# Reforming human rights treaty bodies

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## General issues

Let me emphasise at the outset that the Government supports the human rights treaty body system as a cornerstone of the United Nations (UN) efforts to promote and protect human rights. However, it recognises that there are difficulties with the current system. These difficulties are a matter of concern, not only because as a responsible member of the international community my Government wishes to see the system operating at its most effective, but also because of the substantial amount of time and resources invested by Australia in responding to the monitoring mechanisms. These are not merely Australia's concerns. The UN itself, including the Chairs of the six human rights treaty bodies, have also expressed the view that the system is 'at a crossroads'.

I do not need to rehearse some of the broader contextual reasons behind this, which include the end of the Cold War and the consequent breakdown in ideological barriers that had stalled many issues; the move towards democracy in many countries; and increased globalisation. These events have coincided with increased expectations of the UN at the very time when the UN has been undergoing a major budgetary crisis. But I think it is also fair to say that the enormous growth in the scope of the UN human rights program has led to problems both for the treaty bodies and for States.

Since the adoption and proclamation of the Universal Declaration of Human Rights by the General Assembly — just on 50 years ago — we now have, in addition, six 'major' human rights treaties as well as a multitude of other conventions, protocols, declarations and statements of principles. Added to this is the increasing — and often

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bewildering — range of mechanisms for monitoring States' compliance with their human rights obligations. These range from periodic reporting to the human rights treaty bodies, complaints mechanisms for individuals, special 'thematic' rapporteurs, the various working groups and sub-commissions of the Commission on Human Rights, the Commission on Human Rights itself, and the General Assembly. This proliferation of instruments and mechanisms places enormous demands on the treaty bodies — if they are to keep abreast of developments in the international human rights field — and on States.

This is in no way to denigrate the importance of these instruments and mechanisms and the very real concerns that gave rise to them. Clearly, compliance with human rights treaties needs to be monitored and fostered if the instruments are to be fully effective. But it seems equally clear that all participants in the system — whether they be States parties, the UN Secretary-General, the High Commissioner for Human Rights, or members of the treaty bodies themselves — have an obligation to make a critical reappraisal of the system, its aims and its overall effectiveness.

The UN has already initiated reforms to the treaty body system and the Government has been supporting these reform efforts. Professor Phillip Alston was commissioned by the UN Secretary-General to produce a report on reform of the treaty bodies. Professor Alston submitted his interim report in 1993 and his final report was submitted to the Commission on Human Rights in March 1997.[1] Professor Alston's report focuses on reforms to be pursued by the UN and by the treaty bodies themselves. Professor Alston's report was considered by the Commission on Human Rights in 1998.[2] Australia provided comments to the Secretary-General, supporting many of the suggestions contained in the report.[3] These include the reforms to the reporting procedures with the object of streamlining the reporting obligations on States; the production of shorter and more focussed reports; and encouraging the greater co-ordination and sharing of information between the treaty bodies. Some of the other suggestions put forward by Professor Alston, while not without attractions, can only be achieved in the longer term and require careful consideration. I have in mind his suggestion to collapse the six treaty bodies into one.

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1 Alston's Interim Report is found at A/CONF.157/PC/62/Add 11/Rev 1 and the Final Report is found at E/CN 4/1997/74.

2 See E/CN 4/1998/85 and Doc 4/44/668.

3 See E/CN 4/1998/85 for Australia's comments.

I believe that Australia is well placed to pursue these reform efforts and to ensure that the momentum for reform is not lost. In addition to responding to, and seeking to progress, the recommendations of the Alston report, Australia has continued with like-minded States such as New Zealand and Canada, to encourage UN reform efforts with a particular emphasis on the effective functioning of the treaty bodies. For example, we again made a joint statement with New Zealand and Canada on this issue at the 1997 General Assembly. We have also co-sponsored the resolution at the General Assembly on effective functioning of the treaty bodies. The resolution encourages on-going efforts to identify measures to implement more effectively the UN human rights instruments, emphasises the need to ensure adequate resourcing for the operations of the treaty bodies and encourages the efforts of the Chairs of the treaty bodies to develop appropriate reforms to the reporting system.[4]

