

Casenotes, Commentaries and Recent Developments

The inclusion of materials on human rights issues for Australians at the United Nations is to become a regular feature in the Australian Journal of Human Rights. This new section will cover communications lodged with United Nations treaty monitoring bodies such as the Human Rights Committee, Torture Committee and the Committee on the Elimination of Racial Discrimination. Future issues will also note new developments in committee procedures, General Comments and Views and decisions of the committees with general application to Australia. It will also cover Australia's response and reports to the various committees and treaty bodies and include references to any recent texts or commentaries on the area. In this first edition we take stock of communications lodged under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), in which final views were delivered by the Human Rights Committee.

Human Rights Issues for Australia at the United Nations

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Introduction

Australia became a party to the *International Covenant on Civil and Political Rights* (ICCPR) on 13 August 1990 and acceded to the *First Optional Protocol* (the Protocol) on 25 September 1991. The Protocol came into force for Australia on 25 December 1991. It is now seven years since accession and during that time 24 communications in total have been lodged against Australia with the Human Rights Committee (HRC). In addition to the Optional Protocol, Australia lodged declarations with the United Nations on 28 January 1993 accepting the complaints procedures under Article 14 of the *Convention Against All Forms of Racial Discrimination* and Article 22 of the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*. These declarations took effect immediately. So far, only three communications have been submitted to the Racial Discrimination (CERD) Committee and two communications have been lodged with the Torture Committee.

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At the time of writing, of these 23 cases there have been only four cases under the Protocol in which the HRC has proceeded to make a finding on the merits. In two of these cases, *Toonen v Australia No 488/1994* and *A v Australia No 560/93*, the HRC found that Australia had acted in violation of the person's rights. *Toonen* concerned the criminalisation of homosexuality and *A* concerned the prolonged detention of an asylum seeker. These will be described in more detail below. In two other matters, *ARJ v Australia No 692/1996* and *GT v Australia No 706/1996* no violations were found. Both these cases challenged the legality of deportation.

In a further eight cases the HRC has made a final decision and declared them inadmissible. Of these eight, five were never referred to Australia for respondent submissions. Most of these cases were dismissed as lacking substance, or for lack of exhaustion of domestic remedies or because they related to events prior to the Protocol entering into force for Australia. Finally, one case, *Ramsey v Australia No 655/1995* was withdrawn because the Commonwealth provided a remedy.

There are currently ten cases at the admissibility stage and one case in which the HRC has declared the matter admissible and will proceed to adopt views on the merits.

There have been two significant decisions of the HRC concerning Australia and breaches of the ICCPR.

Toonen v Australia

In *Toonen v Australia* the HRC considered ss 122 (a), (c) and 123 of the Tasmanian *Criminal Code* (the Code). The Code, which criminalised various forms of sexual conduct between homosexual men in private, was alleged to be an interference with Toonen's right to privacy as expressed in Article 17 of the ICCPR. The HRC's views have been discussed in previous issues of this Journal and elsewhere.¹ Following the HRC's decision, the Federal Parliament enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth) providing that sexual conduct involving consenting adults was not to be subjected to any arbitrary interference. Toonen then initiated High Court proceedings arguing that, pursuant to s 109 of the Constitution, the Code was inconsistent with the *Human Rights (Sexual Conduct) Act 1994* (Cth) and was invalid.² The provisions of the Code were eventually repealed.

1 Morgan W 'The Human Rights (Sexual Conduct) Bill 1994' (1994) 1 *AJHR* 409 and Joseph S 'Gay rights under the ICCPR — commentary on *Toonen v Australia*' (1994) 13 *University of Tasmania Law Review* 392.

2 *Croome v Tasmania* (1996) 71 ALJR 430

A v Australia

*A v Australia*³ concerned the prolonged detention of an asylum seeker in the Port Hedland Reception and Immigration Processing Centre. 'A' was a Cambodian national who arrived in Australia by boat (codenamed the 'Pender Bay') on 25 November 1989. He applied for refugee status under the *Migration Act (1958)* (Cth) and the 1951 Convention Relating to the Status of Refugees. His application was rejected in December 1992. 'A' pursued a number of tribunal and court actions in relation to his refugee claim. He was subject to administrative detention under the *Migration Act* from the date of his arrival and the duration of these proceedings until he was finally released on 27 January 1994 on the grounds that his wife had been granted refugee status. 'A' did not receive legal assistance until 13 September 1990 and was moved to four separate locations during his detention.

On 20 June 1993, 'A' lodged a communication with the HRC alleging violations by Australia of the ICCPR. On 4 April 1995 the Committee declared certain aspects of this communication to be admissible. 'A' alleged:

(1) that the length of the period of detention was a violation of the prohibition against arbitrary detention under Article 9.1 of the ICCPR.

