

How effective has the United Nations Human Rights system been in promoting human rights observance by Australian governments?

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Australia is a party to six major UN human rights instruments. It has an obligation to bring our laws and policies into compliance with the human rights standards which they protect. Each instrument has an accountability mechanism, consisting of an independent monitoring body (treaty body), which examines each State on the basis of its written report and open dialogue. Four treaties have an individual complaints procedure. Australia has presented reports to all the treaty bodies, and it has been the respondent to several complaints of violation of rights

To give effect to their human rights treaty obligations, States should enact legislation, repeal laws or introduce policies or programs. Some countries incorporate human rights in their constitutions, thus giving them a superior legal status. Others have given effect to their treaty obligations by enacting specific legislation to create remedies for breaches of rights.

Australia does not have comprehensive constitutional protection of rights. Courts may construe legislation to be consistent with international law and human rights treaties, where this is possible. But the Courts cannot enforce the human rights treaties directly unless their provisions are reflected in laws giving rise to remedies.

Furthermore, though not considered here, Australia has entered reservations to some of the instruments, and it has not ratified new Optional Protocols for the Women's Convention, the Torture Convention, or the Convention on the Rights of the Child (children in armed conflict and sale of children and prostitution). It has not signed the Convention on the Rights of Migrant Workers. This discussion is limited to the four instruments which have complaints procedures.

The first major UN human rights instrument ratified by Australia was the Convention on the Elimination of All forms of Racial Discrimination (CERD). It was

implemented by the *Racial Discrimination Act 1975* (Cth), which attaches the Convention and incorporates many of its provisions. The Act provides a general guarantee of equality and non-discrimination on the ground of race. As Commonwealth legislation it renders invalid inconsistent State law. The Convention and the RDA were applied to invalidate discriminatory Queensland laws, and laid the foundation for the High Court decisions that the Commonwealth could, under the external affairs power, legislate to give effect to a ratified treaty (*Koowarta*, and the *Tasmanian Dams case*).

That was a most effective form of implementation. In later years, however, the Government has ignored the concerns of the Committee (CERD) that the amendments to the Native Title Act in 1998 undermined the protections of the Native Title Act, and that the Government failed to provide an apology or reparation for the stolen generation, among other issues. So far there has been no action to give effect to CERD's decision in the *Hagan* case (Nigger Brown Stand, Toowoomba).

Australia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1980. It is annexed to the *Commonwealth Human Rights and Equal Opportunity Act, 1986*. This enables the Human Rights and Equal Opportunity Commission to exercise functions of inquiry and report in regard to Covenant rights, but it does not make those rights directly enforceable. There is no general legislation to give effect to the Covenant, though some Covenant provisions may be covered by common law or specific statutory provisions, eg, anti-discrimination laws. Australia has also ratified the two Optional Protocols to the Covenant, the first allowing for the right of individual complaint, and the second aimed at abolition of the death penalty.

In assessing compliance with the Covenant, both Commonwealth and State and Territory laws and policies are relevant, since many rights protected under the Covenant relate to matters under the jurisdiction of the States and Territories.

The first case taken to the Human Rights Committee under the complaints procedure concerned an alleged violation by Tasmania. Its anti-gay criminal laws were found by the Human Rights Committee (HRC) to violate the right to privacy, in 1993 (*Toonen*). The Commonwealth later enacted the *Human Rights (Sexual Conduct) Act 1994* to protect the privacy of sexual conduct involving only consenting adults. This is the

only legislation to give direct effect to the Covenant as such. But it demonstrates clearly that given the will, the Commonwealth could legislate to provide remedies for any violation of Covenant rights, whether by the Commonwealth or the States and Territories.

Later cases have had less satisfactory outcomes. In 1997, detention of asylum seekers without prospect of release was found by the HRC to be arbitrary and contrary to the Covenant.¹ In a later case the Committee found that deportation of the parents of a child who had become an Australian citizen would violate Covenant rights, unless grounds were advanced other than the simple enforcement of immigration laws.² In 2000 the Committee found that there had been discrimination in violation of the Covenant when the author was denied a pension as a dependant, on the ground that he was in a same sex relationship. The Government was recommended to reconsider the pension application including if necessary a change in law.³

In none of the above cases under the Covenant could the matter have been determined in the Australian courts. The Human Rights Committee has drawn attention to this deficit in the protection of rights in Australia. It recommended in 2000 that measures be taken by Australia 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. The Committee was unwilling to accept the explanation that the protection of rights involved co-operation with the States and Territories, considering it the responsibility of the national government to ensure the rights it was obliged to implement.

The Committee was also scathing about the rejection by the Australian government of the Committee's interpretation of the Covenant in the A case, and in effect told it to go back and do its homework again.

The Sex Discrimination Act 1984 (Cth), gives legal force to many of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Act targets discrimination in defined areas and provides recourse and

¹ *A v Australia* 560/93, HRC Report 1997, A/52/40, vol II, p 125.

² *Winata and Li v Australia* 930/2000 HRC Report for 2001, vol II, p 199.

³ *Young v Australia* 941/2000 [2003].

remedies. It is, however, hedged about with exemptions and it does not include a comprehensive guarantee of equality. A serious deficiency is that Australia has failed to ratify the individual complaint procedure under the Optional Protocol to CEDAW. This denies to Australian women the opportunity to ask the Committee to consider cases of discrimination in areas now covered by exemptions and exclusions to the SDA, or where no remedy is provided in Australian law.

