



Human rights: Australia versus the UN

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Australia prides itself on being a 'good international citizen'. But how does Australia fare with regard to human rights from an international perspective?¹

It is a party to all major human rights treaties and yet reluctant to make them work at a domestic level. Australia is a party to rights of complaint to United Nations (UN) human rights bodies (Human Rights Committee, Race Discrimination Committee and Committee against Torture).

How do these procedures work?

First case: Toonen

The Keating Labor government responded to the *Toonen* decision by enacting a law overriding the offending provision of the Tasmanian *Criminal Code*. The legislation was supported by both the Labor government and the Opposition Coalition.

This positive Australian response to findings of the Human Rights Committee was not maintained following the change of government in 1996. Under the Howard Coalition government, Australia's relationship with the UN human rights treaty bodies has declined, and the government has failed to comply with almost every decision of the Human Rights Committee.

Second case: A v Australia

The second decision against Australia was issued on 3 April 1997.² Mr A, a Cambodian citizen, had been detained at the Port Hedland Detention Centre for over four years without access to legal advice or court review of his detention. The Human Rights Committee held that Mr A's detention for such a long period was arbitrary and a violation of article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

The Howard government responded to the committee by rejecting its findings outright. It stated:

[T]he Government does not accept that the detention of Mr A was in contravention of the Covenant, nor that the provision for review of the lawfulness of that detention by Australian courts was inadequate. Consequently, the Government does not accept the view of the Committee that compensation should be paid to Mr A.³

Subsequent cases

The Human Rights Committee has handed down decisions in 44 claims concerning Australia. 12 of these complaints have been decided against Australia. Australia's violations of human rights have been found to include:

¹ This paper draws on Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, *No Country is an Island: Australia and International Law*, University of NSW Press, 2006. It was first presented at the Australian Lawyers' Alliance Conference, 22 June 2006.

² *A v Australia* (560/1993) 30 March 1997, UN Doc. CCPR/C/59/D/560/1993.

³ *Official Records of the General Assembly*, 53rd session, UN Doc. CCPR/A/53/40, vol. 1 (1998).

- mistreatment of children—for example, in *Bakhtiyari v Australia*, the Human Rights Committee found that the detention of two children in immigration detention for two years and eight months violated the children's rights;⁴
- inhumane treatment of prisoners—for example, in *Cabal and Bertran v Australia*, the Human Rights Committee found that the detention of two prisoners in a triangular cage the size of a telephone booth was inhuman;⁵
- denial of the right to family life—for example, in *Winata v Australia*, the Human Rights Committee found that deportation of the parents of a 13-year-old child who was born in and had grown up in Australia constituted an interference with the right to family life;⁶
- undue trial delay—for example, in *Rogerson v Australia*, the Human Rights Committee held that a two-year delay by the Northern Territory Court of Appeals to deliver its decision on a criminal contempt charge constituted undue delay.⁷
- In *Young v Australia*, a man applied for a war veteran's dependent pension. This claim was rejected because his partner of 38 years was another man. The Human Rights Committee found that this was a breach of ICCPR article 26, the right to non-discrimination.⁸
- *Brough v Australia* where a disabled young Aboriginal man was held in solitary confinement and deprived of clothing and blankets in a NSW adult prison; the Human Rights Committee found this constituted a violation of the right to humane treatment.⁹
- Most recently, *D & E v Australia* (UN Communication No. 1050/2002, views adopted 25 July 2006) where the Human Rights Committee found that the 'immigration detention' of an Iranian woman, together with her husband and two young children, for over three years was 'arbitrary' and in breach of Article 9 (1) of the ICCPR.

Rejection of the findings of UN Committees

In response to almost every finding against Australia, the Commonwealth Government has reiterated that the Human Rights Committee is not a court and its views are not binding.

⁴*Bakhtiyari v Australia* (1069/2002) 6 November 2003, UN Doc. CCPR/C/79/D/1069/2002.

⁵*Cabal and Bertran v Australia* (1020/2001) 19 September 2003, UN Doc. CCPR/C/78/D/1020/2001.

⁶*Winata v Australia* (930/2000) 18 August 2001, UN Doc. CCPR/C/72/D/930/2000.

⁷*Rogerson v Australia* (802/1998) 15 March 2002 UN Doc. CCPR/C/74/D/802/1998.

⁸*Young v Australia*, (941/2000) 6 August 2003, UN Doc. CCPR/C/78/D/941/2000 (2003).

⁹ UN Doc CCPR/C/86/D/1184/2003 (27 April 2006)

The Australian Government's rejection of the views of the Human Rights Committee is effectively a denial of international obligations that Australia has voluntarily assumed.

The combative approach the government took to the Human Rights Committee decision in *A v Australia* has characterised the Howard government's approach to the UN human rights treaty body system in general.

In its Concluding Observations to Australia's 2000 report, the Committee on the Elimination of Racial Discrimination applauded Australia's implementation of many positive legislative and policy measures designed to reduce the incidence of racial discrimination and to promote the idea of multiculturalism, including the establishment of the (now disbanded) Aboriginal and Torres Strait Islander Commission.