(2) that there was no effective means of review of the lawfulness of his detention by Australian courts and s 54R of the *Migration Amendment Act 1992* (Cth) violated Article 9.4 of the ICCPR.

(3) that the failure of the State party to provide legal assistance for 10 months after his initial arrival and the difficulty in gaining legal assistance during the initial preparation of his refugee application, the administrative stage and the judicial review stage of the application breached his right to equality before the courts and tribunals under Article 14.3 of the ICCPR and his right of review under Article 9.4.

(4) that he was illegally detained for 891 days prior to the enactment of Div 4B of Pt 2 of the *Migration Act* and that pursuant to s 54RA of the *Migration Act*, he was only entitled to compensation of \$1 per day of illegal detention and has therefore been denied just and adequate compensation as required by Article 9(5) of the ICCPR.

In its examination of the admissibility of 'A's' allegations in April 1995 the HRC

3 Communication 560/1993, UN Doc CCPR/C/59/D/560/1993. See also Poynder N 'A Milestone for Asylum Seekers' (1997) 4(1) *AJHR* 155.

admitted three allegations (1, 2 and 3 above) and on 3 April 1997 the HRC concluded its consideration of the communication.

The HRC declared inadmissible the author's claim in relation to Article 9.5 of the ICCPR on the grounds that he had not exhausted domestic remedies. In relation to the author's claim under Article 14.3 the HRC found the complaint inadmissible, since Article 14.3 applies only to criminal hearings. The HRC, however, stated that it would consider the applicability of Article 14.1 to refugee applications, at the merits stage.

Arbitrary detention — Article 9.1

On the merits, the HRC accepted Australia's argument that detention of individuals requesting asylum is not per se arbitrary or contrary to international law and therefore asylum seekers can be placed in detention without necessarily breaching the ICCPR or customary international law. But on the facts the HRC found that the detention in 'A's' case constituted 'arbitrary detention' in breach of Article 9.1. The HRC applied the principle of proportionality and held that detention should not continue beyond a period that can be justified by the state party as reasonable and proportionate to achieve a legitimate end. The HRC found that Australia had not advanced any grounds particular to 'A's' case that could justify his continued detention for a period of four years. The emphasis in the HRC's views was focused on the questions of whether detention can be justified for a legitimate purpose in the circumstances of each individual. This does not mean the HRC will not regard sound reasons of public policy as a legitimate aim. What is required is that those reasons apply to the individual concerned and are capable of justifying the period of detention.

On page 23 paragraph 9.4 the HRC stated:

On the first question, the Committee recalls that the notion of arbitrariness must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The state party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left to liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

Right of review of detention — Article 9.4

In relation to Article 9.4 the HRC concluded that Div 4B Pt 2 of the *Migration Amendment Act 1992* and, in particular, s 54R which precludes a court from releasing a 'designated person', violates Article 9.4 because the domestic courts do not have the power to review detention and order release on the grounds that the detention is 'arbitrary' or otherwise contrary to the ICCPR. The HRC rejected Australia's submission that the lawfulness of detention for the purposes of Article 9.4 is to be determined solely by reference to domestic law. The HRC stated that:

By stipulating that the court must have the power to order release 'if the detention is not lawful', Article 9 para 4 requires that the court be empowered to order release, if the detention is incompatible with the requirements of Article 9 para 2, or other provisions of the Covenant. This conclusion is supported by Article 9 para 5, which obviously governs the granting of compensation for detention that is 'unlawful' either under the terms of domestic law or within the meaning of the ICCPR.

The HRC rejected Australia's argument that 'A' had the right to have the lawfulness of his detention reviewed and held that 'what is decisive for the purposes of Article 9 para 4 is that such review is in its effects real and not merely formal'.

Individual opinions are rare and usually arise where the HRC is divided on the interpretation of controversial provisions, for example death penalty cases. In the 'A' case Prafullachangrd N Bhagwati (an ex judge of the Supreme Court of India) concurred with the HRC but appended an individual opinion (not a dissenting view) in which he elaborated his view and commented on Australia's submission as to the interpretation of Article 9.4. On page 26 he stated that:

The interpretation contended for by the state will make it possible for the state to pass a domestic law virtually negating the right under Article 9 para 4 making a non-sense of it. The state could, in that event, pass a domestic law validating a particular category of detentions and a detained person falling within that category would be effectively deprived of his/her right under Article 9 para 4.

This language is stronger than one normally finds in the HRC's views and indicates strong disapproval of Australia's submission on this point.

