine defaults
- the second highest juvenile imprisonment rate in Australia.³⁵⁵

Its report notes that the initial and subsequent periodic report did not address these issues. The report documented prima facie cases of violations of Art. 1 (re: torture) and Art. 16 (re: CID treatment or punishment), including:

- torture, assaults, and over-zealous, unreasonable and unnecessary use of force
- excessive and improper use of physical restraint by chemical spray, shackles, hobbles, handcuffs, and a full-body “restraint bed”, used in ways that cause injuries and discomfort, often for extensive periods in cruel and degrading conditions
- excessive and unreasonable use of isolation; misuse of “Medical Observation,” Special Handling Unit (SHU) and administrative isolation cells for punitive purposes, contributing to high levels of self-harm and suicidal desperation of prisoners
- “lockdowns” by which prisoners are kept in cells for excessive periods, for example at Casuarina Maximum Prison and Bandyup Women’s Prison
- gross overcrowding and poor, unhygienic living conditions; mixing of remand and sentenced prisoners, young and adult prisoners
- inadequate health services and inappropriate medical attention, forced medication and sedation of prisoners, sometimes without direction or supervision of medical staff; particularly poor conditions for mentally ill and drug dependent prisoners

³⁵² Ibid, para 26.

³⁵³ Ibid, para 32.

³⁵⁴ Ibid, para 38.

³⁵⁵ WA Deaths in Custody Watch Committee Report to the UN Committee Against Torture, 2000. On file with authors.

- psychological abuses and neglect by prison officers who have scant appreciation of their duty of care and are insufficiently accountable
- arbitrary, excessive, inconsistent, capricious and undue punishments and misuse of administrative powers for punitive ends, for example under sections 36 and 43 of the *Prisons Act (WA)* 1981³⁵⁶
- The report also included concerns at the failure to incorporate provisions of CAT into criminal law in the state of WA, including legislative mechanisms, and the requirement to take measures to prevent torture (including training), and to prosecute and punish torture where it occurred.³⁵⁷

The ATSIC report argued that “Australia’s Second and Third Reports to the Committee against Torture fail to adequately address issues affecting Indigenous people in Australia and which may give rise to breaches of the Convention”, particularly as they related to CID treatment or punishment.³⁵⁸

ATSIC argued that:

- “mandatory sentencing regimes in the Northern Territory and Western Australia may constitute cruel, inhuman or degrading treatment because of gross disproportionality
- physical conditions and care and treatment provided to detainees in parts of Australia may constitute cruel, inhuman or degrading treatment
- there has been insufficient implementation of recommendations from the Royal Commission into Aboriginal Deaths in Custody, and as a result
- preventative measures have not been introduced
- there has been insufficient training in safe custody procedures
- review procedures to ensure compliance are inadequate
- measures of scrutiny of actions of public officials are inadequate³⁵⁹

The ATSIC report noted the failure of the Second and Third Periodic Report to refer to the *National Inquiry into Racist Violence* which documented widespread allegations of torture and cruel, inhuman and degrading treatment and punishment and included recommendations to address the instances. The report also documented contemporary possible breaches of CAT by police officers, documenting systemic statistical evidence (ABS and WA Aboriginal Legal Service data) and three individual cases in Queensland (2) and the Northern Territory (1).³⁶⁰

The ATSIC report noted that “Amnesty International, in 1993, noted that ‘conditions in certain detention facilities may amount to cruel, inhuman or degrading treatment.’ In 1997 Amnesty International noted that Indigenous people ‘are still dying in prison and police custody at high levels, sometimes in circumstances which Amnesty International believes may have amounted to cruel, inhuman or degrading treatment. The deaths of Edward Murray, Daniel Yock, Kwementye Ross, Douglas Pitt, and ‘Johnno’ all raise issues of illtreatment and gross negligence and failure to exercise a duty of care.”³⁶¹

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ ATSIC Report to the UN Committee Against Torture, 2000. On file with authors.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Ibid.

Concluding Comments

The CAT Committee's Concluding Comments covered positive aspects, as well as areas of concern and recommendations for change.³⁶²

The Concluding Comments acknowledged as **positive**:

- the conduct of a series of investigations and inquiries into matters of relevance to the implementation of the CAT³⁶³
- consultations with NGOs in the preparation of the report³⁶⁴
- measures to provide for the rehabilitation of victims of torture and Australian contributions to the United Nations Voluntary Fund for the Victims of Torture³⁶⁵
- measures to address disadvantage experienced by Indigenous peoples³⁶⁶
- the establishment of the independent statutory office of the Inspector of Custodial Services.³⁶⁷

Nonetheless, the Committee also raised issues which they considered to **impede implementation** of the CAT, including concerns about:

- the practice of expelling individuals who invoke article 3 (the obligation not to return a refugee to their country of origin if they fear torture) and the lack of an independent mechanism of review for ministerial decisions³⁶⁸
- the use by prison authorities of instruments of physical restraint³⁶⁹
- allegations of excessive use of force or degrading treatment by police forces or prison guards³⁷⁰
- allegations of intimidation and adverse consequences faced by inmates who complain about their treatment in prisons³⁷¹
- legislation imposing mandatory minimum sentences, which has allegedly had a discriminatory effect regarding the indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system³⁷² and the need to address the socio-economic disadvantages that "inter alia, leads to a disproportionate number of indigenous Australians coming into contact with the criminal justice system"³⁷³
- the need to strengthen training for state actors³⁷⁴
- the need to address overcrowding in prisons.³⁷⁵

³⁶² Concluding observations of the Committee against Torture: Australia. 21/11/2000. A/56/44, paras.47-53.

³⁶³ Ibid, para 51.b.

³⁶⁴ Ibid, para. 51.c.

³⁶⁵ Ibid, para. 51.d.

³⁶⁶ Ibid, para. 51.e.

³⁶⁷ Ibid, para. 51.f.

³⁶⁸ Ibid, para. 52.a and 53.b.

³⁶⁹ Ibid, para. 52.b.

³⁷⁰ Ibid, para. 52.c.

³⁷¹ Ibid, para. 52.d.

³⁷² Ibid, para. 52.e.

³⁷³ Ibid, para. 53.g.

³⁷⁴ Ibid, para. 53.c.

³⁷⁵ Ibid, para. 53.f.

Communications

Three communications have been finalised by the CAT Committee, all relate to fear of torture if “refouled” (returned) to their country of origin. All those who filed individual communications had been rejected in their claims for refugee status in Australia. In the case of Mr Elmi the CAT Committee found that expulsion of the communicant would constitute a breach of article 3.³⁷⁶ In the cases of NP and YHA the CAT Committee found that expulsion would not constitute a breach of article 3.³⁷⁷

Implementation of the CAT since 2000

Increasing complaints about acts of torture, cruel and inhumane treatment - prisons

The concerns raised in the Shadow Reporting process continued in the period since the Concluding Comments were issued. In particular, the use of chemical weapons as an instrument of restraint has continued. In one instance in Victoria capsicum spray was used to stop an individual from engaging in self-harming behaviours. Chemical weapons have also been used as a means of dispersing prisoners when they have gathered as a group and prison officials have sought to exert control over them.

The practice of strip searching has continued. Prisoners are searched before and after any contact visit: with family, lawyers or support workers. For prisoners who have a higher level of contact with their support workers, family members or lawyers, the number of strip searches they are subjected to is exponentially higher, and therefore appears to be used as a method of punishment for exercising legal rights. The practice of strip searching becomes a form of CID because of the disproportionate number of prisoners who have been sexually abused, and the re-traumatisation which occurs with every search.

Anecdotal evidence suggests that concerns about retribution on prisoners for using complaints mechanisms continues.

There is an anecdotally noted trend, at least in Victoria, that women with children are increasingly being separated from their children. This is particularly the case for women in protection units. The State Government has argued that protection units also house sex offenders, and rather than find alternative accommodation for women with children, are removing children. This constitutes a form of CID treatment/punishment for women prisoners with children.

Increasing complaints about acts of torture, cruel and inhumane treatment –

Immigration Detention Centres

In the period since the 2000 review of Australia by the CAT Committee conditions in Immigration Detention Centres have deteriorated. Concerns can be grouped into the following key areas:

³⁷⁶ CAT/C/22/D/120/1998.

³⁷⁷ CAT/C/27/D/162/2000 and CAT/C/22/D/106/1998.

- allegations of torture (see case study)
- allegations of CID treatment or punishment (see below and also sections on the CRC and the ICCPR)
- CID concerns in relation to force feeding of detainees on hunger strikes; in particular a concern that the practice of force feeding constitutes a form of CID treatment.³⁷⁸

The following extract, an account from a former ACM employee, was prepared by the ABC's 7.30 Report.

ACM Employee: Basically there was crowd control, riot contract, which ended up being tear-gas sprayed into compounds that included cutting everyone to the ground -- women and children -- until basically no-one moved. They were handcuffed, including women and children. The children didn't get separated or put in a safe space. Everyone got tear-gassed, and little people were on the ground.

MIKE SEXTON: The former officer says the crackdown went on for hours and involved hundreds of detainees. There was no differentiation made between those who had or had not been involved in the protest earlier in the day.

ACM EMPLOYEE: People were extremely frightened, shocked and hurt. People were physically in pain, vomiting, and people were extremely scared. There was no separation between those who didn't want to participate and there was no separation who got the treatment or not.

Indeed, during a visit by the UN Working Group on Arbitrary Detention, concerns were expressed at the use of handcuffs, tear gas, and the use of batons.³⁷⁹

Optional Protocol to the CAT

In July 2002, the Howard/Coalition Government voted against the adoption of a draft Optional Protocol to the Convention Against Torture (DOP to CAT). The draft Optional Protocol will enable UN Inspectors to visit detention centres in the territories of States Parties to ensure that torture or CID treatment or punishment is not being practiced.

Australia lined up alongside countries such as Libya, Sudan, Nigeria, North Korea and China. During the debate at the UN, the Australian Government representative raised the issue of people movements and the need for "international cooperation in the area of migration, management and development". Early reports from DFAT stated that "Australia voted against the plan because it would be an open invitation for UN groups to enter Australian detention facilities at any time."³⁸⁰ Mr Downer later denied a link between the issue

³⁷⁸ For information on force feeding of detainees please see the story on the Law Report, <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s606948.htm>

³⁷⁹ <http://www.abc.net.au/7.30/s595924.htm>

³⁸⁰ http://www.abc.net.au/news/politics/2002/07/item20020726203230_1.htm

of immigration detention centres and the Australian opposition to the DOP to CAT. However, ALP spokesperson Kevin Rudd maintained that the link between the two was clear.³⁸¹

The failure to support the DOP to CAT has two negative implications:

- it undermines the development of international legal standards for the promotion and protection of human rights, mechanisms which will work towards the eradication of torture
- it denies those within Australian territories the right to assert their rights to be free from torture or CID treatment or punishment.

³⁸¹ <http://www.abc.net.au/worldtoday/s632529.htm>

CASE STUDY

ABUSE IN DETENTION

TORTURE AND FAILURE TO PUNISH OFFENDERS

This case study is taken from a story published in the Melbourne Age.³⁸²

"Sayed, a thirteen year old unaccompanied minor in the Woomera Immigration Detention Centre, had been placed in the "customs donga", a portable office, with other young detainees under the care of the female guard because it was unsafe for them to return to their compounds where protests were raging. Dr Meaney and the nurse had been called to the donga to examine one of the detainees.

Dr Meaney, who reported the assault to Woomera management and South Australia's Human Services Department under the mandatory reporting requirements, testified that a stocky guard entered the donga and seised Sayed by the neck and dragged him out.

Witnesses said the female guard who was supervising Sayed tried unsuccessfully to intervene, saying: "What the hell are you doing? . . . this boy has been with me all night."

Sayed later told investigators that once outside, the guards demanded that he identify detainees creating a disturbance in Mike compound.

When he refused, Sayed said that one guard pinned his arms to his side while another bashed him in the head. He was then shoved back into the donga.

Dr Meaney then examined Sayed and reported that the boy had bruising around his neck and a welt on his face, where the boy said he had been bashed. He examined him again the next day and had the injuries photographed. Witnesses said Sayed was sobbing and shaking violently when he was pushed back into the donga. He told a detainee who tried to comfort him: 'see what they do to us? Is this what Australia is about?'

The violence perpetrated against Sayed constitutes torture under the CAT inasmuch as severe physical pain was inflicted on him for the purpose of obtaining information, by a person acting in an official capacity. Moreover, while the employees were originally sacked from ACM, Sydney management later re-instated them, thus violating the treaty which provides for punishment of those who inflict CID treatment on those in immigration detention.

³⁸² <http://www.theage.com.au/articles/2002/04/19/1019020706643.html>

CHAPTER SEVEN - CONVENTION ON THE RIGHTS OF THE CHILD (CROC)

What is the CROC?

The CROC is the primary UN human rights treaty on children.³⁸³ It sets out the child-specific dimensions of human rights, including:

- recognition of the best interests of the child as an over riding concern, although it acknowledges the responsibilities, rights and duties of parents³⁸⁴
- prohibition of discrimination on the basis of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status
- the right to life, nationality and state
- the rights of the child to contribute to decisions relating to their treatment
- rights to freedom of expression, association and peaceful of assembly
- acknowledgement of the role of the mass media
- right to protection from violence
- adoption issues
- the rights of refugee children, minority children, and children with disabilities
- the rights to health, social security, health, education, leisure, culture, recreation and recreation
- protection from economic exploitation, drug use, production and trafficking, sexual abuse and trafficking, cruel, inhuman or degrading treatment or punishment
- legal rights and protection under international humanitarian law.

