

Annex 2: Australia's Fifth Periodic Report under the International Covenant on Civil and Political Rights

1. The Australian Government is pleased to present the Human Rights Committee with Australia's Fifth Periodic Report under the International Covenant on Civil and Political Rights (ICCPR) in accordance with article 40 of the Covenant. Australia ratified the ICCPR on 13 August 1980. The ICCPR came into force for Australia on 13 November 1980, except article 41, which came into force for Australia on 29 January 1993.
2. Australia's Fifth Report under the Covenant covers the period from January 1997 to June 2006.
3. In accordance with the harmonised guidelines for an expanded Core Document issued by the Office of the High Commissioner for Human Rights in May 2006 (HRI/MC/2006/3), Australia has included topics in the Core Document which are congruent between some or all of the major human rights treaties.
4. Table 1 below outlines where the ICCPR provisions are addressed in the core document. Where particular issues are not addressed in the expanded core document, the Australian Government refers the Committee to our previous reports.
5. Table 2 sets out the issues raised by the Human Rights Committee in its Concluding Observations on Australia's Third and Fourth Periodic Reports under the ICCPR, and where these are addressed in the Core Document or in this report.
6. Australia then addresses Communications arising under the First Optional Protocol to the ICCPR during the reporting period.

Table 1: ICCPR articles addressed in the common core document

Article	Core document reference
1	K. Right of self-determination J. Participation in public life
2	G. Non-discrimination and equality H. Effective remedies
3	G. Non-discrimination and equality
4	See pages 57 – 68 of Australia’s Third Periodic Report under the ICCPR
5	See pages 69 – 60 of Australia’s Third Periodic Report under the ICCPR
6	L. Right to life, right to physical and moral integrity, slavery, forced labour and traffic in persons
7	L. Right to life, right to physical and moral integrity, slavery, forced labour and traffic in persons
8	L. Right to life, right to physical and moral integrity, slavery, forced labour and traffic in persons
9	M. Right to liberty and security of the person
10	M. Right to liberty and security of the person
11	M. Right to liberty and security of the person
12	N. Right to freedom of movement, right to access to any public place, expulsion and extradition
13	N. Right to freedom of movement, right to access to any public place, expulsion and extradition
14	G. Non-discrimination and equality I. Procedural guarantees
15	I. Procedural guarantees
16	See page 235 of Australia’s Third Periodic Report under the ICCPR
17	O. Right to privacy, right to freedom of thought, conscience and religion
18	O. Right to privacy, right to freedom of thought, conscience and religion
19	P. Freedom of opinion and expression
20	P. Freedom of opinion and expression
21	Q. Right to peaceful assembly and association
22	Q. Right to peaceful assembly and association U. Trade union rights
23	R. Right to marry and found a family, protection of the family, mother and children
24	R. Right to marry and found a family, protection of the family, mother and children J. Participation in public life
25	J. Participation in public life
26	G. Non-discrimination and equality
27	G. Non-discrimination and equality Y. The right to education, other cultural rights

Table 2: Human Rights Committee’s Concluding Observations on Australia’s Third and Fourth Periodic Reports under the ICCPR

Concluding Observations ³³	Core document reference
<p><i>With respect to article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term ‘self-determination’, the Government of the State party prefers terms such as ‘self-management’ and ‘self-empowerment’ to express domestically the principle of indigenous peoples’ exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.</i></p>	<p>K. Right of self-determination</p>
<p><i>The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art 1, para 2).</i></p>	<p>G. Non-discrimination and equality</p>
<p><i>The Committee is concerned, despite positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (<u>Mabo</u>, 1992; <u>Wik</u>, 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.</i></p>	<p>G. Non-discrimination and equality</p>

³³ Human Rights Committee, Concluding Observations, Australia 24/07/2002, A/55/40, paras 498-528.

The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.

G. Non-discrimination and equality

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.

G. Non-discrimination and equality

The Committee recommends that in the finalisation of the pending bill intended to replace the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), the State party should give sufficient weight to the values described above.

G. Non-discrimination and equality

While noting the efforts by the State party to address the tragedies resulting from the previous policy of removing indigenous children from their families, the Committee remains concerned about the continuing effects of this policy.