Right to legal assistance — Articles 9.4 and 14.1

The HRC did not explicitly address the question whether the right to review under Article 9.4 implies that an asylum seeker is entitled to legal assistance. However, the

The Committee held these reasons were not capable of justifying prolonged detention. HRC did examine in detail 'A's' actual access to legal assistance and formed the view that 'no issue' arose because, on the facts, A was entitled to receive assistance from the time of his arrival and subsequently received assistance throughout his numerous administrative and legal proceedings. The HRC was also of the view that the fact that 'A' had not taken up the offer of assistance when he arrived and was without assistance for several months following his arrival could not be held against Australia.

It is arguable that considering the merits of 'A's' claim concerning legal assistance under Article 9.4 may be read to impliedly provide for a right to legal assistance to ensure the effective exercise of the right to habeas corpus in certain circumstances. The HRC's finding of 'no issue' refers to the lack of evidence to prove the claim and leaves open the possibility of re-arguing this issue in a future case to confirm the HRC's view on the point.

The question whether the right to legal assistance may be implied into Article 14.1 has also been left unresolved by this case. At the admissibility stage the HRC agreed with Australia that a determination of a refugee claim is not a 'suit at law' under domestic law but suggested that nevertheless it could consider the applicability of Article 14.1 to refugee application at the merits stage. Because of the HRC's views on Article 9.4 it avoided the need to consider the question under Article 14.1. The question of the applicability of Article 14.1 to the procedures for determining refugee status is therefore still open for consideration by the HRC.

Compensation — Article 9.5

At the admissibility stage the HRC ruled out 'A's' allegation that Australia was in violation of his right to compensation under Article 9.5 because at the admissibility stage 'A' was found to not have exhausted domestic remedies on this point. However, the HRC did confirm that Article 9.5 governs the granting of compensation for detention that is 'unlawful' either under the terms of domestic law or within the meaning of the ICCPR.

Effective remedy — Article 2.3

The HRC was of the view that Australia was in breach of Article 2.3 relating to the provision of an effective remedy in the event of a breach of the ICCPR. The HRC recommended that an effective remedy should include 'adequate compensation' for the length of the detention. It is arguable that Australia's rejection of the HRC's views, and its refusal to remedy the violation, places Australia in breach of Article 9.5.

Australian Government's response

Following publication of the views of the HRC the Australian Government was asked to respond. The following is a transcript of the Australian Government's response delivered to the HRC on 17 December 1997. This response will be considered by the HRC at a forthcoming meeting and published in the HRC's annual report.

1.The Australian Government presents its compliments to the members of the Human Rights Committee.

2.The Australian Government has given careful consideration to the views of the Committee expressed in Communication No 560/1993, *A v Australia*. The Australian Government provides the following information in response to the Committee's views.

3. Australia takes seriously its international obligations and responsibilities. The Australian Government has made a major contribution, over many years, to the resolution of international refugee and humanitarian problems. Every year, the Australian Government accepts a substantial number of refugees and other displaced persons as part of its immigration intake. In 1997-98, 12,000 places will be provided for refugees and other displaced persons in the Humanitarian Program, constituting close to 20 percent of the total immigration intake. In addition, the Australian Government has devoted considerable effort and resources to the development of processes for full and detailed consideration of claims for refugee status within its territory.

4.The Australian Government welcomes the Committee's finding that it is not per se arbitrary to detain individuals seeking refugee status, nor is such detention a breach of customary international law.

5.As indicated in the Australian Government's submissions to the Committee on the admissibility and merits of this communication, mandatory detention in the context of immigration is an exceptional measure reserved for persons who arrive (or remain) in Australia without authorisation. The Australian Government is firmly of the view that this practice is justified for compelling reasons of domestic policy. These include the need to ensure that every non-citizen entering Australia is authorised to do so and to ensure that the integrity of Australia's migration program is upheld. Accordingly, the detention of unauthorised arrivals is to ensure that they do not enter the Australian community until their claims to do so have been properly assessed and found to justify entry. Detention also provides the Australian Government with effective access to those persons entering Australian territory without authorisation, to process their claims to remain in Australia without delay and, if those claims are unsuccessful, to remove such persons as soon as

practicable. As noted in the Australian Government's submission, Australia has no system of identity cards, or other national identifier or system of registration, which is required for access to the labour market, education, social security, financial services, etc. This makes it more difficult to detect, monitor and apprehend illegal immigrants in the community.