It requires that all appropriate measures be taken to ensure that the rights are implemented.

Monitoring of the CROC

States that are party to the CROC are reviewed and monitored by the Committee on the Rights of the Child (HRC) which is comprised of ten experts. There are two main mechanisms:

- periodic reporting – State parties are required to submit comprehensive reports every five years³⁸⁵
- committee initiated request for further information.³⁸⁶

³⁸³ UN. Convention on the Rights of the Child. UN Doc. 44/25.

³⁸⁴ Ibid, Art. 3.

³⁸⁵ Ibid, Art. 44.

³⁸⁶ Ibid.

Australia and the CROC

Domestic implementation

The Hawke/ALP Government signed and ratified the CROC in 1990. Australia has one reservation in relation to the imprisonment of children: it argues that the geography and demography of Australia may mean that children are imprisoned with adults, if their right to maintain contact with their family is also to be respected (ie, the capacity for visitation rights).

The CROC has been scheduled to the *HREOC Act*. This means that HREOC can consider the CROC provisions in complaints they receive, and that they can conduct an inquiry if they consider that the acts or practices of the Commonwealth or Territories breach the rights and freedoms contained in the CROC. However, no specific legislation has been adopted to enact the provisions of the CROC in domestic law. A number of Commonwealth, state and territory policies implement provisions of the CROC. However, if the policy is revoked there is no capacity to argue in domestic judicial processes that it should be reinstated because of the CROC.

Australia's reports to the CRC

Australia has presented one report to the CROC Committee. The Initial Report was due in 1993 during the Keating/ALP Government, was submitted in 1996 during the Howard/Coalition Government and was considered in 1997. The Second and Third Combined Periodic report is due in 2003.

The 1997 reporting process

Government report

The Keating/ALP Government prepared the Initial Report, coordinated by the Department of the Attorney-General, in consultation with Commonwealth departments and State and Territory governments. It was tabled in Federal Parliament in 1995 by the Keating/ALP Government.³⁸⁷ The Howard/Coalition Government presented the report to the CROC Committee in 1997. The Initial Report³⁸⁸ covered the following issues:

- the adoption of an *Agenda for Families*, which included measures to support children under the social security program, in the provision of childcare
- the free health care system and new initiatives to address children and young people's health needs
- the capacity of the Supported Accommodation Assistance Program to meet the needs of young people

³⁸⁷ Statement on Tabling of Documents relating to consideration by the UN Committee on the Rights of the Child of Australia's First Report under the Convention on the Rights of the Child.
<http://www.law.gov.au/publications/CROCReports/table.html> [Accessed 26 August 2002] (hereinafter Attorney-General's Tabling Statement)

³⁸⁸ Australia. 1996. *Initial Report to the Committee on the Rights of the Child*. CRC/C/8/Add.31.
[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/5d604215991f582e41256330004abb77?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/5d604215991f582e41256330004abb77?Opendocument) [Accessed 19 August 2002].

- employment initiatives, including the national youth wage, pathways to employment program, and other programs
- the particular needs of Indigenous youth in all respects
- new approaches to the justice system
- a review of Unaccompanied Minors, and their guardianship by the Minister for Immigration. The report noted "that unaccompanied refugee minors could be regarded as among the most vulnerable children in Australia, the review specifically took note of the Convention on the Rights of the Child. Implementation of the Review's recommendations, which is currently occurring, will ensure that these minors are not disadvantaged with respect to other residents in comparable circumstances."³⁸⁹
- issues associated with the legal recognition of young people, and young people's experiences of the legal system and privacy measures
- the introduction of a particular focus on the needs of children living with disabilities
- health and well-being programs introduced to build the health of young people, and a particular focus on Indigenous children's health programs.

Government-Committee Dialogue

The Government-Committee dialogue³⁹⁰ included the following issues:

- clarification of age limits in legal processes and employment
- child abuse programs and corporal punishment
- concern at citizenship law which linked children's citizenship to that of their parents
- infringement of freedom of association because of policing methods directed at young people
- anti-discrimination measures
- concerns about Indigenous children
- youth homelessness
- regional and income disparities in access to education
- mandatory sentencing provisions: in response, the Australian representatives noted "The Government considered that the laws in question did not breach the Convention and that it was necessary to take account of the particular conditions in the Northern Territory, which made effective policing difficult. Furthermore, the best interests of the child had to be balanced against those of the wider community and it was clear that the worrying level of juvenile property crime in the region had not been reduced by the previous sentencing regime."³⁹¹

NGO Engagement

Defence for Children International (Australia) prepared an alternative report, *Australia's Promises to Children*³⁹² (1996). The report argued that there was a lack of commitment to the CROC, demonstrated by

³⁸⁹ Ibid, para 74.

³⁹⁰ UN. Committee on the Rights of the Child. 1997.

³⁹¹ 405th meeting, para 78.

³⁹² Report on file with authors.

the failure to adopt domestic legislation on the CROC. The report documented a number of breaches, including:

- abuse of children in systems of care
- denial of the rights of children of asylum seekers
- denial of Indigenous children's rights
- inappropriate youth sentencing laws.³⁹³

The alternative report noted that community organisations had not been consulted in the process of preparing the Government report.³⁹⁴ Moreover, the National Children's and Youth Law Centre argued that report did not

*... state clearly what steps have been taken to bring domestic law in line with the principles of the CROC and it does not contain an honest and objective appraisal of Australia's performance in implementing CROC over the three and half years since it was ratified...The information is frequently self-serving, selective and out of date.*³⁹⁵

Concluding Comments

The CROC Committee's Concluding Comments³⁹⁶ covered positive aspects, as well as areas of concern and recommendations for change.

The CROC Committee noted that rights of the child as recognised in the CROC were implemented in Australia through:

- "the wide range of welfare services"³⁹⁷
- the "universal and free education system"³⁹⁸
- the "advanced health system"³⁹⁹
- certain law reform measures.⁴⁰⁰

Nonetheless, the CROC Committee was concerned that ratification of the CROC did not give rise to a "legitimate expectation" that the provisions would be taken into account in administrative decision making, and that the CROC had not been incorporated into domestic legislation.⁴⁰¹

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Tim Anderson, Steve Campbell & Sheree Turner. 1996. *Youth Street Rights: A Policy and Legislation Review*. Sydney: National Children's and Youth Law Centre. http://www.law.uts.edu.au/~utsclc/youthreport/int_rec_yout_right5.3.htm [Accessed 16 August 2002].

³⁹⁶ United Nations. Committee on the Rights of the Child. 1997. *Concluding observations of the Committee on the Rights of the Child: Australia*. CRC/C/15/Add.79. <http://www.hri.ca/fortherecord1997/documentation/tbodies/crc-c-15-add79.htm> [Accessed 22 August 2002]

³⁹⁷ Ibid, para 3.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid, para 4.

⁴⁰¹ Ibid, para 7.

The CROC Committee was concerned that Australia lacked a comprehensive federal policy on children or monitoring mechanisms of measures adopted on children's behalf⁴⁰² and recommended that such mechanisms be put in place.⁴⁰³

Additional concerns (all of which had recommendations attached) included:

- the lack of public education on the scope and nature of the CROC and the need to conduct better education campaigns amongst diverse groups of people
- limitations in employment law (such that minimum ages for employment are not established)
- breaches in relation to criminal law (for example the low age of criminal responsibility)
- the treatment of children in detention
- the treatment of Indigenous children particularly in light of discriminatory treatment resulting from mandatory sentencing laws
- concern that Indigenous children and children from culturally and linguistically diverse backgrounds were discriminated against
- lack of prohibition of corporal punishment
- limitations on children's right to assembly
- the increase in homelessness amongst young people
- the need for improved mechanisms to address child abuse and to provide for the recovery and social reintegration of victim/survivors
- the CROC Committee also expressed concern at "the treatment of asylum seekers and refugees and their children, and their placement in detention centres."⁴⁰⁴

Australian Government's response

After the Committee considered the report, its Concluding Observations and the Summary Record of proceedings were tabled in Federal Parliament. In tabling the documents, the Attorney-General noted the positive comments of the CROC Committee, and also indicated the areas of concern raised by the CROC Committee. He concluded by stating:

*The issues raised by the Committee in connection with Australia's first report will be considered by the Federal, State and Territory Governments in the course of preparing Australia's second report under the Convention ... It is appropriate that these issues be considered jointly by all Australian Governments and not simply the Federal Government. This reflects Australia's system in which responsibility for children and their welfare vests in all Australian Governments.*⁴⁰⁵

⁴⁰² *Ibid*, para 9.

⁴⁰³ *Ibid*, para 24.

⁴⁰⁴ *Ibid*, para 20.

⁴⁰⁵ *Attorney-General's Tabling Statement*.

Implementation of the CROC since 1997

Detention of children in Immigration Detention Centres

In the period since the CROC report was completed, the practice of detaining asylum seekers has escalated. In December 2001, the Human Rights Commissioner reported that 582 children were in Immigration Detention Centres (IDCs) in Australia and announced that he would be conducting a Public Inquiry into the practice.⁴⁰⁶ The practice of detaining children in IDCs constitutes a violation of a series of human rights contained in the CROC. For example, Art. 22 requires that a child seeking refugee status receive appropriate protection and humanitarian assistance and Art. 37 requires that "the arrest, detention or imprisonment of a child...shall be used only as a measure of last resort and for the shortest appropriate period of time." Moreover, children are required to have the right to challenge the legality of the deprivation of their liberty. The Australian practice of detaining children for lengthy periods of time is in clear contravention of these obligations.

Additionally, the CROC requires that children enjoy all of the rights without discrimination. Amnesty International have argued that children in IDCs are being discriminated against on the basis of their immigration status.⁴⁰⁷ The Women's Rights Action Network Australia have argued that CEDAW and CERD recognise that appropriate measures must be taken to eliminate actions which have either the purpose or effect of discriminating against an individual. While the stated aims of Australia's migration program do not have the purpose of discriminating against individuals, the mandatory detention of asylum seekers has a discriminatory effect as the majority of people in immigration detention are from non-Anglo backgrounds.⁴⁰⁸

The practice of detaining children has implications on their enjoyment of civil and political rights, including the right to freedom of expression (Art. 13), thought and conscience (Art. 14), and the right to freedom of association (Art. 15); and economic, social and cultural rights, including the right to a standard of living adequate for physical, mental, spiritual, moral and social development (Art. 27), the special right to rest and play (Art. 31), and the rights to education (Art. 28 and 29) and health (Art. 24). For example, when HREOC officers visited Woomera IRPC they found that children had a propensity to self-harming behaviours: over a two-week period official ACM figures indicated that:

- five children sewed their lips
- three children slashed themselves
- two children ingested shampoo
- one child attempted to hang themselves
- thirteen children threatened to hurt themselves.⁴⁰⁹

⁴⁰⁶ Human Rights and Equal Opportunity Commission. 2001. "Media Release: National Inquiry into Children in Immigration Detention." http://www.hreoc.gov.au/media_releases/2001/01_71.html [Accessed 19 August 2002]

⁴⁰⁷ Amnesty International. 2002. Submission to HREOC Inquiry. http://www.hreoc.gov.au/human_rights/children_detention/submissions/amnesty_australia.html [Accessed 19 August 2002].

⁴⁰⁸ WRANA. 2002. Response to the Draft Fourth and Fifth Periodic Report of the Australian Government to CEDAW. On file with authors.

⁴⁰⁹ Human Rights and Equal Opportunity Commission. 2002. "Media Release: Woomera Immigration Detention Centre Report of visit by HREOC officers." http://www.hreoc.gov.au/media_releases/2002/05_02.html [Accessed 19 August 2002].

Moreover, while ACM attempted to provide schooling, it is only available to those under twelve, and is substantially below the standards provided for Australian twelve year olds: it is available for two hours a day, and four days a week.⁴¹⁰

HREOC officers observed that “Woomera IRPC is now enveloped in a self-reinforcing miasma of despair and desperation” and concluded that it was an inappropriate environment for children.⁴¹¹ These findings were corroborated by Justice Bhagwati, the UN High Commissioner for Human Rights Special Envoy. His report stated that “these children were growing up in an environment, which affected their physical and mental growth and many of them were traumatised and led to harm themselves in utter despair.”⁴¹² Human rights issues raised in his report included:

- concerns that “most children appeared seriously traumatised, and severely affected by a culture of self-harm”⁴¹³
- inadequate education services⁴¹⁴
- concerns that families are being separated by the process of detention⁴¹⁵ and by the process of granting Temporary Protection Visas which preclude family reunification⁴¹⁶ (also corroborated by the case of Mr Bakhtiyari who resides in Sydney and whose wife and children are detained in the Woomera IRPC. Because persons in immigration detention, or their relatives, have no enforceable statutory rights concerning the location or circumstances of the detention, a TPV holder in Mr Bakhtiyari position cannot legally compel ACM to move his family to Villawood where he would at least be able to visit them).
- Justice Bhagwati argued that “the human rights situation in Woomera IRPC could, in many ways, be considered inhuman and degrading” and that the “detention of children in the context of immigration procedures is certainly contrary to international standards.”⁴¹⁷

Children in Immigration Detention Centres and on Temporary Protection Visas

In addition to the Unattached Children in Immigration Detention Centres, a number of Unattached Children have been granted Temporary Protection Visas. Unattached Children are children (under the age of 18) who are in Australia without parents or guardians. They are wards of the Immigration Minister under the terms of the *Immigration (Guardianship of Children) Act (Cth)* 1946. As a guardian, the Minister has been charged with ensuring that their best interests are protected.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² United Nations. High Commissioner for Human Rights. 2002. Report of Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights. Mission to Australia 24 May to 2 June 2002. *Human Rights and Immigration Detention in Australia*. <http://www.unhchr.ch/huricane/hurricane.nsf/newsroom> [Accessed 19 August 2002], 7.

