



United Nations Human Rights

Office of the High Commissioner for Human Rights (OHCHR)
Regional Office for the Pacific



Submission to the National Human Rights Consultation, Australia

from the

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Introduction

The Regional Office for the Pacific of the United Nations Office of the High Commissioner for Human Rights is based in Suva, Fiji and covers the sixteen Pacific Islands Forum countries, including Australia.

The mandate of the United Nations Office of the High Commissioner for Human Rights (OHCHR) is to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international human rights law. OHCHR is guided in its work by the mandate provided by the General Assembly in resolution 48/141, the Charter of the United Nations, the Universal Declaration of Human Rights and subsequent human rights instruments, the Vienna Declaration and Programme of Action, the 1993 World Conference on Human Rights, and the 2005 World Summit Outcome Document.

The mandate of the Regional Office for the Pacific of OHCHR is derived from the full mandate of OHCHR, outlined above. The Regional Office therefore has an interest in seeing that international human rights standards are applied in Australia.

Which human rights should be protected and promoted?

The world community has accepted the principle that all human rights are universal, indivisible, interdependent and interrelated.¹ In this regard, Australia should protect and promote on an equal footing civil, political, economic, social and cultural rights.²

More specifically and at a very minimum, the Australian State is obliged to protect and promote the human rights that are encompassed in the seven core international human rights treaties and related optional protocols that Australia has ratified.

Australia has ratified the following treaties and optional protocols:

- 1) International Covenant on Economic, Social and Cultural Rights (ICESCR);
- 2) International Covenant on Civil and Political Rights (ICCPR) and its two optional protocols (complaint mechanism and abolition of death penalty);
- 3) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);

¹ See, for example, Article 5 of the Vienna Declaration and Programme of Action the 1993 World Conference on Human Rights, which states: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." Also, Article 6 (2) of the Declaration on the Right to Development states: "All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights." Adopted by General Assembly resolution 41/128 of 4 December 1986

² When reviewing Australia's compliance with the International Covenant on Economic, Social and Cultural Rights in May 2009, the Committee on Economic, Social and Cultural Rights stated in its Concluding Observations: "While welcoming the National Human Rights Consultation regarding the legal recognition and protection of human rights which is currently being carried out in the State party, the Committee regrets that the terms of reference for the National Human Rights Consultation do not specifically call for the consideration of economic, social and cultural rights. **The Committee affirms the principle of interdependency and indivisibility of human rights and calls on the State party to include economic, social and cultural rights when considering the submissions received.**" E/C.12/AUS/CO/4, 22 May 2009

- 4) Convention on the Elimination of Discrimination against Women (CEDAW) and its optional protocol (complaint and inquiry mechanism);
- 5) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- 6) Convention on the Rights of the Child (CRC) and its optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography;
- 7) Convention on the Rights of Persons with Disabilities (CRPD)

Australia has publicly committed to ratifying the Optional Protocol to the Convention against Torture, which establishes monitoring mechanisms for places of deprivation of liberty. It should, therefore, take on the responsibilities encompassed by this instrument.³

The Regional Office of OHCHR would further encourage Australia to promote and protect the rights enshrined in the two remaining core international human rights treaties, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force).

Are human rights sufficiently promoted and protected?

A review of the concluding observations of the human rights treaty bodies (also referred to as “Committees”) that monitor Australia’s compliance with its international human rights obligations shows that there are areas of concern in which Australia has not, thus far, sufficiently advanced human rights. Included in annex 1 are relevant excerpts from concluding observations and links to the full texts are in annex 2.

A number of recommendations that the Committees have consistently made and for which Australia appears to have made little progress in implementing thus far are highlighted below. In addition, Australia’s role in promoting and protecting human rights internationally is briefly examined.

Incorporation of International Human Rights Obligations into Domestic Law

The Committees have repeatedly raised the issue of the failure of Australia to incorporate its international human rights obligations in the treaties ratified by Australia into domestic legislation and the need for such rights to be enforceable before a court of law (see for example, the Committee on Economic, Social and Cultural Rights in 2000 and 2009, the Human Rights Committee in 2000 and 2009, the Committee on the Rights of the Child in 2005, the Committee on the Elimination of All Forms of Discrimination against Women in 2006, Committee against Torture in 2008. Excerpts are in annex 1, below).

The Human Rights Committee and the Committee on the Rights of the Child have emphasized the need for the rights enshrined in the respective treaties to be enforceable at the national level. In Australia’s case, this means that rights should be incorporated into all domestic legislation and the legislation should allow for enforcement through the court system. Mechanisms should be in place to ensure an effective remedy is available for those whose rights have been violated.⁴

³ The Optional Protocol to the Convention against Torture sets up a system of independent national and international monitoring of places where people are deprived of their liberty, as a mechanism to prevent torture and ill-treatment.

