

TREATY BODY MONITOR

International Service for Human Rights



Human Rights Monitor Series

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Key facts	1
Opening remarks by the delegation	1
Overview of key issues.....	2
Constitutional and legislative framework	3
Right to life and prohibition of torture	4
Right not to be subject to arbitrary detention / right to a fair trial.....	5
Non-discrimination and equality	6
Other issues	7
Conclusions and next steps.....	7

Key facts¹

Ratified ICCPR	Reservations	Recognises Committee's competency under Art.41 ²	Submission of State party report	Other core treaties ratified
1980	Art. 10, 14, 20	Yes	Due: July 2005 Submitted: Aug 2007	ICESCR, CAT, CERD, CRC, CEDAW, CRPD

Opening remarks by the delegation

The delegation of Australia was led by Mr Andrew Goledzinowski, Ambassador and Deputy Permanent Representative to the UN in New York. The five other members were senior representatives of the Attorney-General's Department (Mr. Bill Campbell, QC); Department of Families, Housing, Community Services and Indigenous Affairs (DFHCSIA); Department of Immigration and Citizenship (DIAC); and the Australian Mission to the UN in New York.³ Mr O'Flaherty (Ireland) commented that the delegation was a "small team for a developed State", but acknowledged the expertise of its members.

¹ 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 and <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en>

² Article 41 of ICCPR recognises the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.

³ The list of members of Australia's delegation is available at <http://www2.ohchr.org/english/bodies/hrc/docs/list/AustraliaDelegation95.pdf>

Ambassador Golezdzinowski delivered the delegation's opening remarks,⁴ but thereafter largely deferred to other members of the delegation to engage with the Committee.⁵ The Ambassador's brief remarks updated the Committee on developments since the submission of the State party report, which was prepared by the previous Australian Government.⁶ He emphasised the commitment of the (new) Australian Government to strengthen its engagement with the UN human rights treaty framework⁷ and the UN human rights system more broadly, citing the government's extension of a standing invitation to UN special procedures as an example. At the domestic level, he drew attention to the government's commitment to 'a renewed engagement with its indigenous peoples', as demonstrated by the parliamentary apology to the Stolen Generations and the government's commitment to 'close the gap' between indigenous and non-indigenous Australians. The Ambassador also referred to a range of legal and policy reforms that had occurred or were planned, to improve Australia's compliance with international obligations in relation to migrants, asylum seekers, same sex couples; and counter-terrorism responses.

Australia provided detailed written responses to the Committee's list of issues well in advance of the session,⁸ which was welcomed by the Committee. Departmental members of the delegation orally presented Australia's responses to the list of issues, which was very time-consuming and provided no new information.

Overview of key issues

The Australian delegation engaged constructively with the Committee. Several Committee members expressed appreciation for the comprehensive and detailed answers that were provided during the examination, and these in turn often prompted additional rounds of questions from the Committee. As a result, the dialogue ran overtime and Australia had to take a number of questions on notice.

Australia was receptive to some of the Committee's criticisms, but declined to take others on board. For example, several Committee members condemned Australia's 14 page State party report as an 'unsatisfactory experiment' that was not consistent with the reporting requirements set out in article 40, nor the Committee's own reporting guidelines.⁹ Australia advised that although the report was prepared in 'good faith' and was one of the first to be submitted following the introduction of the harmonised reporting guidelines, in future it would return to a more conventional approach. In contrast, the delegation maintained Australia's rejection of the majority of the Committee's findings in relation to individual communications under the First Optional Protocol, despite several requests from members that it reconsider its position.¹⁰

At times the Committee appeared frustrated by the inability of the delegation to provide definitive answers to questions. For example, it observed, and the delegation affirmed, that the Australian Government was conducting reviews and consultations across a wide range of human rights laws and practices, and it was

⁴ The statement is available at <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>.

⁵ Mr. Campbell (Attorney-General's Department) became the de facto Head of Delegation.

⁶ The current Australian Government was elected to office in November 2007.

⁷ Australia intends to ratify the Optional Protocol (OP) to CEDAW, OP to CRPD and OP to CAT.