6. The Australian Government shares the Committee's concerns that prolonged or indefinite detention is undesirable. The Australian Government considers, however, that the Australian system for assessing the claims of applicants for refugee status is fair and thorough and involves responsible management of individual cases. The length of time a person may spend in detention is largely dependent on the amount of time required to investigate and process his or her claims to remain in Australia and to finalise any legal proceedings relating to these claims. It is Australian Government policy to keep to a minimum the length of time a person may spend in such detention. To this end, and consistent with the Australian Government's approach to reviewing and improving its programs, the Australian Government has made a number of enhancements to its processing system which together constitute significant reform, including:

- (i) individual management and priority processing of applications for protection visas from persons in detention;
- (ii) the facilitation of independent assistance in preparing applications for protection visas from persons in detention;
- (iii) the introduction of appropriate statutory time periods in which applicants for refugee status may respond to information and apply for reviews of their applications. This has the effect of eliminating tardiness and delays in legal representations;
- (iv) enhanced administrative review mechanisms, with the independent Refugee Review Tribunal established in 1993;
- (v) the allocation of additional funds to the determination process to provide for processing of protection visa applications;
- (vi) streamlining of administrative practices in the protection visa process, for example, the more efficient use of written decision records; and
- (vii) significant changes to the detention provisions of the *Migration Act 1958* including:

- a rationalisation of the provisions relating to detention;
- the introduction of bridging visas which allow release from immigration detention in special and extenuating circumstances, such as age (under 18 or over 75 years of age), special need (health or prior torture experiences) and length of detention (over six months without a primary decision on a protection application); and
- a requirement to bring to the Minister's attention any person held in detention for a period of more than six months after the lodgement of an application for a protection visa where that application has not been decided at primary level (s 72(2)(c) of the *Migration Act 1958*).

7. As a result of these initiatives, the processing times for protection visa applications has declined significantly. More recently, even in an environment of increasing numbers of applications for refugee status from persons held in detention, the proportion of primary applications finalised within six weeks of lodgement has increased significantly.

8. The Australian Government notes the Committee's view that in the case of Mr A, Australia had not advanced any grounds particular to Mr A which would justify his continued detention for a period of four years and the Committee's conclusion that, as a result, Mr A's detention was arbitrary within the meaning of Article 9.1. However, the Committee has not indicated what, in its view, would be considered a sufficient justification for Mr A's detention nor at what point in time the detention of Mr A became arbitrary.

9. As noted in the Australian Government submissions, Mr A's arrival and subsequent application for refugee status coincided with a dramatic increase in applications for refugee status from persons lawfully within Australia and from unauthorised boat arrivals. In this period, the refugee determination system was under considerable stress and underwent a fundamental restructuring process based on ensuring fairness in a rapidly evolving and over stretched processing system. The number of on-shore applications for refugee status, mostly from persons who had overstayed their entry permits, rose from 1,148 in 1989 to 11,335 in 1990 and 13,045 in 1991. This dramatic increase placed a serious additional burden on the resources for decision making. Delays were experienced in matching suitable resource levels to the substantially increased workload with a major expansion of staffing being made at the end of 1990. In addition, there were delays in the lodgement of applications for refugee status, the subsequent length of time taken to reach a final determination on such applications, and the length of time associated with the pursuit of legal actions by detainees who were refused refugee status. In respect of Mr A's application for refugee status, there were also difficulties and delays in gathering information relevant to investigating and assessing his claims.

10. In its submissions, the Australian Government drew the Committee's attention to the fair and generous nature of Australia's system for processing claims for refugee status and, in particular, the fact that the system allows claimants opportunities to seek both merits and judicial review of adverse decisions on their claims. The fairness of the system, in itself, creates the potential for delay in finalising proceedings. As noted in the Australian Government submissions, the primary decision rejecting Mr A's claim for refugee status was made on 15 May 1991. Mr A subsequently sought administrative review of that decision and he was also involved in a number of court proceedings relating to his detention and his claims for refugee status. The time taken to finalise these proceedings was not within the Australian Government's control. The many layers of review utilised by Mr A were certainly a major contributing factor to the time taken to finalise his application for refugee status and hence the length of the period of his detention.

11. Having given careful consideration to the Committee's views, and in light of the factors explained in the above paragraphs, the Australian Government does not accept that the detention of Mr A was arbitrary, nor that Australia has provided insufficient justification for Mr A's detention. Consequently, the Australian Government does not accept the Committee's view recommending that Mr A be paid compensation.

12. In relation to the Committee's view that there was a breach of Article 9.4, the Australian Government, with all respect, does not consider it to be a correct interpretation of Article 9.4. The obligation on state parties is, in accordance with the actual words of Article 9.4, to provide for review of the lawfulness of detention. In the view of the Australian Government, there can be no doubt that the term 'lawfulness' refers to the Australian domestic legal system. There is nothing apparent in the terms of the Covenant that 'lawful' was intended to mean 'lawful at international law' or 'not arbitrary'. Elsewhere in the Covenant where the term 'law' is used, it clearly refers to domestic law: see for example, Article 9.1, Article 17.2, Article 18.3 and Article 22.2. Furthermore, the use of 'unlawful' in Article 9.4 contrasts with the meaning and use of 'arbitrary' in other provisions of the ICCPR: for example, in Article 17.1. Nor is there anything in the *travaux préparatoires*, the General Comments of the Committee, the Committee's jurisprudence under the Optional Protocol,⁴ or the works of commentators to support the Committee's view that 'lawfulness' in Article 9.4 'is not limited to mere compliance with domestic law'.⁵ Accordingly, the Australian Government cannot accept the Committee's view that Australia has breached Article 9.4.