Yet the committee also criticised Australia. In particular, it expressed concern about the absence of an entrenched constitutional guarantee to preclude the enactment of racially discriminatory legislation; the failure to consult representatives of the Aboriginal community adequately in drafting amendments to the *Native Title Act 1993* (Cwlth); the high rate of Aboriginal incarceration in Australia's prison system and the continuing discrimination experienced by the Indigenous population in the enjoyment of their economic, social and cultural rights.

The Committee on the Elimination of Racial Discrimination regretted that the Commonwealth Government had been unable to apologise to the members of the Stolen Generation as part redress for the 'extraordinary harm inflicted by these racially discriminatory practices'.¹⁰

The response of the government to the Concluding Observations of the Committee on the Elimination of Racial Discrimination was immediate and fierce. The government rejected the comments of the committee, calling them 'an unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs'. The government continued:

We are seriously disappointed about the Committee's comments on race relations in Australia. The Committee has apparently failed to grapple with the unique and complex history of race relations in Australia. It has paid scant regard to the Government's input and has relied almost exclusively on information provided by non-government organisations. This is a serious indictment of the Committee's work. It is unacceptable that Australia, which is a model member of the UN, is being criticised in this way for its human rights record.¹¹

In its official response and in subsequent interviews given by the Prime Minister and his key ministers, the government denounced the committee's findings as a violation of Australia's sovereignty. The Prime Minister remonstrated that 'in the end we are not

¹⁰ *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, CERD/C/304/Add.101, 19 April 2000.

¹¹ Daryl Williams, Attorney-General, 2000, 'CERD Report Unbalanced' (Press Release, 26 March).

told what to do by anybody',¹² and added in a separate interview that such matters should be resolved by Australians in Australia without having to 'dance attendance on the views of committees that are a long way from Australia'.¹³

In Australia's response, there was a sense of victimisation, and an implication that the committee should be concentrating its attention on states guilty of graver human rights violations. The Prime Minister emphasised that 'Australia's human rights reputation compared to the rest of the world is quite magnificent'.¹⁴

So irate was the government about the committee's views that it considered withdrawing entirely from the UN treaty committee system. Four days after the initial media release, the government announced its decision to undertake a 'whole of government review of the operation of the UN treaty committee system as it affects Australia'.¹⁵

The 'reform' measures ultimately adopted by Australia more closely resembled a steady withdrawal from the system. The government resolved to adopt a more 'robust and strategic approach to Australia's interaction with the treaty committee system', deciding, among other things, that:

- Australia would only agree to visits by human rights treaty committees and the provision of information where there is a compelling reason to do so;
- Australia would reject 'unwarranted' requests from treaty committees to delay removal of unsuccessful asylum-seekers from Australia;
- Australia would not sign or ratify the Optional Protocol to CEDAW, which establishes an individual complaints procedure.¹⁶

Since the reforms in 2000, the nature of Australia's approach to the UN human rights treaty bodies has shifted. Rather than reacting publicly to the actions of treaty bodies, the Commonwealth Government appears to have opted for a more low-key approach in response to negative views and decisions. The government has failed, for example, to engage publicly with the Committee on the Elimination of Racial

¹² ABC Radio, 2000, 'The Hon. John Howard MP, Radio Interview with Sally Sara', *AM Programme*, 18 February.

¹³ Lincoln Wright, 2000, 'Howard softens stand on UN', *The Canberra Times* (Canberra), 3 April.

¹⁴ ABC Radio, 2000, 'The Hon. John Howard MP, Radio Interview with Sally Sara', *AM Programme*, 18 February.

¹⁵ Alexander Downer, Minister for Foreign Affairs. 2000, 'Government to Review UN Treaty Committees' (Press Release, 20 March).

¹⁶ Alexander Downer, Daryl Williams & Phillip Ruddock, 2000, 'Improving the Effectiveness of United Nations Committees' (Joint Media Release, 29 August).

Discrimination's Concluding Observations on Australia's 2005 Report: 'Silence effectively killed the story.'¹⁷

The Australian Government has adopted a similarly disengaged approach to decisions of the human rights treaty bodies in cases involving individual complaints. The government does not publish or publicise the views of the treaty bodies. As the decisions of the human rights treaty bodies are not binding, publicity is the key tool available to the treaty bodies to encourage compliance with their decisions.

In fact, decisions against a state generally conclude with a request that the state found in violation publish the committee's views. The Australian Government's failure to publicise the decisions of the treaty bodies indicates a failure to comply with its treaty obligations in good faith.

From a domestic perspective, publication of the decisions is important as it enables informed debate on the issue of rights protection within the domestic population. For example, the decision of the UN Human Rights Committee in *Young v Australia*¹⁸ in 2003, in which Australia was found to have discriminated against same sex partners in the granting of veteran's pensions, was not publicised by media release and no copy or summary of the decision is available on any government department's website.