⁴¹³ Ibid, 16.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid, 15.

⁴¹⁶ Ibid, 16.

⁴¹⁷ Ibid, 19.

As the case study on children in IDCs suggests, there is prima facie evidence that the best interests of the child are not being met through their detention. This constitutes not only a violation of the CRC, but also a significant conflict of interest for their guardian, Mr Ruddock.

The conflict of interest extends to children released into the community on Temporary Protection Visas. As with adults on TPVs these children are unable to access family reunion rights, travel rights, access to settlement services, access to the 510 hours free English Language classes offered by the Adult Multicultural Education program (AMEP), public housing or other government funded welfare programs, federally funded government tertiary education in public universities, or government employment training programs. Moreover, the Minister for Immigration has actively worked to preclude TPV holders from having access to support services traditionally offered by refugee agencies.⁴¹⁸ This means that TPV holders are reliant on support from mostly charities and welfare agencies, often church based. The situation of support for TPV holders is also compounded by the political decision to link the on-shore and off-shore protection program. For example, former refugees who now have residency and have applied for members of their family to come to Australia on family reunions can, in some cases, consider that on-shore applicants are taking places which could have gone to their family. As such, there can be a level of antipathy among former and current refugees/asylum-seekers from the same country of origin.

It is doubtful that the Minister, as a policy maker, is acting to safeguard the best interests of children on TPVs, which is meant to be his role as guardian. For example, Unattached Minors on TPVs have theoretically been able to access secondary education in each state (because it is funded through state government resources). Up until the age of eighteen, they are able to access Centrelink funding to enable them to participate in education. However, at eighteen, the funding is halted, despite the fact that many of the students (who are very often diligent in their studies) have not completed their education (many refugee children have experienced significant periods of dislocation prior to arrival in Australia, and their education has frequently been extensively interrupted; moreover, they have started their education in a new second language). The Minister, as politician, has enacted policies that preclude Unattached Minors having appropriate "guardianship exit strategies" put in place, jeopardising their right to an education. Therefore, the Minister, as Guardian, cannot be said to acting in their best interests.

The Guardianship function of the Minister has also been compromised by the political function in respect of the \$2000 cash incentive being offered to Afghani asylum seekers. Evidence sourced in South Australia suggests that DIMIA officers met with unattached minors who had been released into alternative detention, and whose status was not yet determined. They made the unattached minors aware of the \$2000 incentive, and encouraged the children to ask their legal representatives about the issue as an alternative to their current circumstances. It is understood that the DIMIA officers noted that there would have to be an individual in Afghanistan who was either a parent or who could assume legal guardianship. Nonetheless, in a context where asylum-seekers are generally provided with minimal legal advice and notification of process,

⁴¹⁸ The Asylum Seeker Project in Victoria notes that 'staff at Migrant Resource Centres and DIMA funded settlement workers in Community Health Centres, are told specifically by the Department of Immigration that they are not permitted to assist Asylum Seekers in any way if approached.' <http://vic.uca.org.au/linkup/whoare1.htm>

this constitutes a significant breach of the Minister's guardianship function. It is entirely doubtful that the best interests of the child would be met by returning them to Afghanistan at this time.

Moreover, while the Minister is meant to have an organisational relationship with the state authorities to whom he delegates his guardianship responsibilities, these authorities were not briefed or consulted about the September 2001 legislative amendments to the *Migration Act* which meant that those individuals who had spent seven days or more in a country in which they may have been able to seek protection, and who subsequently entered Australia without appropriate legal documents, became ineligible for permanent protection visas if their application was submitted after 27 September 2001. In talking with civil society advocates it has become apparent that prior to the change in legislation, in some states DIMIA officers provided advice to unattached minors, that they should postpone submitting their application for permanent protection visas. Subsequent to the adoption of the new legislation, these unattached minors have become ineligible for permanent protection visas. Again, the conflict of interest is manifestly evident.

Indigenous children

The *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families, Bringing Them Home* [Bringing Them Home] was released in May 1997. The report documents the practices which created the Stolen Generations, and made a series of recommendations, including calls for reparations for the injury suffered, based on the van Boven principles for reparation for gross violations of human rights as the basis of recommendations for addressing the harm caused;⁴¹⁹ and that self-determination for Indigenous children and young people be implemented through national framework legislation for juvenile justice and care and protection systems.⁴²⁰ The report also considered the contemporary forms of separation practiced against Indigenous peoples today, noting the continuing impact on Indigenous families of policies of forced separation.⁴²¹

The response of the Commonwealth Government has been inadequate, and the failure to acknowledge the harms suffered and the need for reparations has been characterised as racist by HREOC.⁴²²

As noted, the report commented on contemporary forms of separation and the continuing harm being perpetrated against Indigenous children. Indigenous children are over-represented in the criminal justice system (see below). The Aboriginal Legal Service of WA argues that:

The detention of Aboriginal youth is a form of child removal. This can not be denied or ignored. Incarceration and its ensuing deprivation of liberty is a destructive and dehumanising experience.⁴²³

⁴¹⁹ HREOC. 1997. Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. <http://www.austlii.edu.au/au/special/rsproject/rsjlibrary/hreoc/stolen/stolen26.html> [Accessed 16 August 2002].

⁴²⁰ *Ibid*, <http://www.austlii.edu.au/au/special/rsproject/rsjlibrary/hreoc/stolen/stolen44.html> [Accessed 16 August 2002].

⁴²¹ *Ibid*.

⁴²² HREOC. 2000. International Review of Indigenous issues in 2000: Australia http://www.hreoc.gov.au/social_justice/nt_issues/children.html [Accessed 16 August 2002].

The 2001 Social Justice Report notes the following:

Juvenile detention rates among our young people were 31 times the non-Aboriginal rate. This is the highest rate in the country and is twice the national rate.

When our young people do come into contact with the police, they are more likely to be arrested and charged than non-Aboriginal young people are. And they are less likely to be diverted from the juvenile justice system into other programs to try and keep them out of jail - only 54 per cent of our young people get offered other programs, compared to 80 per cent of non-Aboriginal youth.

Dr Jonas found that the WA diversion schemes are sub-standard in general, and that they particularly fail Aboriginal young people. Most diversionary schemes are in urban areas, and the little that is available in regional areas is culturally inappropriate.

Our young people, our future, are failed in many ways. They live in families with a per-capita income of around \$120 per week, compared to \$350 per week for non-Indigenous Australians.

Only 11 per cent of Aboriginal student in the Kimberley complete year 12. This compares to a national rate for all students of more than 70 per cent.⁴²⁴

Mandatory sentencing

Mandatory sentencing laws in WA (introduced in 1996 by the Lawrence/ALP Government) and the NT (introduced in 1997 by the Burke/National Country Party Government) breached CROC and ICCPR. The laws require that the court impose a minimum sentence for a series of mostly property related offences. As a result, juveniles in the NT and WT were imprisoned for up to 12 months for a range of minor property offences:

- two 17 year old girls with no previous criminal convictions were both sentenced to 14 days in prison for theft of clothes from other girls who were staying in the same room
- a 17 year old girl with no prior convictions was sentenced to 14 days in prison for receiving jewellery stolen by other young people. The jewellery was later recovered
- a young offender broke into a toy shop and stole some computer games. He was detained for 14 days even though he confessed to police and his parents paid compensation to the owner of the shop
- two young apprentices were each imprisoned for 14 days for first offences. One of them broke a window and the other broke a light worth \$9.60.⁴²⁵

In 1999, the Human Rights and Equal Opportunity Commission prepared a submission to the Senate Legal and Constitutional Committee, in which they argued that mandatory sentencing was clearly in breach of CROC provisions protecting the best interests of the child. HREOC put the position that rather than seeking

⁴²³ HREOC. 1997. *Bringing them home*. <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen53.html> [Accessed 16 August 2002].

⁴²⁴ HREOC. 2001. *Social Justice Report 2001*. http://www.hreoc.gov.au/social_justice/sjreport_01/recommend.html [Accessed 16 August 2002].

⁴²⁵ HREOC. 2000. *Mandatory detention laws in Australia: An overview of current laws and proposed reform*. http://www.hreoc.gov.au/human_rights/children/mandatory_briefing.html [Accessed 16 August 2002].

to secure the best interests of the child, "On the contrary, these provisions are harsh and punitive and were specifically intended to achieve deterrence and retribution rather than rehabilitation."⁴²⁶ Moreover, the CROC contains provisions requiring that "...the imprisonment of a child shall ... be used only as a measure of last resort and for the shortest appropriate period of time." (Art. 37.b) and that penalties shall be reviewable (Art. 41.2.b).

In July 2000, the Northern Australian Aboriginal Legal Aid Service filed a communication with the UN Human Rights Committee on the issue of mandatory sentencing. While the NT legislation was over-turned when the ALP won office, the mandatory sentencing provisions remain in effect in Western Australia.

Detention

The mandatory sentencing laws in WA and the NT were all the more damaging to Indigenous children because of the lack of alternative sentencing options, for example diversions or community based programs. This issue was raised in the 1996 Australian Law Reform Commission and HREOC report *Seen and heard*⁴²⁷ and the issues remain today. For example, children on Groot Island are placed in Don Dale Centre in Darwin; children from northern WA are placed in centres in Perth. This makes it almost impossible for families to visit their children, and increases the sense of isolation the children feel. The 1996 report noted that not one of the then eight Indigenous children held in detention had received a visitor during their period of detention.⁴²⁸ For Indigenous children the experience of detention can be particularly detrimental, particularly as "a culturally appropriate environment may not exist in some juvenile detention centres."⁴²⁹ The Aboriginal Legal Service of WA presented the following evidence to the Inquiry:

I hate it inside. The guards look down on us Aboriginal kids. I know it is not good for the white kids but we have it worse. They treat us like animals. They don't think we have a brain. They think all Aborigines are crooks. I remember last time I got out of jail, one of the guards said he looked forward to seeing me back soon. He had a smile when he said it. Child, aged 15 years.⁴³⁰

It is hard for my family to visit me. They are scared of prison and white authorities. Dad has been in prison a few times and mum was at New Norcia. Dad was in a mission up near Broome. It was just like a prison. My brother is in Casuarina now. When my mum and dad come to visit me they get really upset and scared. It must be all the bad memories from their childhood and dad's stay in prison. The prison officers don't help. They are not friendly. We don't trust them. Child, aged 14 years.⁴³¹

⁴²⁶ HREOC. 1999. Submission by the Human Rights and Equal Opportunity Commission to the inquiry by the Senate Legal and Constitutional Legislation Committee into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 http://www.hreoc.gov.au/word/human_rights/mandatory_sentencing_submission_99.doc [Accessed 16 August 2002].

⁴²⁷ Australian Law Reform Commission and HREOC. 1997. *Seen and heard: priority for children in the legal process* Report of the National Inquiry into Children and the Legal Process. <http://www.austlii.edu.au/au/other/alrc/publications/reports/84/ALRC84.html> [Accessed 16 August 2002].

⁴²⁸ Ibid, para 20.120.

⁴²⁹ Ibid, para 20.122.

⁴³⁰ Ibid.

⁴³¹ Ibid.

Moreover, the 1996 report points to an increased rate of incarceration among children from culturally and linguistically (CALD) diverse communities⁴³² and this trend has continued. Seen and heard contained a series of recommendations to ensure that Indigenous and children from CALD communities received more appropriate treatment, but it is unclear that the recommendations have been successfully addressed.⁴³³

Age and the legal system

The age of criminal responsibility was identified by the CROC Committee as an area of concern. There continue to be a number of discrepancies in the way in which the legal system responds to the age of children. For example:

- there are concerns that the age of criminal responsibility is too low. The CROC Committee has opined that ten is too young, yet in Tasmania the age is seven, and in the ACT it is eight⁴³⁴
- the defence of *doli incapax* (the notion that a child is too young to engage in criminal conduct) was raised by participants in a Victorian conference on children's rights as continuing to be of concern. In particular, the process of determining whether the defendant understood they were doing something wrong was affected by police processes of investigation⁴³⁵
- there are discrepancies between states, territories and the commonwealth as to the age at which children enter the adult criminal system. In the NT, Victoria, Tasmania and Queensland children enter the adult criminal system at seventeen. Eighteen is the age of majority under general Australian law and the CROC and this should apply to criminal law.⁴³⁶ Some governments have recognised that changing the age of consent to 18 is a smart electoral move, but then on gaining office have failed to take action (for example, the Bracks/ALP Government in Victoria made this promise). Moreover, some existing programs which seek to focus on rehabilitation of 17-21 year olds (the Dual Track system in Victoria for example) and which are consistent with the rehabilitation model favoured by CROC, are being threatened in the context of current "law and order" debates
- the age of consent varies across jurisdictions and according to the sexual partner. Generally the age of consent for male homosexual sex is higher than for heterosexual and lesbian sex.⁴³⁷ In 2002, the ALSO Foundation noted that the age of consent for gay sex is 16 in the ACT and Victoria, 18 for anal sex in Queensland, 21 in WA, 18 in NSW and the NT, and 17 in South Australia and Tasmania.⁴³⁸

⁴³² Ibid, para 20.125.

⁴³³ Ibid.

⁴³⁴ Ibid, 18.12.

⁴³⁵ Federation of Community Legal Centres Victoria. 2001. *The Rights of Children and Young People: Working Conference Report*, 38.

⁴³⁶ ALRC/HREOC, *Seen and Heard*, paras 18.21 and 18.22.

⁴³⁷ Ibid, para 18.23.