Australia ratified the Convention Against Torture in 1989. The *Crimes (Torture) Act 1988* annexes the Convention, but the effect of that legislation is limited to authorising the prosecution of acts of torture committed overseas. Australia accepted the individual complaint procedure under article 22 of the Convention in 1993.

A key issue which arises for asylum seekers and others in immigration detention is to ensure they are fully protected under article 3 of the Convention, which prohibits States from expelling a person to a country where there is a danger that he/she will be exposed to torture. This question is left to the Minister to decide, and there is no provision for review of that decision. The Committee Against Torture expressed its dissatisfaction with this lack of review in 2000. No doubt it had in mind the case of Sadiq Shek Elmi who had taken his case to the Committee in 1998. The Committee took the view that he would be in danger of being subjected to torture if returned to Somalia, and that Australia had an obligation under the Convention, to refrain from forcibly returning him to that country.⁴

Overview

Neither the Concluding Observations of the treaty bodies in the reporting process nor their determinations in complaint procedures are legally binding as such. The Human Rights Committee considers that its views in individual complaints impose obligations on States to consider what remedies to provide and to inform the Committee of its actions. In any event, the role of the treaty body in interpreting the instrument (which itself is binding) should mean that its opinions should be accorded considerable weight.

⁴ *Sadiq Shek Elmi v Australia* Communication No 120/1998. 25/05/99. CAT/C/22/D/120/1998

This very brief survey shows, however, that the Australian Government has been selective in its implementation of human rights standards, and that it has been reluctant to acknowledge and to respect the special role and responsibility of the treaty bodies. The views and recommendations of those treaty bodies in the reporting procedure appear to have carried little weight with government. It is difficult to trace specific improvements in law or policy which followed the reports of the Committees. Australia has shown itself willing to wear the criticism, and has recently been ready to be critical of the Committees themselves, accusing them of a lack of objectivity. CERD was a particular target of attack.

A general study of the reporting process published a few years ago confirms the difficulty in assessing its impact in terms of actual changes in laws and practices.⁵ It is pointed out, however, that there are other values in a system which exposes the State to the independent expert views of the Committees. At the very least, the Committee's questions and concluding observations identify and make public the important human rights issues in the States parties.

The complaints procedures can sharpen national debate around human rights issues, and encourage advocates to study how to bring their claims within the framework of the treaty bodies' mandates. When a Committee finds a violation of rights, this serves to mobilise "human rights" opinion in the country around the issue identified by the Committee. This occurs whether or not the government takes action to provide a remedy.

Nevertheless, by failing to respect the views of independent treaty bodies, the Government has, in important areas, made itself and the Parliament the sole arbiters of compliance with human rights standards. Until recently, criticism of our human rights record focussed mainly on the serious gaps in the protection of the rights of Australia's indigenous people and of asylum seekers. Women, gays and other minority groups have also lacked an effective guarantee of equality. There are now new issues. Since 9/11, the introduction of legislative measures against terrorism has

⁵ Ineke Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights, Practice and Procedures of the Human Rights Committee*, Intersentia - Hart, Antwerp, Groningen, Oxford 1999

created a new danger that rights and freedoms will be eroded in the name of security. This could affect potentially the whole community.

Some argue that Parliament is the guardian of rights, and that nothing more is needed. The counter argument is that there can be no guarantee that an elected Parliament will not enact laws that are inconsistent with rights and freedoms. The Constitution ensures basic democratic rights, the right to vote and to stand for election. Beyond that, it provides only limited protection of rights—such as the implied protection of communication in relation to political matters, and protection of religious freedom. Many rights, even the right to liberty itself, have no entrenched protection and continue only until the legislature takes action to erode them.

The fragility of the notion that Parliament would not trample on cherished liberty, was revealed in the *Al-Kateb* case. Detention contrary to human rights standards was authorised by the Parliament and upheld by the High Court as a valid exercise of legislative power. The Court made it clear that while legislation will be read, so far as possible, to be consistent with international law, including human rights, there is no implication that the Constitution must be construed consistently with international law, including human rights law.⁶

With new and increasingly draconian anti-terrorist legislation, Australians are left without the kind of protection available in the United Kingdom and New Zealand, as well as in most common law democracies. That is, the protection which an independent judiciary can provide against legislative or administrative action which violates basic rights and freedoms, by objectively evaluating the necessity for the restrictions imposed.

Undoubtedly the treaty bodies will express their views about the compatibility of anti-terrorist legislation with human rights standards when they have the chance. That may be too little and too late. More effective legal protection of human rights is needed here and now, particularly at a time when decisions are made under pressure of security concerns without mature consideration of the human rights implications.

⁶ *Al-Kateb v Commonwealth* 2004 78 ALJR 1099

Australia has a high level of respect for the rule of law. But this is not enough to protect human rights, unless those rights are themselves made part of the law. The ACT Bill of Rights provides a measure of protection of Covenant rights in the ACT. A Bill of Rights is under active consideration in Victoria. Action by the States and Territories, however, will not have any impact on Commonwealth laws and policies. We need a Bill of Rights for Australia; we need to join countries such as Canada, New Zealand and the UK, which have decided to give a wider role to their independent judiciary in the protection of rights. Most violations of rights are at the hands of either legislation or action of the executive arm of government. With a Parliament increasingly dominated by the executive, it is necessary to think seriously of extending the role already allocated to the High Court in our constitutional arrangements, by giving it wider powers to protect rights.