4 Except for the individual opinion of Mr Fausto Pocar in *Aduayom, Diasso and Dobou v Togo*, UN Doc CCPR/C/57/D/422/1990 to 424/1990/Rev.1 at p 8, which, however, analyses the issue in a different context and in regard to Articles 9.1 and 9.5.

5 *A v Australia* CCPR/C/59/D/560/1993 at 9.5.

13. The Australian Government will, where appropriate, provide further information to the Committee on developments in Australia in relation to the processing of applications for refugee status.

14. The Australian Government avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.

Other views on communications to the Human Rights Committee

Views on the merits finding no violation of the ICCPR

In two matters, *ARJ v Australia No 692/1996*⁶ and *GT v Australia No 706/1996*⁷ the HRC held that Australia was not acting in violation of the ICCPR. Both cases concerned the deportation of a person who had served a prison sentence in Australia and who had been unsuccessful in applications for refugee status. The HRC found in both cases that Australia was not acting in violation of the ICCPR by deporting the complainants to Iran and Malaysia respectively. While these cases were dismissed they provide an important insight into the HRC's approach to a state party's obligation under the ICCPR not to return a person to a country where he or she might face violations of their human rights. These cases raise issues concerning Australia's international obligations of *non refoulement* which arise under the *Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment* (CAT) and the *Refugee Convention and Protocol*. The lack of individual complaints mechanisms under the Refugee Convention means that individual complaints are being considered by the treaty monitoring bodies under the ICCPR and CAT. In addition to the two cases submitted under the Optional Protocol, a further two cases have been lodged against Australia with the Torture Committee. These cases will be the subject of a separate article in a future edition of the Journal. The issues confronting these bodies to some extent mirror developments under the *European Convention of Human Rights and Fundamental Freedoms*.

Inadmissible communications

Most communications have been held inadmissible on the grounds that: the events complained of occurred prior to Australia's accession to the Protocol; available local remedies were not exhausted; or the subject matter of the complaint did not establish any substance to the allegations. Most communications lodged to date concern

6 Communication No 692/1996, UN Doc CCPR/C/60/D/692/1996.

7 Communication No 700/1996, UN Doc CCPR/C/61/D/700/1996.

violations of the right to a fair trial pursuant to Article 14 of the ICCPR.

*JL v Australia*⁸

JL claimed to be a victim of violations by Australia of Article 14 (fair trial) of the ICCPR. He claimed that he has been denied proceedings before an independent and impartial tribunal. JL was a solicitor practising in Victoria. His complaint arose out of his failure to pay the increased premium for the new insurance scheme under the *Legal Profession Practice Act 1958* (Vic) which he was required to pay to renew his practising certificate.

He continued to practise without a certificate. This led to a number of proceedings in the Supreme Court of Victoria. The Court enjoined him to refrain from practising law. He ignored the injunction, was held in contempt and imprisoned. He was eventually struck off from the role of solicitors. JL alleged that the Court did not accord him a fair trial because it was institutionally linked to the Victorian Law Institute, so the judges' rulings were said to be partial because of their 'special relationship' with the Institute. He also claimed that his detention was unlawful and that the Court had no jurisdiction to entertain the case against him.

While the events occurred prior to 25 December 1991 (the date the ICCPR entered into force for Australia), JL alleged that they had continuing effects and therefore could be the subject of a communication. The HRC held that JL's claim that his detention between 1 September and 29 November 1991 was unlawful related to events prior to the entry into force of the Optional Protocol for Australia and that it did not have any consequences which in themselves were a violation of the Covenant. Accordingly, that part of his claim was inadmissible *ratione temporis*.

As to the claim that he was denied a fair and impartial hearing, the HRC said that although the relevant court hearings took place before 25 December 1991, the effects of the decisions taken by the Court continue until the present time, so this aspect of the communication was not excluded *ratione temporis*. However, it was still inadmissible as it was a matter for states parties to regulate or approve the activities of professional bodies. In addition, the HRC said the entitlement of the Court, under Australian law, to commit JL for contempt of court for failing to respect an injunction not to practice law without paying the practising fee and the insurance premium, was a matter of domestic law and beyond the HRC's competence to investigate.

