

# TREATY BODY MONITOR

International Service for Human Rights



Human Rights Monitor Series

## COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 42<sup>TH</sup> SESSION AUSTRALIA, 4<sup>TH</sup> REPORT 5 AND 6 MAY 2009

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### Key facts<sup>1</sup>

Ratification	Reservations	Party to Optional Protocol <sup>2</sup>	Other core treaties ratified	Date of previous report/examination, and submission of present report
1975	None	Unknown as open for signature in autumn 2009	ICCPR, CAT, CRC, CEDAW, CRPD, CERD	Previous examination 24-25 August 2000 Recent report submitted 25 July 2007

### Opening remarks by the delegation

The delegation of Australia was led by Ms Caroline Millar, Ambassador and Permanent Representative to the UN in Geneva. She was supported by a large but relatively low-level delegation consisting of representatives of the Department of Families, Housing, Community Services and Indigenous Affairs, the Department of Foreign Affairs and Trade, the Australian delegation to the OECD, and the Permanent Mission to the UN.<sup>3</sup>

After the presentation of the delegation, Ms Millar outlined comprehensively the main developments since the submission of the report. In addition to highlighting the detailed written answers submitted to the

<sup>1</sup> The information in this table is sourced from the Office of the High Commissioner for Human Rights (OHCHR), and is available at [www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx](http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx).

<sup>2</sup> Article 1 of the Optional Protocol provides that 'a State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.'

<sup>3</sup> The list of members of Australia's delegation is available at [http://www2.ohchr.org/english/bodies/cescr/docs/list/Delegation\\_Australia\\_42.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/list/Delegation_Australia_42.pdf).

Committee,<sup>4</sup> Ms Millar reminded the Committee of the apology made to the indigenous population by the Australian Prime Minister, in which he addressed laws and policies that were detrimental to the indigenous population. She also stressed that the new Government endorses the *Declaration on the Rights of Indigenous Peoples* and that it will therefore be ‘a landmark document’ for the protection of indigenous rights in Australia.

Ms Millar further elaborated on the newly elected Government’s “ambitious” agenda regarding economic and social rights, focusing in particular on education, health, social cohesion, gender equality, decent housing, and workers rights. Other issues addressed included new policies on sexual violence, homelessness, development aid, and health. The Ambassador also updated the Committee on Australia’s ongoing national human rights consultation, which was launched in 2008 and resulted so far in more than 12,000 submissions. The consultation aims to evaluate the current human rights framework by asking the public whether human rights are protected sufficiently and what rights should be better protected in Australia. She explained that the consultation itself and the outcome has and will continue to influence the formulation of new policies.

In summary, Ms Millar exhibited openness to dialogue with the Committee and pre-emptively acknowledged concerns regarding the structure of the submitted report. She pledged to provide the Committee with a separate report rather than a ‘core document’ for the next review as stipulated by the Committee.

### Overview of key issues

The following overview addresses six areas of the Committee’s concluding observations following the examination on the basis of those themes that the Committee dedicated most time to, whether they requested follow-up on implementation, and whether the final recommendations were specific and implementable within a certain timeframe. Each is assessed according to how they were addressed in the examination, including the initial views of the State, questions, comments and responses provided.

During the interactive dialogue with the Committee, Ms Millar delegated questions posed by the Committee to individual experts, who were mostly able to provide detailed answers. Several times the answers were given after consultation with the Government and few answers had to be submitted in writing after the session.

### **Constitutional and legislative framework to protect economic, social and cultural rights**

Bearing in mind the provisions of article 28 of the Covenant, the Committee reiterates that the principal responsibility for its implementation lies with the State party’s Federal government and recommends that it: a) enact comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions in the Federation; b) consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission; c) establish an effective mechanism to ensure the compatibility of domestic law with the Covenant and to guarantee effective judicial remedies for the protection of economic, social and cultural rights.<sup>5</sup>

Several Committee members highlighted the limitations of the current legal framework to protect economic, social and cultural rights in Australia and criticised the fact that the Covenant is not fully incorporated into domestic law.<sup>6</sup> Mr Ariranga Pillay and Ms Maria Bras Gomes claimed that the legislative framework often does not provide sufficient grounds for remedies in cases of violations and inquired into what steps have been taken to incorporate the protection of all social and economic rights into national legislation. Ms Millar

<sup>4</sup> E/C.12/AUS/Q/4/Add.1, available at <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.AUS.Q.4.Add.1EN.pdf>

<sup>5</sup> E/C.12/AUS/CO/4 para. 11, available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>6</sup> Mr. Alvaro Tirado Mejia, Mr. Ariranga G. Pillay.

responded that current domestic legislation ensures that the Convention is not in contradiction with national law. From the Government's point of view there is no need to incorporate the Covenant into domestic legislation. She added however that the Government is looking into possibilities of including economic and social rights into statutory instruments.