⁴³⁸ Daryl Higgins, ed. 2002. *Alsorts: A sexuality awareness resource*. (ALSO Foundation: Melbourne), 25.

CASE STUDY

ASYLUM SEEKER CHILDREN ARBITRARILY DETAINED - DENIED THEIR BEST INTERESTS, RIGHTS TO EDUCATION, AND RIGHT TO A STANDARD OF LIVING ADEQUATE TO MENTAL, PHYSICAL, SPIRITUAL, MORAL AND SOCIAL DEVELOPMENT

Children are guarded by current and former prison guards in the IDCs, with the following implications:

"A former correctional officer employed at Woomera said: 'ACM's training is utterly inappropriate and based on a prison model. Many guards view the detainees as criminals and are warned to always expect resistance. They go into a CERT (critical emergency response) toggled up in riot gear and prepared to use force in situations best controlled by simply talking to people.'"⁴³⁹

The following case study was included in a section of the KIDS report which documented prima facie breaches of the protection of the best interests of the child, and the rights to a standard of living adequate to mental, physical, spiritual, moral and social development:

Our family had to share the absolutely unfurnished dormitory with another two families. Bed sheets hung over strings were used to separate our territory from the other families. My son was allowed to ride his tricycle only within our area, but he soon lost interest in doing even that. He attended the only preschool available there. ... Elementary English and self-directed painting classes were the only available lessons. Very quickly he became bored and did not want to attend school. After a few weeks he would no longer attend the school. He complained, saying: "There is nothing but classes where we paint whatever we want. I don't want to go any more. I want to go to a real school. Please will you take me to a real school."

He witnessed a detainee who attempted to slash himself with a glass shard, so he rushed panicky to his father's lap frightened, and screamed: "Take me back to the room. I can't stay here. Please take me back to the room now. I can't"

I observed that our son's confidence diminished, his bed-wetting became more frequent and he further lost interest in eating and taking part in any social activities with other children. His panic attacks and terrors in the night continued. Although he was a well socialised and well-mannered boy when we came to Australia, and knew how to obey, he is now showing seriously unacceptable behaviours. ... His speech is delayed and often incomprehensible ... He cannot articulate words properly, although before we came to Australia he showed no such symptoms. Now, some seven months after we arrived in Villawood and almost two years since we sought asylum in Australia, I observe my son's behaviour with fear for the future. Amongst the remarkable problems our family

⁴³⁹ <http://www.theage.com.au/articles/2002/03/17/1015909915818.html>

*encounters with my son are hyperactivity, impulsiveness, aggressiveness and misbehaviour. None of our other children were behaving like this at his age, and his own behaviour was not like this before we were put in detention."*⁴⁴⁰

⁴⁴⁰ KIDS (Kids in Detention Story). 2002. Submission to the Human Rights and Equal Opportunity Commission National Inquiry into Children in Immigration Detention by the KIDS (Kids in Detention Story) Working Group. <http://members.ozemail.com.au/~burnside/hreoc-submission.pdf> [Accessed 27 August 2002], 158-9.

Marching to the millennium - successive Australian Governments continue to retreat from the UN human rights treaty system

This table demonstrates the overwhelming trend of a retreat from, and attack on, the treaty system by the Keating/ALP and Howard/Coalition Governments.

| Year | Government | Event | Response |
|------|------------------|---|------------------|
| 1994 | Keating/ALP | The HRC issued views that legislation outlawing consensual homosexual acts in private was a breach of the right to privacy. The Keating/ALP Government adopts legislation which forces a change in Tasmania. | 👍 |
| 1995 | Keating/ALP | The Keating/ALP Government, following <i>Teoh</i> , states that ratification of a human rights treaty does not create a "legitimate expectation" that the treaty will be used in administrative decision-making. | 👎 |
| 1997 | Howard/Coalition | Howard/Coalition Attorney-General Daryl Williams tables the Concluding Comments of the CRC. | 👍 |
| 1997 | Howard/Coalition | The Howard/Coalition Government dismisses the Concluding Comments of the CEDAW Committee. | 👎 |
| 1997 | Howard/Coalition | The HRC issues views that the practice of mandatory detention of asylum seekers is arbitrary detention. The Howard/Coalition Government disputes the views. | 👎 |
| 1998 | Howard/Coalition | The CERD issues an early warning against the Howard/Coalition Government after the failure of the Keating and Howard Governments to submit Australia's tenth, eleventh and twelfth report. | 👎 |
| 1999 | Howard/Coalition | An urgent communication is made to the Committee Against Torture to stop an asylum seeker being returned to a situation where he feared death (breach of article 3). The Committee directs that he be kept in Australia. The Howard/Coalition Government complies but continues to keep him in detention. | 👍 |
| 2000 | Howard/Coalition | Lawyers in the NT file a communication with the HRC against the practice of mandatory sentencing. | No result as yet |
| 2000 | Howard/Coalition | The Howard/Coalition Government dismisses the Concluding Comments of the ICERD Committee. | 👎 |
| 2000 | Howard/Coalition | The Howard/Coalition Government dismisses the Concluding Comments of the CAT Committee. | 👎 |
| 2000 | Howard/Coalition | The Howard/Coalition Government dismisses the Concluding Comments of the Human Rights Committee. | 👎 |
| 2000 | Howard/Coalition | The Howard/Coalition Government dismisses the Concluding Comments of the ICESCR Committee. | 👎 |
| 2000 | Howard/Coalition | The Howard/Coalition Government announces it will not ratify the CEDAW Optional Protocol, denying women in Australia the right to petition the CEDAW Committee. | 👎 |
| 2002 | Howard/Coalition | The Howard/Coalition Government follows the US Government, and announces it will not ratify the Kyoto Protocol. | 👎 |
| 2001 | Howard/Coalition | The Howard/Coalition Government dismisses the report of the Special Rapporteur on Racism. | 👎 |
| 2002 | Howard/Coalition | The Howard/Coalition Government votes against the adoption of a CAT Optional Protocol which will allow unannounced visits to prisons and detention centres. | 👎 |
| 2002 | Howard/Coalition | The Howard/Coalition Government ratifies the International Criminal Court Statute. | 👍 |
| 2002 | Howard/Coalition | The Howard/Coalition Government dismisses the report of the UN High Commissioner for Human Rights Special Envoy, who found that conditions in the Immigration Detention Centres may have constituted cruel, inhuman and degrading treatment and punishment. | 👎 |

CHAPTER EIGHT - KEY THEMES

*... the quality of democracy and the transparency and integrity of our judicial system, the freedom of our press, the freedom people have from fear of political affiliation, I mean these are gold plated in this country...*⁴⁴¹

John Howard's statement is an attempt to cast Australia as a model nation, by characterising its institutions as exemplifying "best practice" and, by implication, guaranteeing full rights to its peoples. However, the existence of institutions such as free elections, a judicial system, and the media does not itself constitute effective democracy, but is best measured by the way in which those institutions honour and give effect to the needs and aspirations of all people within a nation. Those needs include recognition of and respect for people's inherent dignity, which in the 20th century was recognised by world nations and given legal form in the Universal Declaration of Human Rights and associated human rights treaties.

Contemporary Australian Governments continue the colonial nation's history of systematic practices that have undermined the realisation of human rights in this country. Howard's Coalition Government, in particular, directly abuses the human rights of its own peoples and so fails to live up to its obligations. The Government also denies its international human rights responsibilities in relation to treaties; for example, by its treatment of asylum seekers. This is an indirect wrong to the Australian people, because it is done in our name. Most recently, there is alarming evidence of a "slippery slope" where the Howard/Coalition Government supports both the holding without charge of asylum seekers as non-citizens in this country, and the holding without charge in another country of David Hicks and Mamdouh Habib, both Australian citizens.

Human rights violations are reinforced in recent Governments' attitudes toward the UN, including the practice of late reporting, and the fact that Australia either makes little response to UN treaty bodies' criticisms, or rejects them outright. The Howard/Coalition Government has also refused to allow visits by some treaty system officials, and has shown a lack of respect for them when they do come. This last stance includes public denigration of the UN human rights treaty framework and process. The Prime Minister's comment above was made in response to international condemnation of the Government policy statement which heralded the formal launch of its attack on the system.

By dismissing the legitimate criticisms of UN treaty bodies, the Howard/Coalition Government has marginalised itself within the human rights treaty system. It has also silenced those who have experienced human rights violations in Australia – both citizens and non-citizens. Consequently, the concept of human rights in the popular imagination of many people living in Australia is severely diminished.

Government attitude to treaties has often also resulted in only partial ratification, declarations of reservations, and limited incorporation and scheduling; along with a resistance to applying them (and post-*Teoh*, a tendency from both major political parties to seek to ignore treaties unless they are incorporated). As

⁴⁴¹ Prime Minister John Howard, ABC TV, 30 August 2000, seemingly forgetting that gold plate scratches off to reveal cheap metal.

the Report has documented, human rights principles have also tended to be “read down” by the Government so that, for example, “equality” is interpreted as only formal, rather than substantive, in obligation.

Australian Government practices and attitudes are further reinforced by misinformation, lies, propaganda and historical revisionism directed at the Australian people, including wedge politics – appeal to fear of “the other” - and bald denials of violations in the face of independent evidence. Many of the actions and inactions reinforcing human rights abuses are themselves human rights violations by Australia, because the Government is obliged to positively promote human rights, not just refrain from violating them. It is also obliged to ensure that non-State actors, for example, individuals, organisations or enterprises, also refrain from violating human rights treaty obligations. Government violations are assisted by a lack of information dissemination to, and education of, Australian peoples about the process and content of treaty systems; and the use of smokescreens on issues like federalism;⁴⁴² and sovereignty.⁴⁴³ This stance encourages ignorance about what human rights abuses and obligations actually mean.

This, in turn, means that people are less likely to seek to assert and enforce their rights and freedoms, and to protest about rights abuses committed in Australia’s name. The fact that there is still a great deal of resistance only shows how strong, numerous and wide-ranging the violations have become. However, those who do speak out are less likely to be heeded or to have an effective remedy, coupled, as the situation is, with Australia’s partial implementation of legal mechanisms.

This report also notes that the Howard/Coalition Government 2000 “dummy spit” has set dangerous precedents, which are being exported to countries in our region and beyond:

- a refusal to engage with legitimate criticisms, which undermines the integrity of the treaty system and freedom of expression at an international level and within Australia
- a refusal to acknowledge the expertise of the treaty committees, which also compromises the integrity of the system
- the Australian “reform” agenda is not predicated on reform through engagement; rather, Australia has rejected the legitimacy of the UN treaty framework and process, yet then positions itself as a supporter
- the Australian “reform” agenda plays into the hands of states which consistently assert sovereignty arguments against the UN (for instance, valuing the State report over that of NGOs; arguing that the nation-state does not have to respond to the criticism of people from outside Australia who come from countries with “worse” human rights records)
- the undermining of universality (in so much as Australia seeks to create a ranking of human-rights-violating countries making it illegitimate to criticise nations which appear to be above a certain standard – but also ignoring the fact that human rights are not comparative)
- establishing different tiers of international law, which by its nature undermines international law.

⁴⁴² That is, the fallacious argument that the Commonwealth cannot make the States enforce human rights or that States cannot take their own initiative.

⁴⁴³ This can take two forms. First, in relation to the nation-state, which is an issue in fact long accommodated in the principles of the treaty system. Second, in relation to Parliamentary sovereignty, which does not however mean that the Government need not be democratic, and certainly even if the electoral process is assumed to reflect the will of most people, there is a pronounced lack of consultation and informed debate about the Government’s recent actions concerning human rights, and therefore no clear mandate for Government actions.

This report is therefore about informing and empowering Australian people to assert, promote and protect the human rights of people in Australia and elsewhere, and to encourage people living in Australia to demand that the Government honour its legal obligations to do these things. Aspects of the Australian quality of life eulogised by John Howard and others are actually enshrined in human rights treaties, through such principles as the right to life, shelter and family. In this sense, human rights are not exceptional at all, but rather an essential aspect of ordinary and meaningful living as human beings. As such, they can never be “off” a truly democratic agenda, and any attempt to make them so is “**right off**”.

APPENDIX A - GLOSSARY

Treaty - an agreement between States (countries) that is binding at international law.

Signature – an announcement of intention to become bound to a treaty. The second step of ratification must be taken to make it legally binding.

Accession – the act of becoming party to a treaty which has already entered into force.

Ratification – the legal act of agreeing to be bound by a treaty. Usually a certain number of ratifications are required for a treaty to enter into force.

Enter into force – after a predetermined number of states have ratified the treaty, it becomes a legal document.

Reservation – a statement indicating that a State Party will not agree to certain obligations in the treaty. Reservations should not undermine the purpose of the treaty.

Direct implementation – where the provisions of a treaty are implemented into legislation and are justiciable within the domestic legal system.

Indirect implementation – where the provisions of a treaty are implemented via policy measures, but have no formal basis within the domestic legal system.

Protocol – a legally binding addition to a treaty. Generally, protocols either add new substantive rights, or offer new mechanisms for enforcement.

Individual Communication – the process by which individuals can submit a complaint to selected UN human rights bodies, alleging violation of obligations contained in a particular treaty. The individual must have exhausted all domestic avenues for redress. The committee of oversight adopts views on the communication, but these are not legally binding.