⁸ The list of issues and Australia's written responses are available at <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

⁹ Quote from Mr. Rivas Posada (Columbia). Strong criticism also came from Ms Chanet, Mr. O'Flaherty, Mr. Thelin. In para. 2 of the Concluding Observations, the Committee considered that Australia's 5th report 'does not meet the requirements of article 40 of the Covenant.' Australia's 5th report is comprised of two tables which indicated where Australia's Common Core Document or its previous reports to the Committee addressed a) Covenant provisions and b) previous concluding observations from the Committee in relation to Australia. A third section of its 5th report responded to Communications under the First Optional Protocol to the Covenant, which provides for the confidential consideration of communications from individuals who claim to be victims of a violation of any of the rights proclaimed in the Covenant. The report is available at <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

¹⁰ Mr. Amour commented that Australia's "systematic rejection" of most of the Committee's most recent views created "a real problem". Mr. O'Flaherty appealed to Australia to reconsider a number of outstanding cases and suggested avenues for redress that would "get them off the Committee's books". In para.10 of the Concluding Observations, Australia was requested to 'review its position in relation to Views adopted by the Committee ...and establish appropriate procedures to implement them'.

unclear when and what kind of legislative and administrative reforms might result. This prompted Ms Chanet (France) to advise that the Committee “did not give validity to Ministerial statements”, but was more interested in examining legislation and its implementation to assess State party compliance. Ms Keller (Switzerland) and Mr O’Flaherty (Ireland) emphasised the need for future reports to include more disaggregated data and to evaluate legislation and programmes (respectively), rather than relying on aggregated figures and ‘anecdotal’ information. Several Committee members also expressed concern that Australia seemed to be “routinely rejecting the Committee’s recommendations and general comments on specific issues.”¹¹

Constitutional and legislative framework

Concluding Observations:

8. *The State party should: a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organise training programmes for the judiciary on the Covenant and the jurisprudence of the Committee.*
9. *The State party should consider establishing a mechanism to review its reservations and consider withdrawing its reservations to article 10, para. 2 (a) and (b) and 3; article 14 para.6; and article 20 of the Covenant.*

The Committee was concerned by the lack of direct domestic application and enforceability of the Covenant under Australian law. Mr Salvioli (Argentina) and Mr. Fathallah (Egypt) asked what the federal government was doing to ensure effective implementation of the Covenant at the state and territory level. A related concern was the reversal in the preparedness of the High Court to use the Covenant in a persuasive manner in recent years, and the low level of citation of the Covenant in decisions of the Federal Court. Mr Thelin (Sweden) commented that in the absence of clear legal enforceability, it was disappointing that the ‘judicial atmosphere’ in the High Court was not such that it could not ‘fill the gap’. This prompted suggestions that human rights education was needed to foster a human rights culture amongst jurists, and that the mandatory curriculum for law students should cover Australia’s international human rights obligations.¹²

Australia’s instance that all of its reservations under the Covenant were necessary was met with outright scepticism by many Committee members.¹³ Mr Amour (Tunisia) was ‘amazed’ by the reservation under article 20, and referred the delegation to the Committee’s view in General Comment 29 that there was a prohibition on the use of freedom of expression to justify racial or religious hatred that incited discrimination or violence.¹⁴ Mr. Salvioli (Argentina) asked what processes were in place to foster national debate about the withdrawal of reservations, or whether Australia was complying with its obligation to genuinely reconsider this matter each time it was reviewed. Ms Keller (Switzerland) and Mr Sanchez-Cerro (Peru) suggested that the ‘time was ripe’ for Australia to reconsider its maintenance of reservations on articles that were ‘essential’ to the Covenant.

On a more positive note, Mr. O’Flaherty welcomed the delegation’s answers to his questions about the national consultations on how to better protect human rights which had been initiated by the new government, and were expected to result in a legislative charter of rights. Mr O’Flaherty’s questions reflected NGO concerns about the limited timeframe and budget for these consultations, and whether the process invited a

¹¹ Quote from Mr Amour, which was echoed by Ms Chanet and Mr Sanchez-Cerro.

¹² Mr. O’Flaherty, Mr. Salvioli, Mr. Thelin.

¹³ Mr Amour, Ms Keller, Mr. O’Flaherty, Mr. Sanchez-Cerro, Mr. Salvioli.

¹⁴ Mr O’Flaherty pointed out that there was no federal law against religious vilification and incitement to hatred, and only limited protections in three States. He objected to the inference in the delegation’s answers that the Committee was seeking to create a category of ‘defamation of religion’, or anything other than the criminalisation of ‘extreme forms of expression’.

selective approach to the rights that might be afforded legal protection.¹⁵ However, the responses from the delegation seemed to allay some of Mr. O’Flaherty concerns and led him to comment that Australia’s approach to the consultations was a ‘good practice model’.