Committee members Mr Eibe Riedel, Ms Bras Gomes and Mr Walid Sadi underscored the weak role of the National Human Rights Commission in terms of the protection of economic and social rights as it has a limited mandate, insufficient resources and its recommendations are non-binding. Ms Millar admitted that the recommendations of the Commission are not binding but reiterated that they are considered seriously in Parliament. She added that there has been no cut in the Commission's base budget, as claimed by the Committee. Budgetary changes only reflect changes in the Commission's work. She also acknowledged that, unlike the International Covenant on Civil and Political Rights, the Covenant is not specifically listed in terms of the Commission's monitoring functions. She added that economic, social and cultural rights are not ignored, as there is even a reference to these rights in the Act that established the Commission.

Committee members Ms Bras Gomes and Mr Riedel questioned whether all economic and social rights are included in the ongoing national human rights consultation and why the proposal of a bill of rights is not included in the consultation and considered as a legislative option. Several Committee members questioned the level of awareness of the general population regarding economic and social rights, as well as the current national human rights consultation. Ms Millar replied that economic and social rights are part of the national human rights consultation, which is an extensive process involving broad public participation. Furthermore, the national human rights commission provides awareness programmes on the consultation and a high level of interest has been shown, including from persons in detention. Ms Millar reasoned that the outcome of the consultation will not be a bill of rights as this requires amendments to the Constitution.

Ms Bras Gomes described Australia's anti-discrimination legislative framework as 'piecemeal anti-discrimination protection'. Ms Millar responded that a comprehensive anti-discrimination framework is not in place due to the federal system, but that a working group was set up to look into harmonisation of anti-discrimination law and an individual complaint procedure. Furthermore, she argued that remedies are available for breaches of anti-discrimination law.

Regarding questions on Australia's stance on the new Optional Protocol to the Covenant, which provides for individual communications under the Covenant, Ms Millar stressed that Australia is currently considering signature of the Optional Protocol, but cannot yet give a definite answer regarding the position of the Government. She also stated that the issue of collective rights will be under consideration with regards to justiciability.

## **Housing**

The Committee recommends that the State party take effective measures, in line with the Committee's general comment No.4 (1991) on the right to adequate housing (art. 11, para. 1, of the Covenant), to address homelessness in its territory. The State party should implement the recommendations of the Special Rapporteur on the Right to Adequate Housing contained in the report of his mission to Australia (A/HRC/4/18/Add.2). The Committee requests the State party to provide, in its next periodic report, disaggregated data and information which will allow the Committee to assess the progress made by the State party in improving the housing situation in its territory, in particular with respect to indigenous peoples.<sup>7</sup>

Committee members Ms Ariranga Pillay and Mr Daode Zhan expressed concern regarding the issue of homelessness in Australia. Despite the measures of the Government to address homelessness, including the National Housing Strategy that came into effect in January 2009, and the commitment to halve homelessness

<sup>7</sup> E/C.12/AUS/CO/4 para. 26 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

by 2020, the incidence of homelessness has increased, primarily affecting indigenous communities. Mr Sean Innis from the Department of Families, Housing, Community Services and Indigenous Affairs gave some specific figures on the 104,676 people who are homeless and outlined various measures taken by the Government to address the issue. These measures include the construction of 600 new housing units for the homeless or people at risk, the upgrading of existing housing, and assistance for affordable renting. He added that a ‘national affordable housing agreement’ was agreed and announced by the Council of Australian Governments. Mr John Matthews from the Australian Permanent Mission to the UN claimed that Australia understands that the number of homeless people is too high and that the investment to address the issue has been the highest in history. Ms Millar pointed out that \$ 800 million (Australian) will be spent over the next four years to achieve the goal to half homelessness by 2020. Mr Innis added that a ‘significant amount’ of the increased budget for housing projects, will be assigned to housing for indigenous people as they are overrepresented regarding homelessness. He also stressed that the National Housing Strategy has been developed along the recommendations made by the Special Rapporteur on the right to housing.