FOR INFORMATION ON HUMAN RIGHTS PROCESSES AND ISSUES IN AUSTRALIA

Human Rights and Equal Opportunity Commission – <www.humanrights.gov.au>

Defence for Children Australia - <www.dci-au.org/>

Women's Rights Action Network Australia – <home.vicnet.net.au/~wrana/>

United Nations Association of Australia, Weekly Update - <www.unaa.org.au/fset.html>

Refugee Council of Australia – <www.rcoa.org.au>

ATSIC – <www.atsic.gov.au>

Deaths in Custody Watch Committee, WA (Inc) - <http://www.deathincustody.com/windex_mid.html>

Community Legal Centres in Australia – <www.nacalc.org.au> or <www.austlii.edu.au/au/other/clc/>

The Complete Activist website - <www.nacalc.org.au/activist/index.html>

FOR INFORMATION ON THE RATIFICATION PROCESS FOR TREATIES IN AUSTRALIA:

<www.austlii.edu.au/au/other/dfat/reports/infokit2002.html>

APPENDIX B – MOST RECENT CONCLUDING COMMENTS/OBSERVATIONS OF THE UN HUMAN RIGHTS TREATY BODIES IN RELATION TO AUSTRALIA

International Convention on the Elimination of Racial Discrimination

Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia. 19/04/2000.

CERD/C/304/Add.101. (Concluding Observations/Comments)

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION

Concluding observations of the Committee on the Elimination of Racial Discrimination

Australia

1. The Committee considered the tenth, eleventh and twelfth periodic reports of Australia, submitted as one document (CERD/C/335/Add.2), at its 1393rd, 1394th and 1395th meetings (CERD/C/SR.1393, 1394 and 1395), held on 21 and 22 March 2000. At its 1398th meeting, held on 24 March 2000, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the reports submitted by the State party and the additional oral and written information provided by the delegation, while regretting the late submission of the tenth and eleventh periodic reports. Appreciation is expressed for the comprehensiveness of the report and of the oral presentation. The Committee was encouraged by the attendance of a high-ranking delegation and expresses its appreciation for the constructive responses of its members to the questions asked.

3. The Committee acknowledges that the State party has addressed some of the concerns and recommendations of the Committee's concluding observations on the ninth periodic report (A/49/18, paras. 535-551).

B. Positive aspects

4. The Committee is encouraged by the attention given by the State party to its obligations under the Convention and to the work of the Committee.

5. The Committee notes with appreciation the many measures adopted by the State party during the period under review (1992-1998) in the area of racial discrimination, including those adopted to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The Committee welcomes the numerous legislative measures, institutional arrangements, programmes and policies that focus on racial discrimination, as comprehensively detailed in the tenth, eleventh and twelfth reports, including the launching of a "New Agenda for Multicultural Australia" and the implementation of the "Living in Harmony" initiative.

C. Concerns and recommendations

6. The Committee is concerned over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories.

7. The Committee reiterates its recommendation that the Commonwealth Government should undertake appropriate measures to ensure the consistent application of the provisions of the Convention, in accordance with article 27 of the Vienna Convention on the Law of Treaties, at all levels of government, including states and territories, and if necessary by calling on its power to override territory laws and using its external affairs power with regard to state laws.

8. The Committee notes that, after its renewed examination in August 1999 of the provisions of the Native Title Act as amended in 1998, the devolution of power to legislate on the "future acts" regime has resulted in the drafting of state and territory legislation to establish detailed "future acts" regimes which contain provisions further reducing the protection of the rights of native title claimants that is available under Commonwealth legislation. Noting that the Commonwealth Senate on 31 August 1999 rejected one such regime, the Committee recommends that similarly close scrutiny continue to be given to any other proposed state and territory legislation to ensure that protection of the rights of indigenous peoples will not be reduced further.

9. Concern is expressed at the unsatisfactory response to decisions 2 (54) (March 1999) and 2 (55) (August 1999) of the Committee and at the continuing risk of further impairment of the rights of Australia's indigenous communities. The Committee reaffirms all aspects of its decisions 2 (54) and 2 (55) and reiterates its recommendation that the State party should ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5 (c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of securing the "informed consent" of indigenous peoples. The Committee recommends to the State party to provide full information on this issue in the next periodic report.

10. The Committee notes that the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund is conducting an inquiry into "Consistency of the Native Title Amendment Act 1998 with Australia's international obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD)". It is hoped that the results will assist the State party to re-evaluate its response to decisions 2 (54) and 2 (55). The Committee requests the State party, in accordance with the provisions of article 9, paragraph 1, of the Convention, to transmit the report of the Joint Parliamentary Committee's inquiry to the Committee when it is tabled.

11. The establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) and of the Aboriginal and Torres Strait Islander Social Justice Commissioner within the Human Rights and Equal Opportunity Commission (HREOC) were welcomed by the Committee. Concern is expressed that changes introduced and under discussion regarding the functioning of both institutions may have an adverse effect on the carrying out of their functions. The Committee recommends that the State party give careful consideration to the proposed institutional changes, so that these institutions preserve their capacity to address the full range of issues regarding the indigenous community.

12. While acknowledging the significant efforts that have taken place to achieve reconciliation, concern is expressed about the apparent loss of confidence by the indigenous community in the process of reconciliation. The Committee recommends that the State party take appropriate measures to ensure that the reconciliation process is conducted on the basis of robust engagement and effective leadership, so as to lead to meaningful reconciliation, genuinely embraced by both the indigenous population and the population at large.

13. The Committee notes the conclusions of the "National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families" and acknowledges the measures taken to facilitate family reunion and to improve counselling and family support services for the victims. Concern is expressed that the Commonwealth Government does not support a formal national apology and that it considers inappropriate the provision of monetary compensation for those forcibly and unjustifiably separated from their families, on the grounds that such practices were sanctioned by law at the time and were intended to "assist the people whom they affected". The Committee recommends that the State party consider the need to address appropriately the extraordinary harm inflicted by these racially discriminatory practices.

14. The Committee acknowledges the adoption of the Racial Hatred Act 1995 which has introduced a civil law prohibition of offensive, insulting, humiliating or intimidating behaviour based on race. The Committee recommends that the State party continue making efforts to adopt appropriate legislation with a view to giving full effect to the provisions of, and withdrawing its reservation to, article 4 (a) of the Convention.

15. The Committee notes with grave concern that the rate of incarceration of indigenous people is disproportionately high compared with the general population. Concern is also expressed that the provision of appropriate interpretation services is not always fully guaranteed to indigenous people in the criminal process. The Committee recommends that the State party increase its efforts to seek effective measures to address socio-economic marginalization, the discriminatory approach to law enforcement and the lack of sufficient diversionary programmes.

16. The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends to the State party to review all laws and practices in this field.

17. Taking note of some recent statements from the State party in relation to asylum-seekers, the Committee

recommends that the State party implement faithfully the provisions of the 1951 Convention relating to the Status of Refugees, as well as the 1967 Protocol thereto, with a view to continuing its cooperation with the United Nations High Commissioner for Refugees and in accordance with the guidelines in UNHCR's "Handbook on Refugee Determination Procedures".

18. The Committee acknowledges the efforts being made to increase spending on health, housing, employment and education programmes for indigenous Australians. Serious concern remains at the extent of the continuing discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights. The Committee remains seriously concerned about the extent of the dramatic inequality still experienced by an indigenous population that represents only 2.1 per cent of the total population of a highly developed industrialised State. The Committee recommends that the State party ensure, within the shortest time possible, that sufficient resources are allocated to eradicate these disparities.

19. The Committee recommends that the State party's reports be made widely available to the public from the time they are submitted and that the Committee's observations on them be similarly publicised.

20. The Committee recommends that the State party's next periodic report, due on 30 October 2000, be an updating report and that it address the points raised in the present observations.

International Covenant on Civil and Political Rights

Concluding observations of the Human Rights Committee : Australia. 24/07/2000.

A/55/40,paras.498-528. (Concluding Observations/Comments)

CONSIDERATION OF REPORTS SUBMITTED UNDER ARTICLE 40 CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE

Concluding observations of the Human Rights Committee

AUSTRALIA

The Committee examined the third and fourth periodic reports of Australia (CCPR/C/AUS/99/3 and 4) at its 1955th, 1957th and 1958th meetings (CCPR/C/SR.1955, 1957 and 1958), held on 20 and 21 July 2000. At its 1967th meeting, on 28 July 2000, the Committee adopted the following concluding observations.

1. Introduction

The Committee appreciates the quality of the reports of Australia, which conformed to the Committee's guidelines for the preparation of States parties' reports and provided a comprehensive view of such measures as have been adopted by Australia to implement the Covenant in all parts of the country. The Committee also appreciated the extensive additional oral and written information provided by the State party delegation during the examination of the report. Furthermore, the Committee expresses appreciation for the answers to its oral and written questions and for the publication and wide dissemination of the report by the State party.

The Committee regrets the long delay in the submission of the third report, which was received by the Committee 10 years after the examination of the second periodic report of the State party.

The Committee expresses its appreciation for the contribution of non-governmental organisations and statutory agencies to its work.

2. Positive aspects

The Committee welcomes the accession of the State party to the Optional Protocol to the Covenant in 1991, thereby recognising the competence of the Committee to consider communications from individuals within its territory and subject to its jurisdiction. It welcomes the action taken by the State party to implement the Views

of the Committee in the case of communication No. 488/1992 (Toonen v. Australia) by enacting the necessary legislation at the federal level.

The Committee welcomes the enactment of anti-discrimination legislation in all jurisdictions of the State party, including legislation to assist disabled persons.

The Committee welcomes the establishment of the Aboriginal and Torres Strait Islander Social Justice Commissioner in 1993.

The Committee notes with satisfaction that the status of women in Australian society has improved considerably during the reporting period, particularly in public service, in the general workforce and in academic enrolment, although equality has yet to be achieved in many sectors. The Committee welcomes the initiatives to make available to women facilities to ensure their equal access to legal services, including in rural areas, and the strengthening of the Sex Discrimination Act, 1984.

3. Principal subjects of concern and recommendations

With respect to article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term 'self-determination', the Government of the State party prefers terms such as 'self-management' and 'self-empowerment' to express domestically the principle of indigenous peoples' exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2).

The Committee is concerned, despite positive developments towards recognising the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo, 1992; Wik, 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.

The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.

The Committee recommends that in the finalization of the pending bill intended to replace the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), the State party should give sufficient weight to the values described above.

While noting the efforts by the State party to address the tragedies resulting from the previous policy of removing indigenous children from their families, the Committee remains concerned about the continuing effects of this policy.

The Committee recommends that the State party intensify these efforts so that the victims themselves and their families will consider that they have been afforded a proper remedy (arts 2, 17 and 24).

The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.

The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy (art. 2).

While noting the explanation by the delegation that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights, the Committee stresses that such negotiations cannot relieve the State party of its obligation to respect and ensure Covenant rights in all parts of its territory without any limitations or exceptions (art. 50).

The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.

The Committee is concerned by the Government bill in which it would be stated, contrary to a judicial decision, that ratification of human rights treaties does not create legitimate expectations that government officials will use their discretion in a manner that is consistent with those treaties.

The Committee considers that enactment of such a bill would be incompatible with the State party's obligations under article 2 of the Covenant and it urges the Government to withdraw the bill.

The Committee is concerned over the approach of the State party to the Committee's Views in Communication No. 560/1993 (A. v. Australia). Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.

The Committee recommends that the State party reconsider its interpretation with a view to achieving full implementation of the Committee's Views.

Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes

committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles of the Covenant.

The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.

The Committee notes the recent review within Parliament of the State party's refugee and humanitarian immigration policies and that the Minister for Immigration and Multicultural Affairs has issued guidelines for referral to him of cases in which questions regarding the State party's compliance with the Covenant may arise.

The Committee is of the opinion that the duty to comply with Covenant obligations should be secured in domestic law. It recommends that persons who claim that their rights have been violated should have an effective remedy under that law.

The Committee considers that the mandatory detention under the Migration Act of "unlawful non-citizens", including asylum-seekers, raises questions of compliance with article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right.

The Committee urges the State party to reconsider its policy of mandatory detention of "unlawful non-citizens" with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel.

4. Dissemination of information about the Covenant (art. 2)

The Committee requests the fifth periodic report to be submitted by 31 July 2005. It requests that the present concluding observations and the next periodic report be widely disseminated among the public, including civil society and non-governmental organisations operating in the State party.

International Covenant on Economic, Social and Cultural Rights

Concluding Observations of the Committee on Economic, Social and Cultural Rights : Australia. 01/09/2000.

E/C.12/1/Add.50. (Concluding Observations/Comments)

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLES 16 AND 17 OF THE COVENANT

Concluding observations of the Committee on Economic, Social and Cultural Rights

Australia

1. The Committee on Economic, Social and Cultural Rights considered the third periodic report of Australia on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add.21) at its 45th, 46th and 47th meetings, held on 24 and 25 August 2000, and adopted, at its 55th meeting, held on 31 August 2000, the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the third periodic report of Australia, which has been prepared in conformity with the revised reporting guidelines established by the Committee. The Committee expresses its appreciation for the readiness of the State party to advance the date of the presentation of its third periodic report, which is indicative of the State party's willingness to cooperate with the Committee.

3. The Committee welcomes the constructive dialogue which took place between the delegation of the State party and Committee members. The Committee regrets, however, that, owing to the unexpected advance of the consideration of the State party's report, the written replies to its list of issues were not available to Committee members before the dialogue. The Committee also regrets that a number of questions were not answered to its satisfaction.

B. Positive aspects

4. The Committee acknowledges that, in general, the majority of Australians have a high standard of living and that the State party is continuing efforts to maintain this high standard of living in the country. This is supported by the fact that Australia is ranked fourth on the UNDP Human Development Index for the year 2000.

5. The Committee notes the introduction by the State party of policies for streamlining business regulation

and the delivery of government services, in particular the implementation, beginning in July 2000, of the Goods and Services Tax, aimed at the reduction of income tax for the majority of working Australians.