8 Communication No 491/1992, UN Doc CCPR/C/45/D/491/1992 (1994), 28 July 1992, 45th session.

KLBW v Australia⁹

Mrs KLBW claimed to be a victim of a violation by Australia of Articles 2.2, and 2.3, 6, 7, 9, 10, 16, 17 and 26 of the ICCPR. Mrs KLBW's claim arose out of treatment at the Chelmsford private hospital in New South Wales in 1970 where she was subjected to deep sleep therapy. She alleged that she was held against her will, sexually abused by the psychiatrist and assaulted by the nurses. She conceded that she had not exhausted domestic remedies, but claimed that the application of domestic remedies would be unreasonably prolonged, within the meaning of Article 5.2 of the ICCPR, because court action against the doctors and hospital had been futile and expensive. Mrs KLBW had also applied to the Victims Compensation Tribunal but none of the doctors had been convicted and she did not expect to obtain compensation.

She alleged that the failure of the New South Wales Government to provide an adequate remedy for the maltreatment she suffered constituted an ongoing violation by Australia of her rights under the ICCPR. In its views, the HRC did not address the merits of the claim but made the general observation that the ICCPR could not be applied retroactively and that the HRC was therefore precluded *ratione temporis* from examining the events.

AS and LS v Australia¹⁰

The authors claimed to be victims of violations by Australia of Articles 2, 16, 17, 26 and 'others possibly to be determined by the Human Rights Committee' of the ICCPR. The HRC observed that the ICCPR does not apply retroactively and concluded that the HRC is precluded *ratione temporis* from examining events that occurred in 1985-1987, unless it is demonstrated that these acts or omissions continued or had effects after the entry into force of the ICCPR, constituting in themselves violations of the ICCPR.

The communication arose out of proceedings in the Federal Court of Australia concerning property development and certain financing arrangements. AS and LS contended that the judge discriminated against them and unduly favoured the defendants. They alleged that the judge's action violated Articles 2 and 26 of the

9 Communication No 499/1992 UN Doc. CCPR/C/47/D/499/1992/Rev.1 (1993) 30 March 1993, 47th session.

10 Communication No 490/1992 UN Doc CCPR/C/47/D/490/1992 (1993) 30 March 1993, 47th session.

ICCPR. Finally, AS and LS claimed to be victims of a violation of Article 17 of the ICCPR because the judge allegedly allowed the defendants to introduce as evidence confidential documentation on AS obtained by 'illegal means' from the Department of Social Security. They also alleged that the manner in which the appeal was conducted violated their rights under the ICCPR.

*Jarman v Australia*¹¹

Mr Jarman claimed to be the victim of violations by Australia of Articles 14 (fair trial), 16 (right to recognition before the law) and 26 (equality before the law) of the ICCPR. The complaint arose in relation to the sale of an insurance business and dispute over legal fees. The dispute went to court and Mr Jarman defended himself. He claimed to have been discriminated against by the judicial system because he was unrepresented.

He claimed that he did not receive a fair and public hearing by a competent and independent court, as the magistrate was a friend of the solicitor against whom he was litigating. Mr Jarman lost his case and then sought to appeal. He filed his appeal three months late and the court refused to accept the appeal.

Mr Jarman also claimed his right to be recognised as a person before the law and his right to equal treatment were violated as he was not permitted to submit his appeal out of time. The HRC found that the complaint of an unfair trial and the alleged irregularities in his hearings could not be substantiated and there was no substance to the allegations of discrimination and non-recognition of his rights as a person before the law.

*Lang v Australia*¹²

Mrs Lang claimed to be the victim of violations by Australia of Articles 1, 2(1), (2), (3), 7, 14, 16, 17 and 26 of the ICCPR. The complaint arose out of legal proceedings in the Supreme Court of New South Wales. In the court proceedings, Mrs Lang complained about work carried out on an embankment causeway of an adjacent property. The neighbours' property had a right of way for access over Mrs Lang's

11 Communication No 700/1996, UN Doc CCPR/C/58/D/700/1996 (1996), 8 November 1996, 58th session.

12 Communication No 659/1995, UN Doc CCPR/C/58/D/659/1995 (1996), 8 November 1996, 8th session.

property and she claimed the work had been carried out without the correct council approvals.

The proceedings before the Equity Division of the Court involved a trial and appeal. Mrs Lang was unsuccessful and was held in contempt of the Court's orders for her refusal to comply with an order to allow the construction on her property.

Mrs Lang alleged that the Australian legal system and legal profession were corrupt and claimed that she did not receive a fair trial because she was unrepresented and that the courts were biased against women and immigrants.

The HRC observed that the allegations of discrimination and bias on the part of the Australian courts were not substantiated for the purposes of admissibility. The HRC said that the complaint was a sweeping allegation and did not reveal how Mrs Lang's rights under the ICCPR might have been violated.