### Employment/right to work

The Committee recommends that the State party continue its efforts to improve the realisation of workers rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87. In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action and consider amending the Fair Work Act 2009. The State party should lift the restrictions on “pattern bargaining”, the pursuit of multi-employer agreements and matters that are not “permitted”, and to remove the secret ballot requirements for workers who wish to take industrial action.<sup>8</sup>

Mr Philippe Texier partially welcomed the *Fair Work Act*, but argued that there is room for improvement in the areas of dismissals, unions’ right to strike and collective bargaining. He pointed specifically to the high fines for industrial action included in the *Building and Construction Industry Improvement Act 2005* as a limitation on freedom of association and emphasised that the right to strike should be open to all workers. Ms Oon- Ying Chin from the Australian Delegation to the OECD replied that the *New Fair Work Act* provides for the right of collective bargaining.

Mr Texier also noted that inequality in access to employment is still of concern in Australia, as evidenced by high unemployment rates among indigenous people, asylum seekers, migrants and people with disabilities.<sup>9</sup> Ms Chin argued that the Government designed a variety of programmes to create equal employment opportunities for vulnerable groups. From July 2009 new job services provide more tailored assistance and special programmes are implemented to facilitate access to employment for indigenous people. Migrants have to possibility to access English language programmes in increase employment access.

### Health

The Committee recommends that the State party: a) develop adequate strategies to provide all detainees with appropriate health and medical care, in line with the Committee’s General Comment No.14 on the right to highest attainable standard of health (2000) and the relevant UN standard minimum rules for the treatment of prisoners; b) ensure that adequate health care for prisoners be taken into account in the its health programmes and policies; and c) encourage the Detention Health Advocacy Group to adopt a human rights based-approach when proposing reforms to the detention care system.<sup>10</sup>

<sup>8</sup> E/C.12/AUS/CO/4 para. 19 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>9</sup> E/C.12/AUS/CO/4 para. 18 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>10</sup> E/C.12/AUS/CO/4 para. 29 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

The Committee recommends that the State party take effective measures to ensure the equal enjoyment of the right to the highest attainable standard of mental health, including by: a) allocating adequate resources for mental health services and other support measures for person with mental health problems in line with the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care; b) implementing the recommendations of the Australian Medical Association's 2008 report on indigenous health; c) reducing the high rate of incarceration of people with mental diseases; and d) ensuring that all prisoners receive an adequate and appropriate mental health treatment when needed.<sup>11</sup>

The Committee expressed concern regarding a variety of health aspects. Mr Riedel pointed to inadequate mental health services, in particular those provided for indigenous people, prisoners and asylum seekers in detention. In reply Mr Sanjeev Commar from the Permanent Mission to the UN outlined that mental health services have been significantly expanded, as well as the funding for programmes in the areas of anxiety and depression, to address this hitherto unmet need. Funding for certain programmes has doubled and a number are specifically targeted towards indigenous people and children, such as the 'social and emotional wellbeing' programmes, which include home counsellors and regional centres in remote areas. Programmes have also been introduced to increase access to psychiatrists and social workers via the medicare scheme. Mr Commar argued that the focus is reoriented towards prevention and early intervention in mental health issues. He reiterated that a new mental health plan is currently being finalised.

With regards to mental health services in detention centres, Mr Matthews argued that Australia recognised that people in detention experience mental distress and have special health needs. He also acknowledged that services have inadequately addressed these needs, and for that reason an advisory group has been established to assist in the development of a mental health framework. Various measures have been taken, such as the development of memoranda of understanding with state government to address the issue. Mr Commar added that the question of HIV/AIDs is a high priority for the government and that a ministerial advisory committee on prevention has been established. In addition, a working group is currently reviewing the present strategy. Services for prisoners with HIV/AIDs fall under the current HIV strategy and are managed by different governments individually.

Mr Riedel also asked what concrete steps had been taken to improve the health situation of prisoners and requested data in the next report on waiting periods for hospitalisation. Mr Matthews indicated that the medium waiting time for hospitalisation is 32 days, but varies depending of on the different specialisation areas. Mr Walid Sadi also questioned if a two tier medical system exists for Australians on one side and indigenous people on the other. In response to Mr Commar claimed that the medicare system is universal in Australia, but that there are special programmes that are designed for indigenous people.