Seven months after the response deadline, the Commonwealth Government replied that it did not accept the Human Rights Committee's finding that Australia had violated article 26 of the ICCPR, which prohibits discrimination on the basis of sexuality, and therefore rejected the committee's conclusion that the complainant was entitled to an effective remedy.

Government objections

The Australian Government has explained its hostility toward the international human rights regime on the basis of three objections: a mistrust of the international institutions responsible for monitoring human rights; disagreement about the significance of the issues raised by the committees; and, above all, a concern with domestic sovereignty.

In relation to its criticism of the institutions themselves, Australia is not alone in suggesting that reform of the human rights treaty bodies is required. A major reform initiative has been underway for some time.¹⁹ Most other reform measures are, however, directed toward improving the efficiency of the committees, rather than questioning their right to criticise government policy.

¹⁷ David Marr, 2005, 'Geneva v Canberra', *Sydney Morning Herald* (Sydney), 28 March.

¹⁸ *Young v Australia*, (941/2000) 6 August 2003, UN Doc. CCPR/C/78/D/941/2000 (2003).

¹⁹ See generally Ann Bayefsky, 'Reform of the UN Human Rights Treaty System' <<http://www.bayefsky.com/tree.php/area/reform>>.

The government's claim that rights violations within Australia are less significant because they are not as serious as those committed by some of the world's worst regimes also misunderstands the nature of Australia's international obligations. Australia has agreed to the standards of the international human rights system. In assessing whether Australia has complied with those standards, the UN human rights treaty committees measure Australia's conduct against the objective standards of the treaties, not against the relative compliance of other countries.

The argument that international human rights standards impinge on Australian sovereignty is the most common of the government's objections. International committees, it is argued, intrude unreasonably into Australia's domestic affairs when they criticise Australian human rights standards.

This argument has been difficult to sustain since the adoption of international human rights instruments, beginning with the Universal Declaration of Human Rights in 1948, confirmed that the way a government treats its people is a legitimate concern of the international community.

Many of the arguments raised by the government, including sovereignty, appear to mask a broader concern with the notion of human rights. The impact of international human rights decisions can range from minor to substantial. The use of sovereignty to rebuff all findings suggests that the government's concern is not based on a close assessment of the domestic impact of the decisions, but stems from an ideological objection to human rights as an intrusion on domestic policy.

The government's general resistance to human rights is also evident when the government's approach to international decisions is compared with its response to findings of human rights violations by domestic courts. In April 2000, in *Hagan v Australia*,²⁰ the UN Committee on the Elimination of Racial Discrimination found that the use of the word 'nigger' on a sporting grandstand in Toowoomba in Queensland was racially offensive and should be removed.

The government refused to follow the committee's decision on the basis that Australian courts had considered the issue, and that the government was 'confident that Australia's domestic processes, which found no racial discrimination in this case, are second to none in the world'.²¹

Yet, in August 2000, when an Australian court found that the detention of children amounted to a violation by Australia of its human rights obligations, the government attacked the court's decision. The then Minister for Immigration, Philip Ruddock, described the decision by the Family Court in *B and B v Minister for Immigration and*

²⁰ *Hagan v Australia*, (26/2002) 4 March 1992, UN Doc. CERD/C/62/D/26/2002 (2002).

²¹ Ashleigh Wilson, 2003, 'Canberra to defy UN on "Nigger" sign', *The Canberra Times* (Canberra), 24 April.

*Multicultural Affairs*²² as an example of the courts acting ‘in excess of their power’ and argued that ‘arrangements that the parliament intended should operate [were] being unwound by judicial actions’.²³

Mr Ruddock has made similar comments in relation to the Federal Court. He has stated that it should be the parliament that decides Australia’s laws, not what he termed ‘unelected and irresponsible officials’ of the courts.²⁴ The similar government responses to both international and domestic findings of human rights violations reveal that the government’s concern is not so much with sovereignty: it is with any body that challenges government policy on the basis of human rights concerns.

In this context, the nostrum of anti-bill of rights campaigners that ‘it aint broke so don’t fix it’ sounds rather hollow. From a human rights perspective, there are many broken elements. Australia’s lack of concern with its international reputation with respect to the protection of human rights is applauded by many commentators²⁵ but it has done a lot of damage. This is not least because it provides an alibi for many countries, including those we regularly criticise—for example Zimbabwe—to make exactly the same arguments. But it also, I think, underlines the need for much better domestic human right protection here in Australia.

²² *B and B v Minister for Immigration and Multicultural Affairs* [2003] Fam CA 451 (successfully appealed to the High Court by the Minister for Immigration in *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20).

²³ ‘I’ll try to keep children locked up: Ruddock’, 2003, *Sydney Morning Herald* (Sydney), 1 August.

²⁴ ‘Ruddock ambushed over refugee stance’, 2002, *Sydney Morning Herald* (Sydney), 23 April.

²⁵ E.g., James Allan, 2006, in *The Australian* 21 June.