⁴ See, for example, article 2 of the International Covenant on Civil and Political Rights.

In a General Comment adopted in 2004, the Human Rights Committee stated: “Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.”⁵

In relation to obligations of States with a federal system, the Committee stated: “The obligations of the Covenant... are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party... In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions’⁶.

Human Rights Education

The Human Rights Committee, the Committee on the Elimination of All Forms of Discrimination against Women and the Committee on Economic, Social and Cultural Rights found that there was a low level of awareness of human rights in Australia and recommended that the Australian Government should undertake training and awareness programmes on human rights, in particular for officials, including the judiciary, but also for the public through the education system.⁷

Implementation of Human Rights Committee Decisions

The Human Rights Committee has repeatedly expressed concern that Australia fails to fulfil its obligations under the First Optional Protocol to the International Covenant on Civil and Political Rights. Under the First Optional Protocol, Australia recognized the competence of the Human Rights Committee to receive and consider communications from individuals who claim to be victims of a violation of the rights in the Covenant. Failures to give effect to the views of the

⁵ Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting), para. 13.

⁶ Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting), para. 4.

⁷ See, for example, paragraph 27 of the Concluding Observations of the Human Rights Committee in April 2009: “The Committee notes that the State party lacks a framework and programme to promote knowledge of the Covenant and the Optional Protocol among its population. (art.2) The State party should consider adopting a comprehensive plan of action for human rights education including training programmes for public officials, teachers, judges, lawyers and police officers on the rights protected under the Covenant and the First Optional Protocol. Human rights education should also be incorporated at every level of general education.”

Committee on previous communications have called into question Australia's commitment to the First Optional Protocol and have left victims of violations without reparations.

Foreign Policy and Human Rights

Under the United Nations Charter, the Universal Declaration of Human Rights and a number of human rights treaties ratified by Australia,⁸ Australia has a duty to promote human rights internationally and particularly in countries where Australia is highly engaged through its foreign policies. It would also seem to be in Australia's national interest to promote human rights in countries with which Australia has a high level of engagement or which are close in proximity. The Regional Office believes that Australia has yet to systematically respond to this duty and national interest. Australia is actively engaged in aid delivery to many countries, with a particular focus on Asia and the Pacific. However, the promotion of human rights is not incorporated in a systematic fashion into its aid delivery policies or its involvement in peace-keeping missions. Similarly, Australia has significant political engagement with many countries of the Asia and Pacific regions and yet fails to have human rights policies or strategies incorporated systematically into their political engagement programmes.

How could Australia better protect and promote human rights?

- 1) Ratify and implement the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- 2) Ratify and implement the International Convention for the Protection of All Persons from Enforced Disappearance;
- 3) Fulfil its commitment to ratify the Optional Protocol to the Convention against Torture;
- 4) Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;
- 5) Strengthen the mandate, capacity and powers of the Australian Human Rights Commission, in line with the Paris Principles of 1993;⁹
- 6) Fully incorporate the core UN human rights treaties that Australia has ratified into domestic legislation. This should allow for enforcement of rights through the courts and administrative bodies, in line with the relevant treaty. Legislation incorporating the provisions of all international human rights treaties should provide for an effective remedy to people whose rights have been violated;
- 7) Design and implement a nation-wide programme of human rights education for officials, including the judiciary and members of parliament, and also for the public through the education system;
- 8) Establish appropriate procedures to implement the views of the Human Rights Committee and any other Committees established under the core human rights treaties that have the power to receive and consider communications from individuals who claim to be victims of a violation of the rights in the relevant treaty. The procedures should lead to an effective remedy and reparation when, according to the Committee, there has been a violation of the Covenant or other respective core human rights treaty;

⁸ For example, ICESCR articles 2(1), 11(1), 15(4), 22 and 23; CRC articles 4, 24(4) and 28(3); ICMW article 64; Disability arts. 32 and 33

⁹ The 2009 Concluding Observations of the Committee on Economic, Social and Cultural Rights on Australia state at paragraph 13 that the "Committee notes with concern that the Australian Human Rights Commission has limited competency as regard the Covenant rights and lacks adequate human and financial resources, which affects its capacity to fulfill its role and functions. **The Committee recommends that the State party strengthen the mandate of the Australian Human Rights Commission in order to cover all the Covenant rights and ensure that adequate human and financial resources are allocated to this institution, in line with the Paris Principles of 1993.**"

- 9) Formally incorporate a human rights based approach into Australia's aid policies and programmes, and in particular into the work of AusAID and Australian civil and military contingents joining peace-keeping missions¹⁰;
- 10) Systematically develop policies or strategies to promote human rights at the political level with countries of Asia and the Pacific with which Australia has significant political engagement.