*Perera v Australia*¹³

Mr Perera claimed to be the victim of a violation by Australia of Articles 14 and 26 of the ICCPR. The communication arose out of Mr Perera's arrest, trial and conviction on drug-related offences. He was found guilty on two charges of supplying heroin and one charge of possession of a sum of money obtained by way of commission of a drug offence and was sentenced to nine years imprisonment. On 21 August 1985, the Qld Court of Criminal Appeal quashed the decision and ordered a retrial. Following a retrial Mr Perera was found guilty of possession and sale of heroin. He was sentenced to eight years imprisonment. His appeal was dismissed and special leave to the High Court of Australia was refused.

Mr Perera claimed that he did not receive a fair trial and that the police discriminated against him because of his racial and national origin. He claimed that he was called racist names by the police officers who arrested him. He claimed that these police officers fabricated evidence against him for racial reasons.

In this case, Australia lodged a detailed submission in December 1993 and argued that the communication was inadmissible. Australia said that the claim under Article 14 had not been sufficiently substantiated because:

13 Communication No 536/1993, UN Doc CCPR/C/53/D/536/1993 (1995), 28 March 1995, 53rd session.

- the independence of the judiciary and the conditions for a fair trial are guaranteed by the constitution of Queensland and satisfy the criteria set out in Article 14;
- Perera's retrial was fair and that it was not the HRC's function to provide a judicial appeal from or review of decisions of national authorities;
- Perera was not hindered by Australia in obtaining the attendance of a witness, rather it was his counsel's decision not to do so;
- it was not the Government's responsibility to organise the defence of a person accused of having committed a crime; and
- that the appellate courts evaluated the facts and evidence placed before the trial courts and reviewed the interpretation of domestic law by those courts, in compliance with Article 14.5.

In relation to the claims of race discrimination, Australia submitted that:

- the incidents complained of occurred in July 1984;
- the allegations were rejected by the courts and other commissions; and
- other remedies were available under the *Racial Discrimination Act 1975* (Cth) and Mr Perera failed to avail himself of this remedy.

In its decision, the HRC observed that Perera's allegations related to the evaluation of evidence by the court. It said that it was the role of the appellate courts of states parties to the ICCPR and not the HRC to evaluate the facts and evidence in a particular case unless it is clear that a denial of justice has occurred or that the court violated its obligation of impartiality. Perera's allegations and submissions did not show that his trial was defective, so his claim failed.

The HRC said that Australia was not accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. This aspect of the claim also failed.

The complaints of police violence and race discrimination were inadmissible *ratione temporis*.

*X v Australia*¹⁴

X was an Aboriginal man. He lodged the communication on his own behalf and on behalf of his three children. He claimed violations by Australia of Articles 14.1, 18, 23.1, 26 and 27 of the ICCPR. The communication concerned proceedings in the Family Court of Australia for custody (and access) of his three children, and division of property.

In March 1992, the Family Court granted custody to X's former wife. The communication alleged that the racism and ethnocentrism allegedly displayed by the Family Court of Australia violated several of X's rights under the ICCPR.

Australia made some submissions on the question of admissibility. It argued X had failed to exhaust domestic remedies and that X withdrew from the proceedings at an early stage at first instance and subsequently withdrew his appeal to the Full Court of the Family Court. Australia also argued that the part of the communication relating to the Family Court hearing of 28 November 1991 was inadmissible *ratione temporis*.

The HRC declared the communication inadmissible because X had failed to exhaust domestic remedies as required by Article 5(2)(b) of the ICCPR. The HRC noted both Australia's submission that the appeal constituted an effective remedy in the circumstances and X's assertion that his appeal would not have been successful and that it would be costly, but concluded:

... mere doubts about the effectiveness of remedies do not absolve an individual from exhausting them. All arguments of the author relating to exclusion of evidence and non-consideration of the Aboriginal family structure should have been raised before the Family Court during the original trial and subsequently on appeal. In the instant case, the author has not shown the existence of special circumstances which prevented him from pursuing the domestic remedies available.

*Werenbeck v Australia*¹⁵

Klaus Werenbeck was a German citizen who was convicted of the charge of illegally importing narcotics into Australia. He was sentenced to 13 years imprisonment. Werenbeck's communication arose out his trial and detention. The grounds of his petition were as follows:

14 Communication No 557/1993, UN Doc CCPR/C/57/D/557/1993 (1996), 16 July 1996, 57th session.

15 Communication No 579/1994, UN Doc CCPR/C/59/D/579/1994, 27 March 1997.

- that his pre-trial detention of nine months was excessive and in violation of Articles 9.3 and 14.3(c);
- he did not receive proper medical treatment during his detention, as a result of which he was not feeling well during the trial, breaching Article 10;
- changes in his legal representation meant that did not have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, in breach of Article 14.3(b) and (d);
- he was not informed in detail and in a language he understood of the charges against him, in breach of Article 14.3(a) and (f);
- the failure to call witnesses on his behalf constituted a violation of Article 14.3(e);
- his sentence was too harsh and in violation of Article 26;
- the appeal was not a full review, breaching Article 14.5; and
- he was not present during the hearing, although he had indicated that he desired to be, violating Article 14.3(d).