## Reporting and communication procedures

I move from this more general level to focus on the issues of reporting and communications procedures, which comprise the core functions of the treaty bodies. There have been headlines in the national press that say words to the effect: 'Australia's human rights record criticised by the UN'. For example, during the consideration of Australia's report under the Convention on the Rights of the Child in 1997, there were articles pronouncing 'UN slates Australia's treatment on children' and 'Rebuke from UN on child policies'. But where are the articles reporting that at least two members of the Committee on the Rights of the Child specifically stated that they found the dialogue with the Australian delegation inspiring?

These negative press articles do everyone a disservice. By giving the impression, quite erroneously, that Australia has done nothing right, they not only misinform the general public, but they also fail to draw attention to particular problems that should be remedied. Their lack of objectivity leads to genuine criticism being ignored. Also implicit in these types of press articles is the view that, whenever there is a difference of opinion between Australia's assessment of a situation and that of a human rights treaty body, it is the latter opinion which is 'correct'. Accordingly, the Government, if it takes its human rights obligations as seriously as it claims, is obliged to follow whatever advice the treaty body gives.

I do respect the work of the treaty bodies and the dedication, commitment and knowledge that the members of these bodies possess. Yet the work of the UN human

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4 General Assembly Resolution 52/118 (1997). See also the General Assembly agenda item on Effective Implementation of International Human Rights Instruments, A/C 3/53/L.22/Rev 1 (1998).

rights bodies must be put into a more realistic perspective. The inherent limitations in the system itself must be recognised. I shall use the Human Rights Committee (the Committee) as an illustrative example.

The Committee consists of 18 independent experts elected by the States parties to the International Covenant on Civil and Political Rights (ICCPR). Article 28 of the ICCPR stipulates that members of the Committee 'shall be persons of high moral character and recognised competence in the field of human rights' and that they 'shall serve in their personal capacity'. They are elected for a four-year term, although they may seek re-election. Naturally, the members of the Committee come from a variety of States, with differing political, social, economic and legal systems, and different cultures. English may not necessarily be their first language; in fact, the working languages of the Committee are French, Spanish and English. There is also the need to get a representative geographic spread of Committee members.

The meeting times of the Committee are very limited. The UN has allocated the Committee only three sessions of three weeks each year. Even if the pre-sessional working group meetings, which last for a week, are taken into account, the total amount of time that the Committee can devote to its work is only 12 weeks a year. In this time, the Committee has to consider the periodic reports of States parties under the ICCPR, which is the bulk of its work, as well as communications from individuals under the Optional Protocol procedure. In addition, one or two days per session may be set aside for other business, such as the formulation of interpretive comments on particular articles of the ICCPR, known as 'General Comments', or consideration of changes to the Committee's Rules of Procedure. The Committee also has to set aside time for meetings with non-government organisations (NGOs) and other UN organisations.

The amount of written and other material the Committee is required to get through each session is voluminous. Clearly, in order to keep functioning, the system relies on the Committee members putting in a great deal of their own time outside each session. Of course it should be remembered that most, if not all, members of the Committee have many other demands on their time. After all, the expertise that leads to their nomination and election to the Committee is usually a result of their eminence in their professional lives and their voluntary work. In addition, the numbers of people available in the UN Centre for Human Rights to provide secretariat support to the Committee is quite small. I understand that, due to budget cuts and the consequent restructuring in the Centre for Human Rights, there are now only two full-time lawyers working on communications and only two full-time professional staff working on reports under the ICCPR.

So what are the implications for a State like Australia when its reports or communications are considered by one of these committees? Clearly, there are issues of limited time, limited resources, the barriers of language, and limited familiarity with a system as complex as Australia's.