¹⁰ For a more in depth discussion of the adoption of human rights approaches to aid delivery by donor countries' aid agencies, see OECD report, "Integrating Human Rights into Development, a Synthesis of Donor Approaches and Experiences," 2005, (which can be found at: http://www.odi.org.uk/rights/Publications/humanrights_into_development.pdf)

ANNEX 1

United Nations Treaty Body Comments that Support Entrenching Australia's International Human Rights Obligations into National Law

Committee on Economic, Social and Cultural Rights, Concluding Observations, 2000¹¹:

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.

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.

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.

Committee on Economic, Social and Cultural Rights, Concluding Observations, 2009¹²

11. The Committee regrets that the Covenant has not yet been incorporated into domestic law by the State party, despite the Committee's recommendations adopted in 2000 (E/C.12/1/Add.50). It notes with concern the lack of a legal framework for the protection of economic, social and cultural rights at the Federal level, as well as of an effective mechanism to ensure coherence and compliance of all jurisdictions in the Federation with the State party's obligations under the Covenant.

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.

¹¹ E/C.12/1/Add.50, 31 August 2000

¹² E/C.12/AUS/CO/4, 22 May 2009

Human Rights Committee, Concluding Observations, 2000¹³:

17. 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.

18. 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).

19. 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).

20. 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.

28. 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.

Committee on the Rights of the Child, 2005¹⁴:

9. The Committee appreciates the careful scrutiny by the State party of existing and new laws in order to ensure their compliance with the Convention. However, it remains concerned that, while the Convention may be considered and taken into account in order to assist courts to resolve uncertainties or ambiguities in the law, it cannot be used by the judiciary to override inconsistent provisions of domestic law.

10. **The Committee recommends that the State party strengthen its efforts to bring its domestic laws and practice into conformity with the principles and provisions of the Convention, and to ensure that effective remedies will be always available in case of violation of the rights of the child.**

CEDAW, Concluding Observations, 2006¹⁵:

11. **The Committee recommends that the State party promote and guarantee the implementation of the Convention throughout the country, including through its power to legislate for implementation of treaty obligations in all states and territories. The Committee recommends increased attention in existing consultative forums and other mechanisms of control and partnership to the consistent implementation of the Convention in all states and territories.**

¹³ A/55/40, paras.498-528, 28 July 2000

¹⁴ CRC.C.15.Add.268, 30 September 2005

¹⁵ CEDAW/C/AUL/CO/5, 30 January 2006

12. While noting the existence of national legislation to prohibit sex discrimination at federal, state and territory levels, the Committee expresses concern about the status of the Convention at these levels and the absence of an entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men.

13. The Committee urges the State party to ensure that all states and territories are in full compliance with the obligations under the Convention and to take steps to entrench the prohibition of discrimination against women and the principle of equality of women and men in line with article 2, subparagraph (a), of the Convention. The Committee further recommends that the State party undertake awareness and training programmes on the Convention for the judiciary, law enforcement officials, members of the legal profession and the public.

Committee against Torture, Concluding Observations, 2008¹⁶:

9. The Committee is concerned that the Convention has been only partially incorporated into Federal law and noted that the State party does not have a constitutional or legislative protection of human rights at the Federal level, i.e. a Federal Bill or Charter of Rights protecting, inter alia, the rights contained in the Convention.

The State party should fully incorporate the Convention into domestic law, including by speeding up the process to enact a specific offence of torture at the Federal level. The State party should continue consultations with regard to the adoption of a Bill of Rights to ensure a comprehensive constitutional protection of basic human rights at the Federal level.

Concluding Observations of the Human Rights Committee, 2 April 2009¹⁷:

1. The Committee notes that the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law, including the Covenant. (art.2)

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) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.

¹⁶ CAT/C/AUS/CO/3, 22 May 2008

¹⁷ CCPR/C/AUS/CO/5, 2 April 2009

ANNEX 2

Links to Concluding Observations of Treaty Bodies for Australia since 2000:

ICESCR

- 2009: <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>
- 2000: <http://www.unhchr.ch/tbs/doc.nsf/0/693c56f3d2694130c12569580039a1a2?Opendocument>

ICCPR

- 2009: <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>
- 2000: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40.paras.498-528.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40.paras.498-528.En?OpenDocument)

ICERD

- 2005: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.AUS.CO.14.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.AUS.CO.14.En?Opendocument)
- 2000: <http://www.unhchr.ch/tbs/doc.nsf/0/eb3df96380faaf97802568ac00544c55?Opendocument>

CEDAW

- 2006: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CEDAW.C.AUL.CO.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CEDAW.C.AUL.CO.5.En?Opendocument)

CAT

- 2008: <http://www.unhcr.org/refworld/pdfid/4885cf7f0.pdf>
- 2000: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/426c1339fcf62c56c125699f00340669?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/426c1339fcf62c56c125699f00340669?Opendocument)

CRC

- 2005: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?Opendocument)