The Australian Government made submissions on the issue of admissibility. It argued that the aspect of the communication concerning Articles 9, 10, 14 (in relation to the trial at first instance) and 26 was inadmissible *ratione temporis* as it occurred in June 1989-March 1990 and this was not a case of continuing violation. It then argued that Mr Werenbeck failed to substantiate his claims in relation to the failure to be informed of the charges in a language he understood. As regards the claim that he was not present at the appeal hearing, although he had indicated that he desired to be there was no violation, referred to the HRC's General Comment 13. The Australian Government argued that Article 14.3(d), did not contain an absolute requirement to have an accused present at the appeal, when counsel was representing him.

As regards his claim under Article 16, the Australian Government argued that there was no real issue as Werenbeck exercised the same legal rights as any other individual brought before a court in Australia.

The HRC's declared the communication inadmissible. In doing so, it agreed with the Australian Government's submissions. The findings were as follows:

- the claims in relation to Articles 9.3, 10.1, and 14.3(c) were inadmissible *ratione temporis*;
- the claim that he did not have adequate time and facilities for the preparation of his defence and that he was denied the right to communicate with counsel of his own choosing, had no substance. The HRC noted that Mr Werenbeck was represented by counsel and that Article 14.3(d) does not entitle an accused to choose counsel provided free of charge;
- in relation to the claim under Article 14.3(a), he had not adduced any facts in support of his contention that he was not promptly informed, in detail and in a language which he understood of the nature and cause of the charge against him;
- the claim about the failure to call witnesses on his behalf constituted a violation of Article 14.3(e). The HRC said that the defence was free to call any witness, and the Australian Government 'cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interest of justice'.
- in relation to the claim that he was a victim of a violation of Articles 26 and 16, the HRC noted that each criminal case has to be examined on its own merits and that the acquittal of one accused and the conviction of another as such does not raise issues of recognition as a person or of equality before the law. This part of the communication was therefore inadmissible under Article 3 of the Protocol, as incompatible with the provisions of the ICCPR; and
- in relation to the claim under Article 14.5, the HRC said that Werenbeck's appeal with regard to both conviction and sentence was in fact heard and the evidence reviewed by the Court of Appeal. This part of the communication was inadmissible under Article 2 of the Protocol. ●

Reference Material

Texts

The three most widely used texts on the ICCPR are:

1. Nowak M, *UN Covenant on Civil and Political Rights CCPR Commentary*, N P Engel, Strasbourg, 1993.

2. Bossuyt M J, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, Netherlands, 1987.
3. McGoldrick D, *The Human Rights Committee: Its role in the Development of the ICCPR*, Clarendon Press, Oxford, 1994.

In addition the following texts are useful for comparative jurisprudence under the European Convention on Human Rights:

P van Dijk & G J H van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd Ed, Kluwer Law, Netherlands, 1998.

F G Jacobs, RCA White, *The European Convention on Human Rights*, 2nd Ed, Clarendon Press, Oxford, 1996.

D J Harris, M O'Boyle and C Warburton, *Law of the European Convention on Human Rights*, Butterworths, London, 1995.

Boeles Pieter, *Fair Immigration Proceedings in Europe*, Martinus Nijhoff, Netherlands, 1997 (contains chapters on the ICCPR).

Guides to making complaints

AHRIC *Guide to Using the Optional Protocol* (also available electronically from the AHRIC site).

Chinkin C 'Using the Optional Protocol: The Practical Issues' (1993) 3 (64) *Aboriginal Law Bulletin* 6.

Charlesworth H 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 *Melbourne University Law Review* 428.

Eastman K 'International Human Rights Remedies' Ch 15.3, *Lawyers Practice Manual* (NSW), Law Book Company.

Løfgren N 'Complaint Procedures under Article 22 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment' (1994) 1 *Australian Journal of Human Rights* 400.

Internet

Australian Human Rights Information Centre provides access to UN and Australian primary documents and links to other relevant sites. For the decisions and views of the UN Human Rights Committee:

<http://www.austlii.edu.au/au/other/ahric/Primary/hrcomm/australia.html>

Human Rights UN High Commissioner home page gives access to the treaty monitoring bodies databases which include annual reports and general comments:

<http://www.unhchr.ch/tbs/doc.nsf>

Decisions and views of the UN Human Rights Committee can be found in the Committee's annual reports and in electronic form at the University of Minnesota Human Rights Library:

<http://www.umn.edu/humanrts/undocs/undocs.htm>