Right to life and prohibition of torture

Concluding Observations:

19. *The State party should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subject to other cruel, inhuman or degrading treatment or punishment.*
20. *The State party should take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, as well as whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state, and revoke the residual power of the Attorney-General in this regard.*

The Committee was concerned by the adequacy of Australia’s extradition laws to ensure that its citizens were not charged with or subject to the death penalty for offences committed overseas. Multiple questions from several members¹⁶ exposed the lack of legislative or policy guidance on the circumstances in which Australian police could provide assistance to their overseas counterparts, if that assistance might lead to an Australian citizen being charged with an offence that was punishable by death. Unsatisfied by the delegation’s responses, Mr O’Flaherty referred to specific case law that was cited in an NGO shadow report to demonstrate that many aspects of Australia’s mutual assistance and agency-to-agency assistance policies sat uncomfortably with its commitment to work towards the international abolition of the death penalty.¹⁷ The delegation advised that the government was reviewing its extradition and mutual assistance laws, and would bring the Committee’s concerns to its attention. However, the same NGO report noted that the government’s review excluded consideration of agency-to-agency assistance, and despite the review having been completed, no findings had been made public or amendments proposed.¹⁸

Australia’s failure to enact a legislative prohibition on the use of evidence obtained under torture, or to investigate serious allegations of torture of Australian citizens overseas, prompted several rounds of questions from Sir Nigel Rodley (United Kingdom). Drawing on specific case studies in an NGO shadow report,¹⁹ Sir Nigel suggested it was time for the government to “make the law clear” on the prohibition of evidence obtained using torture, rather than leaving it open to interpretation by the courts. He was equally concerned by another NGO report that suggested the Australian Government had been ‘indifferent’ to serious allegations of abuse of Australian citizens held by Coalition forces in Abu Ghraib prison in Iraq.²⁰ The delegation took on notice a series of questions that challenged the veracity of the government’s eventual investigation of the abuse allegations.

Sir Nigel also asked a series of questions in an effort to establish whether Australian law explicitly incorporated the principle of *non-refoulement*, and what follow-up measures Australia had in place to ensure returnees were not tortured or ill treated. He cited two case studies from an NGO submission which suggested that Ministerial discretion was used to assess the veracity of diplomatic assurances from the receiving State

¹⁵ Amnesty International, Shadow Report to the Human Rights Committee, February 2009, p.5. These concerns were also raised by Australian NGOs in their informal briefing to Committee members. All Australian NGO reports to the Committee are available at <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

¹⁶ Ms Chanet, Ms Keller, Mr. O’Flaherty.

¹⁷ Law Council of Australia, ‘Shadow Report to Australia’s Common Core Document’, 29 August 2008, p48-55. All NGO reports are available at <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

¹⁸ Law Council of Australia, ‘Shadow Report to Australia’s Common Core Document’, 29 August 2008, p.55.

¹⁹ NGO Submission to the Human Rights Committee, ‘Freedom, respect, equality, dignity: action’, September 2008, p.90-93.

²⁰ New South Wales Council for Civil Liberties, ‘Shadow Report’, 28 November 2008, p20-22.

that returnees would not be tortured or ill-treated.²¹ The delegation firmly denied Australia had breached its international obligations in the cases cited and outlined its “comprehensive statutory review process”. It also advised that requests for Ministerial intervention were being “streamlined” and following consultations, specific criteria might be put in place to assess immigration cases where *refoulement* was a potential concern. Mr O’Flaherty’s request for a specific timeline for the introduction of these reforms went unanswered.