First, the limited amount of time allotted to the committees for their work and their chronic under-resourcing inevitably means delays. The average period taken by the Committee to reach a view on a communication under the Optional Protocol is around four years. As far as reports are concerned, it takes at least 18 months from the date of submission of a report before it is considered by the Committee. Obviously, by the time a report is considered there may be significant amounts of material which are out of date. In making these comments I am, of course, conscious that Australia's Third and Fourth Reports under the ICCPR are well overdue, although I hope that they will be submitted to the UN in the near future. While not making excuses, it must be acknowledged that reporting places a significant burden on States parties (of which there are 141) and the committees. As at 30 June 1996, 115 reports under the ICCPR were overdue.

Second, reports under the ICCPR and the other conventions are generally considered over one and a half days — or a total of nine hours. I understand that the usual format is for each of the Committee members to ask a series of questions to which the delegation then responds. There is, therefore, very limited opportunity to enter into an in-depth consideration of issues or real 'dialogue', or to even clarify points which may have arisen. In fact, it is quite possible that not all questions may be able to be dealt with in the time available.

Third, there are the difficulties which arise from social, political, legal, cultural and language differences. Apart from misunderstandings that may arise during translation of the oral proceedings, all the written material may not have been translated. The questions themselves may follow a standard format or deal with issues that may not be especially relevant to the circumstances of a particular State. The expectations and understandings of each individual Committee member are informed by his or her own background. For example, I understand that during the consideration of Australia's report on the Convention on the Rights of the Child in 1997, one member of the Committee on the Rights of the Child expressed concern about the amount of 'discretion' available to decision-makers in Australian law. He appeared to be of the view that our laws should be much more detailed and prescriptive in order to ensure justice. The Australian delegation was at pains to explain that discretions in our system usually exist precisely to ensure that justice is done according to the circumstances of each case and to enable the law to be applied flexibly.

Finally, the 'concluding observations' drafted by the Committee may not be very detailed, may lack justification for a particular stance taken by the Committee, or they may even be inaccurate. For example, the Committee on the Rights of the Child was of the view that the minimum age of criminal responsibility in Australia — in most jurisdictions this is 10 years of age – is too low. However, no reason was advanced for this opinion. It was also strongly recommended that Australia withdraw its reservation to Article 37 of the Convention on the Rights of the Child relating to the separation of juveniles from adults in detention. This was despite it having been pointed out to the Committee that, given the vast size of Australia, the sparse population in remote areas and the desirability of having child offenders remaining near their family wherever possible, it was not feasible to implement this Article fully.

Despite these difficulties, there is certainly an expectation by the committees and by domestic NGOs and commentators, that the Government will give effect to all the observations and recommendations of every committee, whether or not we agree with them.

Similar difficulties arise when it comes to the consideration of communications under the individual complaints mechanisms. In particular, it is often overlooked by NGOs and the media in Australia that the Committee is not a court. It does not issue legally binding decisions or judgments. It merely expresses its views which, however measured they might be, nevertheless retain their non-binding character. This is quite clear from the terms and drafting history of the Optional Protocol itself. Indeed, given the inherent difficulties that the treaty bodies labour under, the Committee is neither adequately equipped to act like a court, nor could it reasonably be expected to do so.

I am also concerned that the Committee's processes, such as interim measures requests under Rule 86 of its Rules of Procedure, may be used, consciously or unconsciously, to interfere unreasonably with, or delay, valid domestic proceedings. Interim measures requests are issued to prevent irreparable damage being done to a person who is the subject of a communication. The usual situation in which they are issued is where a person's life may be at risk. It is, in my view, an abuse of the Rule 86 procedure for it to be used by complainants or their legal representatives essentially as a way of halting deportation proceedings. For example, in late 1997 officers of my Department were contacted by a solicitor around five o'clock on a Friday afternoon. This solicitor was acting for a person who was to be deported from Australia that Sunday. The solicitor asked my Department to halt the scheduled deportation because he had submitted a communication under the Optional Protocol together with a request that the Committee issue an interim measures request not to

proceed with the deportation. Upon questioning, it transpired that the solicitor had faxed the communication to the UN Centre for Human Rights just a few minutes earlier. This example is not in any way intended as a criticism of the Committee. Indeed, it goes without saying that, given the extremely short period of time that had elapsed, there was no indication that the Centre for Human Rights had even received the communication, let alone any indication as to whether an interim measures request would be issued. Nevertheless, examples of this nature reinforce my earlier point about the community misconceptions concerning the role and functions of the Committee.