6. The Committee commends the State party's contribution to resolving the recent Asian financial crisis.

7. The Committee notes with appreciation the State party's leadership role in maintaining peace and stability in the region, inter alia by providing economic and humanitarian assistance, particularly in East Timor.

8. The Committee notes that, in August 1999, the Parliament passed a motion expressing commitment to reconciliation with the indigenous populations of Australia as an important national priority, and a "deep and sincere regret" for past policies that have negatively affected them. The Committee also notes that, in May 2000, the Council for Aboriginal Reconciliation presented to the Australian people its final proposals for a Document of Reconciliation towards the development of measures to improve the position of the indigenous populations of Australia.

9. The Committee notes that the State party has allocated 2.3 billion Australian dollars for giving priority to indigenous programmes.

10. The Committee welcomes the partnership between the State party and indigenous communities in initiatives aimed at providing greater access for indigenous peoples to culturally appropriate health services and allocating significant resources for the improvement of indigenous health in general.

11. The Committee notes that, despite the persistence of disparities between men and women in the field of employment, there has been an increase in the percentage of women employed at higher levels.

12. The Committee welcomes the various programmes established by the State party to address domestic violence, among them "Partnerships against Domestic Violence", the "Rural and Remote Domestic Violence Initiative", the "Gender and Violence Project" and "Crisis Payment".

C. Factors and difficulties impeding the implementation of the Covenant

13. In spite of existing guarantees pertaining to economic, social and cultural rights in the State party's domestic legislation, the Covenant continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions.

D. Principal subjects of concern

14. The Committee regrets that, because the Covenant has not been entrenched as law in the domestic legal order, its provisions cannot be invoked before a court of law.

15. The Committee expresses its deep concern that, despite the efforts and achievements of the State party, the indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education.

16. The Committee notes with regret that the amendments to the 1993 Native Title Act have affected the

reconciliation process between the State party and the indigenous populations, who view these amendments as regressive.

17. The Committee notes with concern that the Workplace Relations Act of 1996 favours individual negotiation with employers over collective bargaining, thereby reducing the role of the Australian Industrial Relations Commission. The Committee is also concerned about the restrictions resulting from the Act with regard to the protection of wages, job security and temporary employment.

18. The Committee notes with concern that homeworkers, who are predominantly women, do not enjoy any form of social protection and are paid substantially lower wages than the minimum wage, which compels them to work excessively long hours in order to earn enough to ensure the daily subsistence of their families.

19. The Committee notes with concern that paid maternity leave is not provided for in law or in collective labour conventions, and that the State party has not ratified ILO Convention No. 103 concerning maternity protection.

20. The Committee regrets that the absence of an officially set poverty line in Australia has deprived the Committee of the criteria it needs to determine the progress achieved over time by the State party in its efforts to reduce poverty.

21. The Committee is concerned that the current Residential Tenancies Act 1987 (in New South Wales) does not provide adequate security of tenure and protection against eviction and arbitrary rent increases, and that, consequently, rents in Sydney have increased substantially and forced evictions are reported to have taken place, especially in connection with the forthcoming Olympic Games.

22. The Committee expresses its deep concern that, despite the guarantees of coverage for all under the Medicare system, the problem of long waiting periods for medical services in hospitals, and in particular for surgery, has not been sufficiently addressed.

23. The Committee notes with concern that no steps have been taken to respond to its 1993 recommendation to strengthen human rights education in formal and non-formal curricula. Furthermore, while the State party has given information relating to the funding of private and public schools, it has not provided sufficient information on the difference in quality of schooling available to students in public and private schools.

E. Suggestions and recommendations

24. The Committee strongly recommends that the State party incorporate the Covenant in its legislation, in order to ensure the applicability of the provisions of the Covenant in the domestic courts. The Committee urges the State party to ensure that no conflicts occur between Commonwealth and state law in this respect. The Committee encourages the State party to follow the High Court's position concerning "legitimate expectations" arising from the ratification of the Covenant.

25. The Committee encourages the State party to pursue its efforts in the process of reconciliation with Australia's indigenous peoples and its efforts to improve the disadvantaged situation they are in.

26. The Committee recommends that the State party ensure that the legislative provisions concerning job security are strengthened and effectively implemented, especially for the most vulnerable groups, such as fixed-term contract workers, temporary workers and casual workers.
27. The Committee strongly recommends that the State party undertake measures to protect homeworkers and to ensure that they receive the official minimum wage, that they benefit from adequate social security and that they enjoy working conditions in conformity with the legislation.
28. The Committee recommends that the State party consider enacting legislation on paid maternity leave and ratifying ILO Convention No. 103 concerning maternity protection.
29. The Committee recommends that the State party limit its prohibitions on the right to strike to essential services, in accordance with ILO Convention No. 87, and, in the context of the civil service, to civil servants who exercise functions of State authority.
30. The Committee recommends that the State party ensure that labour in private prisons is voluntarily undertaken and is properly remunerated.
31. The Committee requests that the State party provide detailed information on the work for dole scheme in its fourth periodic report.
32. The Committee calls upon the State party to ensure that the two-year waiting period for the receipt of social security assistance by new immigrants does not infringe upon their right to an adequate standard of living.
33. The Committee strongly urges the State party to establish an official poverty line, so that a credible assessment can be made of the extent of poverty in Australia. The Committee requests further that the State party provide information on this issue in its fourth periodic report.
34. The Committee strongly recommends that the State party, at the federal level, develop a housing strategy in keeping with the Committee's General Comments No. 4 and 7, including provisions to protect tenants from forced eviction without reasons and from arbitrary rent increases. In addition, the Committee recommends that the State party ensure that all state and territory governments establish appropriate housing policies in accordance with this strategy.
35. The Committee calls upon the State party to take effective steps to ensure that human rights education is included in primary and secondary school curricula and requests the State party to inform the Committee of the measures taken in this regard in its fourth periodic report.
36. The Committee requests the State party to provide additional, more detailed information, including statistical data which is disaggregated according to age, sex and minority groups, concerning the right to work, just and favourable conditions of work, social security, housing, health and education, in its fourth periodic report.
37. Finally, the Committee requests the State party to ensure the wide dissemination in Australia of the present concluding observations and to inform the Committee of measures taken to implement the recommendations contained herein in its fourth periodic report, to be submitted by 30 June 2005.

Convention on the Elimination of All Forms of Discrimination Against Women

Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Australia. 12/08/97.

A/52/38/Rev.1,PartIIparas.365-408. (Concluding Observations/Comments)

Australia

365. The Committee considered the third periodic report of Australia (CEDAW/C/AUL/3) at its 352nd and 353rd meetings, on 18 July 1997 (see CEDAW/C/SR.352 and 353).

366. The report was introduced by the Assistant Secretary, Office of the Status of Women, Department of the Prime Minister and Cabinet. She explained that the report before the Committee had been prepared in 1993 as a supplementary report to Australia's second periodic report and had been submitted to the Secretariat as Australia's third periodic report in 1994. In stressing her Government's commitment to its treaty obligations, she regretted its inability to prepare a formal supplementary report for consideration by the Committee at the current stage, but noted that Australia had produced an implementation plan for the Beijing Platform for Action which was available to the Committee for information. The detailed answers to the questions on notice would provide the Committee with an up-to-date picture of the status of women in Australia. Noting the high standards of Australia's past reports as well as past practice, she regretted that the present report had not benefited from the involvement of non-governmental organisations. She indicated her Government's intention to combine the fourth and fifth periodic reports for the Committee's consideration at the beginning of the next century.

367. In her introductory statement, the representative of the State party noted that a robust framework of anti-discrimination legislation, positive measures, strategies and programmes had been put in place since ratification of the Convention in 1983. Government-funded services for women, specialised governmental machinery, and attention to women's health, educational curricula, violence against women, employment and women's participation in public life had resulted in a record of achievement which was significant by world standards. At the same time, the Government was aware of the need to address a number of specific areas where equality for women remained to be achieved.

368. As to the reservations Australia had entered to the Convention, the representative noted that while significant progress had been made towards the provision of comprehensive maternity leave, the Government was not in a position to remove the reservation regarding paid maternity leave. On the other hand, a modification of the reservation regarding "combat-related" employment in the armed forces was being considered.

369. The change in Federal Government following the March 1996 elections had brought a fresh approach. In a strengthening of gender mainstreaming policy, responsibility for gender issues, which had been concentrated in the Office of the Status of Women, had now been extended to all areas of the

Commonwealth bureaucracy. Specialist units in line departments had responsibility for enhancing linkages and cooperation, including cooperation with women's organisations. A tight fiscal environment where tax increases or budget deficits were not considered to be means for covering shortfalls had led to difficult choices, but she emphasised the Government's commitment to expanding opportunity and choice for all.

370. While major advances had been achieved in the area of domestic violence over the last 20 years, it remained a significant area of concern, requiring a more comprehensive approach to prevention and response. A National Campaign against Violence and Crime would address, inter alia, domestic violence. A recent programme had assisted in decreasing the incidence of family violence in Aboriginal and Torres Strait Islander communities. The portrayal of violence in the media was also receiving attention.

371. Australia was one of the few countries with a national women's health policy, and new efforts were under way better to understand women's specific health needs. Programmes and services were implemented to improve the health of Aboriginal and Torres Strait Islander women, including resource allocation. In order to address immigrant women's and girls' risk of genital mutilation, legislation to ban the practice had been introduced in most Australian states and territories, and programmes to prevent it had been developed.

372. New temporary measures had been introduced to increase women's participation in politics at the state and federal level. Rather than relying on quotas, the Government had chosen other means, such as mentoring and executive searches, to increase the number of women in politics. The last federal elections had seen a significant increase in the number of women parliamentarians. There had been an increase in the percentage of women in the Cabinet, in state and local government and in political parties.

373. Women's representation in decision-making and management in the private sector was increasing slowly. The Affirmative Action Agency's awards to recognise worthwhile employers' initiatives, as well as other measures, such as education strategies and the waiving of annual reporting requirements for organisations having implemented high-quality affirmative action programmes over three-year periods, were among the strategies used.

374. The Government was committed to greater participation of women in the paid labour market through the promotion of greater flexibility in the workplace, continuing support for childcare and a broadening of options in employment and training. Women's participation in the labour force had grown by 30 per cent in the past 10 years, almost double the increase for men.

375. The new legislative basis for industrial relations, adopted in 1996, included provisions for parental leave and the prohibition of employment termination for reasons of, inter alia, family responsibilities. Other provisions expected to benefit women in particular were the removal of restrictions on regular part-time work and the capacity to formalise individual workplace agreements. An Office of the Employee Advocate had been established to provide advice and assistance in that regard. She noted that wage gaps between men and women remained, and that a comprehensive income security safety net was available which benefited women to a greater extent than men.

376. In addressing disadvantages experienced by indigenous populations, the Government was committed to reconciliation between Aboriginal and Torres Strait Islanders and the larger Australian community.

Indigenous women were playing an active role in those efforts.

377. She noted that the High Court Mabo (No. 2) decision of 1992, which had overturned the terra nullius doctrine and recognised the existence of native title, did not refer to gender as affecting the recognition of native title.

378. To ensure better options for indigenous women, recommendations contained in a report submitted to Parliament in May 1997 were being considered by the Government. A number of new initiatives, including the Aboriginal and Torres Strait Islanders "Healthy Women - Strong Families" initiative which had been announced at the Beijing Conference, were aimed at improving the health status of that group of women.

379. The representative concluded by saying that the Government of Australia believed that far-reaching cultural and economic changes required the support and acceptance of the community. She pledged Australia's determination to build on its existing achievements so as to ensure that women participated fully in all aspects of life so that their families, their communities and Australia would prosper.

Concluding comments of the Committee

Introduction

380. The Committee commended the Government for its past initiatives and efforts to promote and protect the human rights of women nationally and internationally. Australia's leadership for the advancement of women at the Fourth World Conference on Women and its initiative to make it into a "conference of commitment" were particularly noteworthy. The Committee took note of the fact that Australia had prepared a comprehensive national action plan to implement the Beijing Declaration and Platform for Action and provided a copy to each member of the Committee. The Committee appreciated the comprehensive introductory statement and detailed responses provided to the Committee's written questions by the representative.

381. The Committee noted, however, that the third periodic report did not comply with the Committee's reporting guidelines for periodic reports, and that it essentially reiterated information that had been considered at the time of presentation of Australia's second periodic report in 1994. At the same time, Australia could have combined its third periodic report with the fourth, which was due in August 1996, to enable the Committee to explore more fully the developments that had taken place since 1995 when the third report was submitted.

382. As there seems to be misunderstanding about the status of Australia's reports under the Convention, for the sake of clarification the situation is as follows:

| <u>Report</u> | <u>Date due</u> | <u>Date submitted</u> | <u>Considered</u> |
|--------------------------|-----------------|-----------------------|-------------------|
| Initial report | August 1984 | October 1986 | 1988 |
| 2 nd periodic | August 1988 | July 1992 | 1994 |
| 3 rd periodic | August 1992 | March 1995 | 1997 |

| | | |
|--------------------------|-------------|---------------|
| 4th periodic | August 1996 | Not submitted |
| 5 th periodic | August 2000 | Not submitted |

Positive aspects

383. Australia's commitment to the full implementation of the Convention and to the realization of the human rights of women was reflected in such legislative and administrative efforts as the New National Agenda for Women of 1993, the Sex Discrimination Act of 1984 and Amendment of 1995, the Human Rights and Equal Opportunity Act of 1986 and its amendments, the review of the Affirmative Action (Equal Employment Opportunity for Women) Act of 1986, the annual women's budget statement, the register of women maintained by the Office of the Status of Women, and the Office of the Sex Discrimination Commissioner.