Right not to be subject to arbitrary detention / right to a fair trial

Concluding Observations:

11. *The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant. In particular, it should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences. The State party should in particular: a) guarantee the right to be presumed innocent by avoiding reversing the burden of proof; b) ensure that the notion of “exceptional circumstances” does not create an automatic obstacle to release or bail; and c) envisage to abrogate provisions providing Australian Security Intelligence Organisation (ASIO) the power to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods. [The Committee requested follow-up information on the implementation of this recommendation within one year].*
23. *The State party should: a) consider abolishing the remaining elements of its mandatory immigration detention policy; b) implement the recommendations the Human Rights Commission made in its Immigration Detention Report of 2008; c) consider closing down the Christmas Island detention centre; and d) enact in legislation a comprehensive immigration framework in compliance with the Covenant. [The Committee requested follow-up information on the implementation of this recommendation within one year].*

The Committee asked many questions about Australia’s forty new pieces of counter-terror legislation.²² In their shadow reports and briefings to the Committee, NGOs raised concerns that legislation permitted (inter alia): a person to be held in detention for questioning by intelligence officials without charge for renewable periods of seven days, prolonged solitary confinement and incommunicado detention. NGOs stressed that in the absence of a federal charter of rights Australia’s laws had not been adequately assessed against, or counterbalanced by its human rights obligations. The Australian delegation elaborated on the ‘strict legislative safeguards’ to ensure compliance with human rights obligations, and emphasised that key pieces of legislation would be reviewed in 2010 and 2016.²³ However, Mr. Thelin responded that this appeared to be “too little too late” and sought further information on how Australia was implementing the recommendations of the UN Special Rapporteur on counter-terrorism following his visit to Australia in 2006.

In response, the delegation advised that 30 people were currently held under counter-terrorism legislation. It assured the Committee that international practice inform the Australian government’s development and review of legislation, and that it always sought to strike a balance between national security and Australia’s human rights obligations. Further, the government was aware of the recommendations of the Special Rapporteur on counter-terrorism, and it intended to amend legislation to allow a person accused of a counter-terrorism offence to appeal a denial of bail.

Australia’s laws, policies and practices in relation to asylum seekers and migrants also came under strong criticism, with Ms Chanet expressing concern that Australia continued to ignore the Committee’s recommendations on these matters from 2000. Although some Committee members welcomed the abolition

²¹ *Al Masri and Zhang cases*. NGO Submission to the Human Rights Committee, ‘Freedom, respect, equality, dignity: action’, September 2008, p.97-98.

²² Mr Amour, Ms Chanet, Mr. Fathalla, Sanchez-Cerro, Mr. Thelin.

²³ Replies to the list of issues, Australian Government (CCPR/C/AUS/Q/5/Add.1), 21 January 2009, p.5-6.

of the so-called ‘Pacific Solution’,²⁴ Ms Majodina (South Africa) was concerned that the re-opening of the Christmas Island immigration detention facility, over 2,600km from the nearest Australian capital city, meant this policy was still in effect. Despite assurances in Australia’s replies to the list of issues that the Minister for Immigration intended to relegate mandatory immigration detention to a measure of last resort, and that ‘indefinite or otherwise arbitrary’ detention would not be ‘acceptable’,²⁵ evidence from the Australian Human Rights Commission confirmed that the practice remained in place.²⁶ In response to direct questions, the delegation also confirmed that as of January 2009, 38 people had been in immigration detention for two years or more, and mandatory immigration detention would remain a core element of the government’s approach. However, the delegation argued the government had made the length of detention and the conditions subject to regular review and put in place mechanisms to ensure that unauthorised arrivals would be removed from detention at the earliest opportunity.

Non-discrimination and equality

Concluding Observations:

12. *The State party should adopt federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination.*
13. *The State party should increase its efforts for an effective consultation with indigenous peoples in decision-making in all areas having an impact on their rights and establish an adequately resourced national indigenous representative body.*
14. *The State party should redesign the Northern Territory Emergency Response (NTER) measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the Racial Discrimination Act 1995 and the Covenant.* [The Committee requested follow-up information on the implementation of this recommendation within one year].
15. *The State party should adopt a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the Stolen Generations policies.*
16. *The State party should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander peoples.*

Australia’s treatment of indigenous peoples was a concern expressed by a majority of Committee members.²⁷ The sentiment of the Committee was best encapsulated by Ms Wedgewood (US) who commented that achieving justice for its indigenous peoples was a “fundamental moral challenge” that Australia had to comprehensively meet. The Committee also welcomed where progress had been made by the new Australian Government, including its commitment to address indigenous social and economic disadvantage through the development of the ‘close the gap’ targets and benchmarks. Although the Committee welcomed the parliamentary apology to the Stolen Generations, Sir Nigel asked whether other forms of reparation would follow, particularly in the form of compensation. The delegation made it clear that compensation had been expressly ruled out by the government, suggesting instead that individual compensation claims could be made through the courts.