### **Social security**

The Committee recommends that the State party take additional measures, legislative or otherwise, to ensure universal coverage of the social security system so as to include asylum seekers, newly arrived immigrants and indigenous peoples. The Committee also recommends that social security benefits, including unemployment benefits, old age pensions and youth allowance enable recipients to enjoy an adequate standard of living. The Committee strongly recommends that the State party review conditionality such as "mutual obligations" in the welfare to work programme and the "quarantining" of welfare payments under the Northern Territory Intervention that may have a punitive effect on disadvantaged and marginalized families, women and children. The Committee further recommends that the State party consider ratifying ILO Convention No. 102 on minimum social security standards.<sup>12</sup>

<sup>11</sup> E/C.12/AUS/CO/4 para. 30 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>12</sup> E/C.12/AUS/CO/4 para. 20 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

The Committee recommends that the State party introduce a compulsory paid maternity and paternity leave scheme and consider ratifying ILO Conventions No. 103 concerning Minimum Standards of Social Security (1952) and No. 183 concerning the Revision of the Maternity Protection Convention (Revised), 1952 (2000).<sup>13</sup>

Ms Bras Gomes highlighted several issues related to social security and pointed out that the right to social security is not a universal right and not enforceable in Australia. She questioned the need of conditionality in the welfare system, including the practice of quarantining welfare payments. She argued further that conditionality of the social security system negatively affects the most vulnerable groups. She also enquired whether Australia will introduce paid maternity leave as was already recommended by the Committee in 2000. The delegation responded that the right to social security is enforceable through the legislative system, when proof of residency and income can be provided. Newly arrived people have a waiting period of two years, while refugees and migrants have immediate access to health care. Asylum seekers are however not eligible for social security payments, but can access an asylum seeker assistance scheme when experiencing financial hardship.

In response to the question whether the Government will introduce paid maternity leave, Mr Innis stated that an interim report has been published by the Productivity Commission and the Government is currently considering the issue on the basis of this report.

In response to Mr Mohamed Abdel-Moneim on how much the Government contributes to the social security system, Mr Innis explained that the social security system is fully tax payer funded. He added that the income quarantine has been reviewed by the Government, in particular whether quarantining should be made voluntary. However, the Government decided to continue with broad based income management in the Northern Territories. He acknowledged that the policy is controversial and promised an active review to ensure that it is in line with the *Racial Discrimination Act*. Furthermore, Mr Innis reiterated that there are additional measures for those that face extra costs, such as persons with disabilities. Measures for those in need can include for example rent assistance, reduced costs for access to medication and transport for older people. Mr Innis pointed to two recent reviews that were undertaken; firstly, a review of the pension system that will be considered in the forthcoming budget and secondly, a review on the tax transfer, which is due at the end of this year.

### Rights of indigenous peoples

The Committee recommends that the State party: a) address the human rights violations identified in the 2007 *Little Children are Sacred* report bearing in mind the recommendations of the 2008 report of the Northern Territory Intervention Response Review board in this regard; b) conduct formal consultations with the indigenous peoples concerned regarding the operation and impact of the Northern Territory Intervention; c) establish a national indigenous representative body with adequate resources; and d) ratify ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989).<sup>14</sup>

The Committee recommends that the State party produce accurate national data on indigenous school-age children in remote areas to assess whether the existing education infrastructure and services meet the needs of indigenous peoples living in remote areas. The Committee also recommends that wherever the school provision does not meet the populations' needs, the State party develop an adequate national plan to improve the educational system for indigenous peoples, including in remote areas.<sup>15</sup>

<sup>13</sup> E/C.12/AUS/CO/4 para. 21 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>14</sup> E/C.12/AUS/CO/4 para. 15 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>15</sup> E/C.12/AUS/CO/4 para. 31 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

During the whole session the Committee repeatedly addressed the economic and social rights of indigenous people in Australia. Ms Virginia Bonoan-Dandan was interested in the substitute body for the Northern State Island Commission and the timeframe for this substitute body. Ms Bonoan-Dandan was also interested in how participation in the representative body will be ensured. Regarding the consultative body Mr Innis explained that consultations already took place and that criteria for the establishment of the body were already agreed. However, the consultations have been extended and a report of the outcomes will be provided to Parliament this year.