384. The Committee welcomed Australia's pioneering role in addressing violence against women and the measures and strategies that had been put in place to prevent and eliminate it. It commended the Government (Bureau of Statistics) for the establishment of the first comprehensive national statistical profile on the extent and nature of violence against women, and for its strong commitment to reducing the incidence of domestic violence including through preventive measures. The recommendations emanating from a National Domestic Violence Forum in September 1996 and the convening of a National Domestic Violence Summit in 1997 were considered to be important steps towards raising awareness about the issue and contributing to the creation of a climate in which such violence would no longer be tolerated.

385. The Committee welcomed the existence of a national health policy for women, which had been established in 1989, and for which funding was currently allocated for financial year 1998-1999. The policy's participatory approach in providing innovative primary health care and in emphasising services for disadvantaged groups of women, including Aboriginal and Torres Strait Islanders, and migrant women were commendable, as was the inclusion of women's reproductive health and sexuality among its seven priority issues.

386. Legislation enabling the Government to prosecute Australians who committed sexual offences abroad was also commended.

387. The preparation by the Law Reform Commission of the report on equality of women before the law was an important step in further strengthening the equal access of women to justice and in eliminating discrimination and gender bias in areas such as legal aid, violence against women, immigration and refugee law. The recommendation of the Commission to enact an Equality Act which could lead to the entrenchment of equality legislation in the Constitution would, if implemented, reinforce Australia's leadership role with regard to the equality of women.

388. The Committee applauded the Government's intention to ratify the amendment to article 20, paragraph 1, of the Convention concerning the Committee's meeting time and noted with satisfaction Australia's support for the preparation of an optional protocol to the Convention on a complaints procedure and the initiation of domestic consultations in that regard.

Factors and difficulties affecting the implementation of the Convention

389. The Committee noted that the changing role of government in terms of public expenditure and the ongoing decentralization of responsibility in a number of areas, including health, from the federal to territorial or state Governments, had had an impact on the legal and practical implementation of the Convention. Australia continued to have two reservations to the Convention, one with regard to paid maternity leave and one with regard to "combat-related" employment in the armed forces, which constituted an obstacle to the full implementation of the Convention.

390. The Committee was aware that Aboriginal and Torres Strait Islander women continued to face discrimination and disadvantages in terms of access to rights, opportunities and resources.

Principal areas of concern

391. The Committee was concerned about the Government's apparent shift in attention and commitment to the human rights of women and the achievement of gender equality. Indications such as the cut by 38 per cent in the budget of the Office of the Status of Women and a similar reduction of funding for the Human Rights and Equal Opportunities Commission gave rise to concern. While increased efforts at gender mainstreaming into all sectoral areas were commendable, the Committee was concerned about the weakened role of national machinery in providing policy advice on equality issues and in monitoring the effective implementation of such policies. The discontinuation of the women's budget statement, as well as of the national register of women, was regrettable since both had served as a model for other Governments embarking on similar exercises.

392. The Committee was alarmed by policy changes that apparently slowed down, or reversed, Australia's progress in achieving equality between women and men, such as in housing and childcare programmes, and in employment assistance. It was concerned about the delay in appointing a Sex Discrimination Commissioner and about the Government's declared intention to change its human rights policy and legislation as it pertained to women.

393. The Committee expressed its concern about the possibility that, at a time of fiscal constraint, resources for programmes and policies benefiting women or aimed at overcoming discrimination, for example in health, the provision of legal aid services, training and awareness programmes on violence against women for health, judicial, professional and other workers might be subjected to disproportionate budget cuts.

394. The Committee noted with concern that violence against women, notwithstanding major efforts, remained a central concern to Australian women, 7 per cent of whom experienced some type of violence in the course of a year. It noted the absence of data concerning violence against Aboriginal and Torres Strait Islander women and assessment of programmes directed at reducing such violence.

395. The Committee was also concerned about paedophilia and sex tourism involving Australian men, primarily in Asian countries, and the situation of women brought to Australia as brides.

396. The Committee noted with concern that new legislation on industrial relations providing for the negotiation of individual contracts between employer and employee might have a disproportionately negative impact on women. Part-time and casual workers, of whom women formed a disproportionate share, were usually in a weaker position than other workers to negotiate favourable working agreements, in particular

with regard to benefits. The reservation to the Convention with regard to paid maternity leave, and Australia's non-ratification of ILO Convention No. 103 concerning maternity protection, remained a concern for women workers with family responsibilities.

397. The Committee was concerned at the continuing adverse situation of Aboriginal and Torres Strait Islander women. Major causes of concern included a higher incidence of maternal mortality, lower life expectancy, reduced access to the full range of health services, a high incidence of violence, including domestic violence, and high unemployment rates. Their situation, as well as that of migrant women, was further compromised by an apparent rise in racism and xenophobia.

Suggestions and recommendations

398. The Committee recommended that the Government should carefully monitor the impact of recent policy changes in all areas covered by the Convention for inclusion in its next periodic report. To that end, it recommended that Australia conduct analyses of the successes and shortcomings of the new policies with a view to providing data for future action, both in Australia and elsewhere. It recommended that the Government design a long-term strategy aimed at the full implementation of the Convention.

399. In particular, the Committee recommended that an evaluation should be conducted of the Workplace Relations Act of 1996, assessing its impact upon women of different age groups, with different educational levels and in different occupational groups. The Government should assess whether the Act leads to increased or decreased part-time and casual work, and its impact on women workers' benefits and on workers with family responsibilities, particularly women's ability to obtain maternity leave. A similar evaluation and assessment was recommended for Australia's new childcare benefit scheme.

400. The Committee encouraged the Government to assess the benefits of a continuing national women's health policy and to ensure that any further change in that policy did not lead to a decreased access by women, especially vulnerable groups of women, to comprehensive health services. It also recommended that data and indicators on health should be collected, disaggregated by sex, age, ethnicity, rural/urban areas and other distinctions. Data should also be collected on the impact of the shift in responsibility for health care from the federal to the state level.

401. The Committee recommended that the Convention and the Beijing Declaration and Platform for Action should be translated for non-English-speaking Australians.

402. The Committee recommended that a comprehensive strategy to eliminate violence against women should be adopted following the National Domestic Violence Summit, with an emphasis on prevention, and with sufficient funding. It also recommended that ways should be found to involve women's groups in the development of strategies to reduce violence in the media, including electronic media, and that they should participate in the development of regulatory codes of practice of the media. The Government should further assess its monitoring and enforcement responsibilities in that regard.

403. The Committee noted the differing state provisions in relation to prostitution and encouraged the Government to assess the effectiveness of the varying measures in reducing the exploitation of prostitution.

404. The Committee encouraged the Government to collect statistical data on the participation of Aboriginal and Torres Strait Islander women in the workforce, in decision-making, in politics and administration, and in

the judiciary with a view to enhancing programmes that would benefit them. It suggested that the Government might include representatives of those communities when it presented its next report to the Committee.

405. The Committee recommended that, in the light of the Mabo and Wik judgements of the High Court, the Government should develop the necessary legislative and policy measures to ensure women's equal access to individual ownership of native land.

406. The Committee encouraged the Government to strengthen its support for women's studies, to provide funding for research and teaching, and to facilitate international academic exchange and cooperation in that field.

407. The Committee encouraged the Government to resume its active and visible participation in international forums on women's equality, such as the Commonwealth and the United Nations.

408. The Committee requested the wide dissemination in Australia of these concluding comments so as to make individuals aware of the steps that had been taken to ensure de facto equality for women and the further steps required in this regard.

Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment and Punishment

Concluding observations of the Committee against Torture : Australia. 21/11/2000.

A/56/44,paras.47-53. (Concluding Observations/Comments)

Australia

47. The Committee considered the second report of Australia (CAT/C/25/Add.11) at its 444th, 447th, and 451st meetings, on 16, 17 and 21 November 2000 (CAT/C/SR.444, 447 and 451), and adopted the following conclusions and recommendations.

A. Introduction

48. The Committee notes that the report was submitted with a delay of six years and was said to be the combined second and third periodic reports, the latter of which was due in 1998. The Committee welcomes the constructive dialogue with the delegation of Australia and greatly appreciates the lengthy and detailed information submitted both orally and in writing, which not only updated the report, which included information only until 1997, but also contained specific reference to each component part of the Australian federation, referred to factors and difficulties affecting the federation and gave answers to nearly all specific cases referred to it.

49. The Committee wishes to express its appreciation for the additional information submitted in 1992 (CAT/C/9/Add.11) in response to questions asked during the examination of the initial report of Australia.

50. The Committee also expresses its appreciation for the contribution of non-governmental organisations and statutory agencies to its work in considering the State party's report.

B. Positive aspects

51. The Committee particularly welcomes the following:

(a) The declarations made by Australia on 28 January 1993, under articles 21 and 22 of the Convention, and its ratification of the Optional Protocol to the International Covenant on Civil and Political Rights;

(b) The many investigations and inquiries that have been undertaken by, inter alia, Royal Commissions of inquiry, parliamentary committees, the Human Rights and Equal Opportunity Commission, ombudspersons and other ad hoc bodies, at both the federal and state levels, on matters of relevance to the implementation of the Convention;

(c) The consultations with national non-governmental organisations that took place during the preparation of the report;

(d) The information contained in the report about the expansion of the rehabilitation services available for victims of torture, and the contributions of the State party to the United Nations Voluntary Fund for the Victims of Torture;

(e) The measures taken to address the historical social and economic underpinnings of the disadvantage experienced by the indigenous population;

(f) The establishment of the independent statutory office of the Inspector of Custodial Services.

C. Subjects of concern

52. The Committee expresses its concern about the following:

The apparent lack of appropriate review mechanisms for ministerial decisions in respect of cases coming under article 3 of the Convention;

The use by prison authorities of instruments of physical restraint that may cause unnecessary pain and humiliation;

Allegations of excessive use of force or degrading treatment by police forces or prison guards;

Allegations of intimidation and adverse consequences faced by inmates who complain about their treatment in prisons;

Legislation imposing mandatory minimum sentences, which has allegedly had a discriminatory effect regarding the indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system.

D. Recommendations

53. The Committee recommends that:

The State party ensure that all States and territories are at all times in compliance with its obligations under

the Convention;

(b) The State party consider the desirability of providing a mechanism for independent review of ministerial decisions in respect of cases coming under article 3 of the Convention;

(c) The State party continue its education and information efforts for law enforcement personnel regarding the prohibition against torture and further improve its efforts in training, especially of police, prison officers and prison medical personnel;

(d) The State party keep under constant review the use of instruments of restraint that may cause unnecessary pain and humiliation, and ensure that their use is appropriately recorded;

(e) The State party ensure that complainants are protected against intimidation and adverse consequences as a result of their complaint;

(f) The State party continue its efforts to reduce overcrowding in prisons;

(g) The State party continue its efforts to address the socio-economic disadvantage that, inter alia, leads to a disproportionate number of indigenous Australians coming into contact with the criminal justice system;

(h) The State party keep under careful review legislation imposing mandatory minimum sentences, to ensure that it does not raise questions of compliance with its international obligations under the Convention and other relevant international instruments, particularly with regard to the possible adverse effect upon disadvantaged groups;

(i) The State party submit its next periodic report by November 2004, and ensure that it contains information on the implementation of the present recommendations and disaggregated statistics.

Convention on the Rights of the Child

Concluding observations of the Committee on the Rights of the Child : Australia.
10/10/97.

CRC/C/15/Add.79. (Concluding Observations/Comments)

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 44 OF THE CONVENTION

Concluding observations of the Committee on the Rights of the Child: Australia

1. The Committee considered the initial report of Australia (CRC/C/8/Add.31) at its 403rd to 405th meetings (CRC/C/SR.403-405) on 24 and 25 September 1997, and adopted* the following concluding observations:

A. Introduction

2. The Committee expresses its appreciation to the State party for its extensively detailed report, which has been prepared in full conformity with the Committee's guidelines, and for the submission of written replies to its list of issues (CRC/C/Q/AUS/1). The Committee notes with satisfaction the constructive and open dialogue it had with the delegation of the State party, and the detailed replies it received from the delegation during the dialogue. The Committee also notes the supplementary information provided by the delegation during and following the consideration of the report. The Committee regrets, however, that the State party did not include full information in its report on the External Territories that are administered by it. The Committee notes that article 2 of the Convention requires States parties to ensure the implementation of the Convention for areas under their jurisdiction, which therefore includes the obligation to report on progress achieved in all its territories.

B. Positive aspects

3. The Committee appreciates the State party's firm commitment to adopting measures for the implementation of the rights of the child as recognised in the Convention. The Committee notes specifically the wide range of welfare services for the benefit of children and their parents, the provision of universal and free education and the advanced health system.

4. The Committee notes the efforts by the State party in the field of law reform. The Committee welcomes the recent amendments to the Family Law Act, 1975 and the Crimes (Child Sex Tourism) Amendment Act, 1994.

5. The Committee welcomes the intention of the State party to ratify the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.

6. Noting the long-standing efforts made by the State party in the field of international cooperation, the Committee would like to encourage the State party to achieve the 0.7 per cent of GDP target for international assistance to developing countries.

C. Principal subjects of concern

7. The Committee is concerned that although the Convention on the Rights of the Child has been declared a relevant international instrument under the Human Rights and Equal Opportunity Act, 1986, which enables the Human Rights and Equal Opportunity Commission to refer to the Convention when it is considering complaints, this does not give rise to legitimate expectations that an administrative decision will be made in conformity with the requirements of that instrument. The Committee is also concerned that there is no right of citizens to launch complaints in the local courts on the basis of the Convention on the Rights of the Child.