Given these sorts of difficulties, I think that the Committee should consider very carefully before making interim measures requests of States. Moreover, I think it is quite reasonable for States to expect that, if the Committee does issue an interim measures request, then the Committee must also be prepared to expedite the consideration of communications subject to such requests. At the same time, I am conscious of the limited resources and limited time available to the Committee.

Further, I am concerned about the lack of comprehensive reasoning in some of the decisions emanating from the Committee. Often issues raised in a communication are dealt with in an extremely cursory fashion or not at all. Little reasoning or justification is advanced for a particular view reached by the Committee.

## Australian suggestions for reform

I believe that the reforms the Government is putting in place for the drafting of our reports will help to address some of these issues. In the future, our reports will be much shorter and drafted to focus on particular themes or issues. These themes or issues will basically be directed to the comments of a committee on an earlier report or to highlight new issues of concern. There will also be cross-referencing to other Australian reports and the committees will only be updated on significant developments since the submission of the last report. This should avoid a lot of unnecessary duplication of material and should also reduce delays in the production of the reports. These reforms are consistent with some of Professor Alston's recommendations.

Internationally, we will continue to work constructively with other like-minded Governments to seek to progress the issue of treaty body reform either in multilateral fora or by raising issues directly with the treaty bodies themselves. While we acknowledge that additional resources are essential if the human rights treaty body system is to function effectively, there is much that can be done to improve the functioning of the treaty bodies within existing resources. The recommendations in

Professor Alston's reports provide a valuable basis for these reform efforts. In particular, his suggestion that reports should be based upon dialogue with, and more targeted questioning by, the relevant committee is a valuable one.

Similarly, there is, as Professor Alston points out, a need for much better co-ordination between the treaty bodies themselves and other UN human rights mechanisms. Clearly, better co-ordination and better sharing of information among the treaty bodies will not only allow them to work more effectively and in a more integrated fashion but, from a State's perspective, it will avoid a lot of unnecessary duplication of information. It is, therefore, greatly encouraging that the chairs of the treaty bodies, at their recent annual meeting, agreed to continue to examine better means of co-operation and of reducing the reporting burden on States parties.

I would also like to see more attention given by the committees when considering reports to the drafting of their concluding observations. In the case of the committees which are mandated to consider communications, I would like to see much more detailed reasons being provided for the committees' views. At present, most attention is paid to setting out the background information and facts, with the final views being limited, in most cases, to a mere expression of whether the acts complained of comply with the relevant treaty. It is not helpful to Australian lawyers to be told merely that an action is in breach, without being afforded the benefit of the committee's reasons. In this regard, it may be an opportune time for the committees to consider moving away from the consensus rule that often constrains the committees in developing their reasons.

Australia, together with New Zealand and Canada, submitted a paper to the Committee prior to its March 1998 session which sets out a number of reform suggestions for the consideration of communications under the Optional Protocol. Among the suggestions for reform of the Committee's procedures are a more efficient mechanism for filtering out communications which are clearly inadmissible, extending the mandate of the Working Group on Communications, the establishment of chambers to make merits decisions in cases which can be decided on the Committee's existing jurisprudence, clarification of the rules and practice of the Committee so as to prevent authors of communications constantly reworking and extending their allegations, and reform of the Committee's procedures regarding the issuing of interim measures requests. I hope that these reform suggestions will be received favourably by the Committee.

## Conclusion

In closing, I would like to emphasise again my belief that the work of the human

rights treaty bodies operates to underpin the promotion and protection of human rights. Much however remains to be done to ensure their continued effectiveness. The reforms which I have outlined for you will, I hope, contribute constructively to the better functioning of the treaty bodies as well as demonstrating this Government's continuing commitment to the promotion and protection of human rights. ●