Mr. Riedel and Ms Bras Gomes were interested in status of the Northern Territory Intervention measures which were considered to be inconsistent with rights enshrined in the Covenant, in particular with the principle of non-discrimination. They argued that these measures have a negative impact on the realisation of the rights of indigenous peoples and that they were adopted without sufficient and adequate consultation with the peoples concerned. In response, Mr Innis, described the support of the Government for the Declaration on Rights of Indigenous People as a “historic shift” and argued that the Government is currently redesigning its approach to the Northern Territories to be in line with the *Anti-Discrimination Act*. He added that the *Northern Territory Act* is under review since June 2008 and that the Parliament will discuss the issue in August 2009. The review incorporates visits and submissions. In spring 2010 legislation to ensure human rights obligations of the *Northern Territory Act* will be passed. He added that 20 indigenous engagement offices have been installed and an advisory group of 25 indigenous leaders has been created to provide feedback on the *Northern Territory Act*.

Mr Philippe Texier in particular criticised the fact that *ILO Convention No. 169* on indigenous and tribal people has not been ratified by Australia. Ms Millar replied that the Government was currently reviewing its position on *ILO Convention No. 169*.

In response to Mr Sadis and Mr Azzouz Kerdouns comments that indigenous children end up in segregated schools, Ms Chin claimed that there is no such segregation, but that there is a problem for indigenous children to access secondary school. The Government also recognised that the education outcomes of indigenous children and in particular of those from remote areas are lower. Therefore the Government included the issue on the policy agenda and made the successful completion of year 12 for indigenous people a top priority. Boarding schools were identified as one means to reach this target for indigenous children from remote areas.

### Other issues not reflected in concluding observations

As previously stated, Ms Bonoan-Dandan criticised the fact that Australia did not provide a specific report for the Committee but submitted a ‘**common core document**’.<sup>16</sup> Ms Bonoan-Dandan in particular argued that the report lacks the treaty-specific obligations and in-depth information. Moreover, it contained no information on follow-up to previous concluding recommendations. The Committee demanded a separate report for the next reporting period. Ms Millar acknowledged the concerns regarding the format of the report and argued that the format was chosen in good will.

Ms. Bras Gomes was interested in what measures the Government has taken to harness the effects of **climate change** on the culture of indigenous people. Ms Miranda Brown from the Permanent Mission to the UN replied that the Government is currently funding a study on the effects of climate change on indigenous people. Indigenous people are also included in the consultations on the post-2020 global climate framework.

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<sup>16</sup> The common core document should according to the harmonized guidelines on reporting to treaty bodies only contain general information on the State that is relevant to all treaty bodies such as demographic, economic, social, and cultural characteristics, information on the political, and legal structure and acceptance of human rights norms. Detailed information can be found in HRI/MC/2005/3 available at <http://www2.ohchr.org/english/bodies/icm-mc/documents.htm>

All other main issues addressed, such on the high incidence of domestic violence,<sup>17</sup> in particular violence against women and specifically against indigenous women, the lack of increase in overseas developments assistance,<sup>18</sup> the persistence of trafficking in human beings,<sup>19</sup> and the high poverty rate of 12% despite economic prosperity,<sup>20</sup> have been reflected in concluding observations.

## Conclusions and next steps

At the end of the session Ms Millar reiterated Australia's strong commitment to human rights and to the collaboration with the treaty monitoring bodies. She recognised the high expertise of the Committee members and welcomed the active engagement of the civil society. Moreover, she showed willingness to provide further information and apologised for the shortcomings of the report.

The chair of the Committee thanked the Australian delegation for the constructive dialogue and the knowledgeable and effective answers. She emphasised the importance of the common core document, but stated that she is looking forward to a single report to cover the next reporting period.

The next report should be submitted by 30 June 2014.

*Last revised and updated: 15 July 2009*

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<sup>17</sup> E/C.12/AUS/CO/4 para. 22 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>18</sup> E/C.12/AUS/CO/4 para. 12 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>19</sup> E/C.12/AUS/CO/4 para. 23 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

<sup>20</sup> E/C.12/AUS/CO/4 para. 24 available at <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm>

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