8. The Committee notes with concern the reservation made by the State party to article 37 (c) of the Convention. The Committee notes that this reservation might impede the full implementation of the Convention.

9. The Committee is concerned about the absence of a comprehensive policy for children at the federal level. It is also concerned by the lack of monitoring mechanisms at federal and local levels. Such mechanisms are of essential importance for the evaluation and promotion of the development of policies and programmes for the benefit of children. Disparities between the different states' legislation and practices, including budgetary allocations, are of concern to the Committee.

10. The Committee notes that the Convention and its principles are not generally known to the public, although the notion of rights is. The Committee regrets that there seems to be lack of adequate understanding in some quarters of the community of the principles of the Convention, as well as its holistic and interrelated approach, and the importance that the Convention places on the role of the family.

11. The Committee also expresses its concern that employment legislation on the federal level, as well as in all the states, does not specify minimum age(s) below which children are not allowed to be employed. The law also does not prohibit the employment of children who are still in the compulsory education. The Committee is deeply concerned that the minimum age of criminal responsibility is generally set at the very low level of 7 to 10 years, depending upon the state.

12. The Committee is concerned that the general principles of the Convention, in particular those related to non-discrimination (art. 2) and the respect for the views of the child (art. 12) are not being fully applied.

13. While noting the information provided by the delegation of the State party on a number of programmes to raise health standards for Aboriginal and Torres Strait Islander children and the State party's intention to start a two-year anti-racism campaign, the Committee is nonetheless concerned about the special problems still faced by Aboriginals and Torres Strait Islanders, as well as by children of non-English-speaking backgrounds, with regard to their enjoyment of the same standards of living and levels of services,

particularly in education and health.

14. The Committee is concerned that in some instances, children can be deprived of their citizenship in situations where one of their parents loses his/her citizenship.

15. The Committee expresses its concern about the lack of prohibition in local legislation of the use of corporal punishment, however light, in schools, at home and in institutions; in the view of the Committee this contravenes the principles and provisions of the Convention, in particular articles 3, 5, 6, 19, 28 (2), 37 (a), (c), and 39. The Committee is also concerned about the existence of child abuse and violence within the family.

16. The Committee is also concerned by local legislation that allows the local police to remove children and young people congregating, which is an infringement on children's civil rights, including the right to assembly.

17. The Committee is concerned that women working in the private sector are not systematically entitled to maternity leave, which could result in different treatment between children of State employees and those working in other sectors.

18. While noting the support services that are provided to homeless children, including housing, education and health services, the Committee remains concerned at the spread of homelessness amongst young people. The Committee is worried that this puts children at risk of involvement in prostitution, drug abuse, pornography, or other forms of delinquency and economic exploitation. The incidence of suicide among young people is an additional cause of concern to the Committee.

19. The Committee is concerned about the continued practice of female genital mutilation in some communities, and that there is no legislation prohibiting it in any of the states.

20. The Committee is concerned about the treatment of asylum seekers and refugees and their children, and their placement in detention centres.

21. The situation in relation to the juvenile justice system and the treatment of children deprived of their liberty is of concern to the Committee, particularly in the light of the principles and provisions of the Convention and other relevant standards such as the Beijing Rules, the Riyadh Guidelines and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

22. The Committee is also concerned about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them. The Committee is particularly concerned at the enactment of new legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.

D. Suggestions and recommendations

23. In the light of the Vienna Declaration and Programme of Action of 1993, the Committee encourages the State party to review its reservation to article 37 (c) with a view to its withdrawal. The Committee emphasises

that article 37 (c) allows for exemptions from the need to separate children deprived of their liberty from adults when that is in the best interests of the child.

24. The Committee recommends that the State party create a federal body responsible for drawing up programmes and policies for the implementation of the Convention on the Rights of the Child, and monitoring their implementation. The Committee suggests that cooperation in the field of the rights of the child between the authorities and non-governmental organisations as well as Aboriginal and Torres Strait Islander communities should also be further strengthened.

25. The Committee encourages the State party to allocate special funds in its international cooperation programmes and schemes to children. The Committee also encourages the State party to use the principles and provisions of the Convention as a framework for its programme of international development assistance.

26. The Committee suggests that the State party take all appropriate measures, including of a legislative nature, to prohibit corporal punishment in private schools and at home. The Committee also suggests that awareness-raising campaigns be conducted to ensure that alternative forms of discipline are administered in a manner consistent with the child's human dignity and in conformity with the Convention. The Committee also believes that cases of abuse and ill-treatment of children, including sexual abuse within the family, should be properly investigated, sanctions applied to perpetrators and publicity given to decisions taken. Further measures should be taken with a view to ensuring the physical and psychological recovery and social reintegration of the victims of abuse, neglect, ill-treatment, violence or exploitation, in accordance with article 39 of the Convention.

27. The Committee recommends that awareness-raising campaigns on the Convention on the Rights of the Child be conducted, with a particular focus on its general principles and on the importance the Convention places on the role of the family. The Committee suggests that the Convention be disseminated also in languages that are used by Aboriginals and Torres Strait Islanders, and by persons from non-English-speaking backgrounds. The Committee also suggests that the rights of the child be incorporated in school curricula. It further recommends that the Convention be incorporated in the training provided to law enforcement officials, judicial personnel, teachers, social workers, care givers and medical personnel.

28. The Committee believes that there is a need for an awareness-raising campaign on the right of the child to participate and express his/her views, in line with article 12 of the Convention. The Committee suggests that special efforts be made to educate parents about the importance of children's participation, and of dialogue between parents and children. The Committee also recommends that training be carried out to enhance the ability of specialists, especially care givers and those involved in the juvenile justice system, to solicit the views of the child, and help the child express these views.

29. The Committee recommends that specific minimum age(s) be set for employment of children at all levels of government. The Committee suggests that there is also a need for clear and consistent regulations in all the states on maximum allowed work hours for working children who are above the minimum employment age. The Committee also encourages the State party to consider ratifying ILO Convention No. 138 concerning minimum age for employment. While acknowledging the fact that the federal Government is planning to harmonise the age of criminal liability and raise it in all the states to 10 years, the Committee believes that this age is still too low.

30. The Committee recommends that legislation and policy reform be introduced to guarantee that children of asylum seekers and refugees are reunified with their parents in a speedy manner. The Committee also recommends that no child be deprived of his/her citizenship on any ground, regardless of the status of his/her parent(s).

31. The Committee encourages the State party to review its legislation and make paid maternity leave mandatory for employers in all sectors, in the light of the principle of the best interests of the child and articles 18 (3) and 24 (2) of the Convention.

32. The Committee encourages the State party to take further steps to raise the standards of health and education of disadvantaged groups, particularly Aboriginals, Torres Strait Islanders, new immigrants, and children living in rural and remote areas. The Committee is also of the view that there is a need for measures to address the causes of the high rate of incarceration of Aboriginal and Torres Strait Islanders children. It further suggests that research be continued to identify the reasons behind this disproportionately high rate, including investigation into the possibility that attitudes of law enforcement officers towards these children because of their ethnic origin may be contributing factors.

33. The Committee recommends that further research be carried out to identify the causes of the spread of homelessness, particularly among young persons and children, including, *inter alia*, the socio-economic background of the child and his/her family, and to identify any link between homelessness and child abuse, including sexual abuse, child prostitution, child pornography, and trafficking in children. The Committee also encourages the State party to adopt further policies of poverty alleviation, and to further strengthen the support services that it provides to homeless children.

34. The Committee recommends that specific laws be enacted to prohibit the practice of female genital mutilation and to ensure adequate implementation of the legislation. The Committee also recommends that further awareness-raising campaigns be conducted, in cooperation with the different communities, to sensitise them about the dangers and harm that result from this practice.

35. Finally, in the light of article 44, paragraph 6, of the Convention, the Committee recommends that the initial report and written replies presented by the State party be made widely available to the public at large and that the reports be published, along with the relevant summary records and the concluding observations adopted thereon by the Committee. Such a document should be widely distributed in order to generate debate and awareness of the Convention and its implementation and monitoring within the Government, the Parliament and the general public, including concerned non-governmental organisations.

APPENDIX C - ICCPR COMMUNICATIONS RULED INADMISSIBLE

(as at 26.8.02)

| Case | 1* Failed to exhaust domestic remedies | 2* Failed to substantiate claim | 3* Failed to satisfy "victim" requirement | 4* Ratione Temporis Rule | 5* Ratione Materiae Rule |
|---|--|--|---|-----------------------------------|-----------------------------------|
| JL v Australia ⁴⁴⁴ | | | | • | • |
| AS & LS v Australia ⁴⁴⁵ | | | | • | |
| KLB-W v Australia ⁴⁴⁶ | • | | | • | |
| Perera v Australia ⁴⁴⁷ | | | | | • |
| X v Australia ⁴⁴⁸ | • | | | | |
| Jarman v Australia ⁴⁴⁹ | | • | | | |
| Werenbeck v Australia ⁴⁵⁰ | • | | | • | • |
| BL v Australia ⁴⁵¹ | | • | | | |
| Lindon v Australia ⁴⁵² | • | • | • | • | |
| Lamagna v Australia ⁴⁵³ | | • | • | | |
| Pasla v Australia ⁴⁵⁴ | • | | | | |
| McDonald & Poynder (on behalf of Y) v Australia ⁴⁵⁵ | | | • | | |
| Hart v Australia ⁴⁵⁶ | | • | | • | |
| Uebergang v Australia ⁴⁵⁷ | | • | | | • |
| Jensen v Australia ⁴⁵⁸ | | • | | | |
| F (on behalf of C) v Australia ⁴⁵⁹ | | • | | | |
| Mankarious v Australia ⁴⁶⁰ | • | • | | | |
| Irving v Australia ⁴⁶¹ | | | | | • |

* The information contained in the above table is intended as a *general guide only* and should *not* be relied upon as legal advice. Before lodging an ICCPR communication, people should seek legal advice, or undertake their own research, as to the admissibility requirements.

⁴⁴⁴ Communication No. 491/1992: Australia. 18/9/92 CCPR/C/45/D/491/1992

⁴⁴⁵ Communication No. 490/1992: Australia 30/3/93. CCPR/C/47/D/490/1992

⁴⁴⁶ Communication No. 499/1992: Australia 30/3/93. CCPR/C/47/D/499/1992

⁴⁴⁷ Communication No. 536/93: Australia 28/3/95. CCPR/C/53/D/536/1993

⁴⁴⁸ Communication No. 557/93: Australia 1/8/96. CCPR/C/57/D/557/1993

⁴⁴⁹ Communication No. 700/1996: Australia 18/11/96. CCPR/C/58/D/700/1996

⁴⁵⁰ Communication No. 579/1994: Australia 9/5/97. CCPR/C/59/D/579/1994

⁴⁵¹ Communication No. 659/1995: Australia 3/12/97. CCPR/C/58/D/659/1995/Rev.1

⁴⁵² Communication No. 646/1995: Australia 25/11/98. CCPR/C/64/D/646/1995

⁴⁵³ Communication No. 737/1997: Australia 30/4/99. CCPR/C/65/D/737/1997

⁴⁵⁴ Communication No. 751/1997: Australia 12/5/99. CCPR/C/65/D/751/1997

⁴⁵⁵ Communication No. 772/1997: Australia 8/8/2000. CCPR/C/69/D/772/1997

⁴⁵⁶ Communication No. 947/2000: Australia 27/10/2000. CCPR/C/70/D/947/2000

⁴⁵⁷ Communication No. 963/2001: Australia 27/3/2001. CCPR/C/71/D/963/2001

⁴⁵⁸ Communication No. 762/2001 Australia 2/4/2001. CCPR/C/71/D/762/2001

⁴⁵⁹ Communication No. 832/1998 Australia 31/7/2001. CCPR/C/71/D/832/1998

⁴⁶⁰ Communication No. 1065/2002 Australia 1/4/2002. CCPR/C/74/D/1065/2002

⁴⁶¹ Communication No. 880/1999 Australia 15/4/2002. CCPR/C/74/D/880/1999

1. Failure to exhaust domestic remedies

Art. 5 para 2(b) of the FOP requires that a person alleging violation of ICCPR rights and freedoms, must first "exhaust" available remedies in Australia before pursuing a complaint to the HRC.

2. Failure to substantiate claim

Art. 2 FOP requires that a written communication must disclose evidence that substantiates claims of the alleged violations. That is, the communication must reveal facts that show that the acts/omissions complained of are violations of the rights and freedoms expressed in the ICCPR.

3. Failure to satisfy "victim" requirement

Art. 1 of the FOP requires that victims themselves, or their immediate family, lodge a communication. Other than this, others purporting to act on behalf of a victim are required to demonstrate that the victim has authorised them to take such action. The criterion also requires that only natural persons, not corporate entities, can be victims of violations of human rights and freedoms.

4. Ratione Temporis Rule

Art. 1 of the FOP and precludes examination by the HRC of the issues raised in a communication where the events complained of in a communication occurred before Australia's acceptance of the FOP (ie, before 25 December 1991). However, where the communication alleges that the acts or omissions of Australia - notwithstanding that they began before 25/12/91 - have continued or had effects after 25/12/91, and the continuation or effects themselves constitute violations, then the HRC is able to consider them.

5. Ratione Materiae Rule

Art. 3 of the FOP requires that a communication, among other things, must disclose a "material" issue relevant to, or compatible with, the provisions of the ICCPR. That is, the allegations (and the facts supporting them) must clearly relate to the rights or freedoms expressed in the ICCPR. Art. 3 also precludes the consideration of anonymous communications, or those that the HRC considers to be an "abuse of process".