In addition to the Committee’s general concern at Australia’s lack of comprehensive statutory non-discrimination protections, Ms Madjodina and Mr Thelin both inquired about the government’s decision to suspend the operation of the *Racial Discrimination Act* (RDA) in Aboriginal communities in the Northern Territory to allow the implementation of the NTER. Like the Committee on the Elimination of Racial Discrimination, Human Rights Committee members questioned why the reinstatement of the RDA in these

²⁴ Sir Nigel Rodley. The ‘Pacific Solution’ was the name given to the Australian Government policy (2001-2007) of transporting asylum seekers to detention camps on small island nations in the Pacific Ocean, rather than allowing them to land on the Australian mainland where they would have better access to medical, legal and other services while their claims were processed.

²⁵ Australia’s replies to the list of issues (CCPR/C/AUS/Q/5/Add.1), 21 January 2009, issue 13.

²⁶ Australian Human Rights Commission, *2008 Immigration detention report*, January 2009, available at http://www.hreoc.gov.au/human_rights/immigration/idc2008.html

²⁷ Ms Keller, Ms Madjodina, Ms Motoc, Mr O’Flaherty, Sir Nigel Rodley, Mr. Salvioli, Mr. Thelin, Ms Wedgewood.

communities had not already occurred, as recommended by the government's own Review Board.²⁸ The delegation responded that the government planned to introduce a bill in the latter quarter of the year to ensure the NTER complied with the RDA and that other changes would be phased in to ensure there was an "orderly transition".

Other areas of concern included Australia's failure to take sufficient steps to implement the Committee's recommendations from 2000 to improve the operation of native title legislation, and the delay in establishing a new national representative body to provide indigenous Australians a voice in the decision-making process at this level. The delegation assured the Committee that amendments were planned to make the native title process "less adversarial", and that it was committed to establishing a new representative body to "help re-establish its relationship with indigenous people."

Other issues

The Committee also engaged the delegation in discussion on the following matters, all of which were addressed in the Concluding Observations: treatment of persons deprived of liberty (reduce excessive use of force by police); violence against women (particularly indigenous women); homelessness (particularly indigenous peoples); religious discrimination (against Muslims); trafficking (need for victim-oriented responses); juvenile justice (improve protection of detained children); access to justice (legal aid, particularly for indigenous peoples); human rights education (need for a comprehensive plan of action).

The full list of Concluding Observations should be read in conjunction with this report and are available at <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

Conclusions and next steps

In its brief concluding remarks, the Australian delegation thanked the Committee for a "constructive and candid dialogue." Perhaps prompted by Ms Wedgewood's statement that immediately preceded the closing remarks, in which she drew attention to Australia's obligation to "bring justice" to its indigenous peoples, the delegation reiterated its commitment to comprehensively address the disadvantage of indigenous Australians. Australia also thanked the NGOs for their contribution to the process, commenting that it was "very appropriate that they put their views to the Committee."

Breaking with the practice of the previous Chairperson (Mr Rivas Posada, Columbia), the new Chairperson (Mr Iwagasa, Japan) did not provide concluding remarks. This meant the delegation departed without an indication of what to expect in the Committee's concluding observations, or where it thought Australia had made progress.

Australia's next report to the Human Rights Committee is due by 1 April 2013. Australia will be reviewed by the Committee on Economic, Social and Cultural Rights in Geneva on 5-6 May 2009.

Last revised and updated: 20 April 2009.

²⁸ Under its Early Warning and Urgent Action procedure, CERD wrote to the Government of Australia on 13 March 2009 expressing concern about the slow progress to reinstate the RDA in Aboriginal communities in the Northern Territory. CERD requested Australia provide 'further details and information' on this matter by 31 July 2009. CERD correspondence is available at http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia130309.pdf

TREATY BODY MONITOR STAFF

Eléonore Dziurzynski, Communications Officer, Geneva

Gareth Sweeney, Deputy Manager, Geneva

Katrine Thomassen, Manager International Programme, Geneva

Michael Ineichen, Human Rights Officer, Geneva

Michelle Evans, Representative to the UN, New York

Vanessa Jackson, Human Rights Officer, New York

AUTHOR OF THE AUSTRALIA REPORT

Vanessa Jackson, New York Office

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