R. Right to marry and found a family, protection of the family, mother and children

The Committee recommends that the State party intensify these efforts so that the victims themselves and their families will consider that they have been afforded a proper remedy (arts 2, 17 and 24).

R. Right to marry and found a family, protection of the family, mother and children

The Committee is concerned that in the absence of a constitutional Bill or 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.

D. General legal framework within which human rights are protected at the national level

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).

D. General legal framework within which human rights are protected at the national level

The Committee is concerned by the Government bill in which would be stated, contrary to a judicial decision, that ratification of human rights treaties does not create legitimate expectations that government officials will use their discretion in a manner that is consistent with those treaties.

D. General legal framework within which human rights are protected at the national level

The Committee considers that enactment of such a bill would be incompatible with the State party's obligations under article 2 of the Covenant and it urges the Government to withdraw the bill. The Committee is concerned over the approach of the State party to the Committee's Views in Communication No 560/1993 (A v Australia). Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.

D. General legal framework within which human rights are protected at the national level

Report on Communications arising under the Optional Protocol, below.

The Committee recommends that the State party reconsider its interpretation with a view to achieving full implementation of the Committee's Views.

Report on Communications arising under the Optional Protocol, below.

Legislation regarding mandatory imprisonment in WA and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles of the Covenant.

I. Procedural guarantees

The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.

I. Procedural guarantees

The Committee considers that the mandatory detention under the Migration Act of 'unlawful non-citizens', including asylum seekers, raises questions of compliance with article 9, paragraph 1, of the

M. Right to liberty and security of the person

Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right.

The Committee urges the State party to reconsider its policy of mandatory detention of 'unlawful non-citizens' with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel.

M. Right to liberty and security of the person

Communications under the Optional Protocol to the International Covenant on Civil and Political Rights: January 1997 – June 2006

7. During the reporting period January 1997 – June 2006, Australia has been formally advised of the Committee's Views in 37 Communications under the Optional Protocol to the ICCPR. Twenty-one of these Communications were found to be inadmissible by the Committee.³⁴ Of the remaining 16 Communications decided on their merits, the Committee found no violation of the ICCPR in five cases.³⁵

8. The Committee was of the view that there were actual or potential violations of the ICCPR in 11 cases.

Australia's response to the Views of the Human Rights Committee in A v Australia, Communication No 560/1993

9. In *A v Australia*, the Committee found that the right to review the lawfulness of detention pursuant to article 9(4) of the ICCPR requires that the court be empowered to order release if detention is incompatible with the requirements in

³⁴ Communication Numbers: 579/1994; 646/1995; 737/1997; 751/1997; 762/1997; 772/1997; 832/1998; 880/1999; 881/1999; 901/1999; 947/2000; 954/2000; 963/2001; 978/2001; 984/2001; 1012/2001; 1087/2002; 1065/2002; 1127/2002; 1239/2004; and 1336/2004.

³⁵ Communication Numbers: 692/1996; 706/1996; 920/2000; 983/2001; and 1080/2002.

article 9(1). The Australian Government response disagreed with the Views of the Committee.

10. In its Concluding Observations in 2002³⁶, the Human Rights Committee raised concerns with Australia's approach to the Committee's Views in *A v Australia*, claiming that it undermines the State party's recognition of the Committee's competence to consider communications under the Optional Protocol, and urging Australia to reconsider its interpretation.

11. Australia is careful to ensure that all communications concerning Australia are responded to in a considered manner. The fact that Australia may on occasion disagree with the Committee does not undermine our recognition and acceptance of the communications mechanism under the Optional Protocol.

12. The Australian Government takes seriously its international obligations and responsibilities, and gave careful consideration to the Views the Committee expressed in *A v Australia*. In the view of the Australian Government, there can be no doubt that the term 'lawfulness' in article 9(4) 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'. Furthermore, the use of 'unlawful' in article 9(4) contrasts with the meaning and use of 'arbitrary' in other provisions of the Covenant, for example, article 17(1). Nor is there anything in the *travaux préparatoires* or elsewhere to support the Committee's view that 'lawfulness' in article 9(4) is not limited to compliance with domestic law.

13. The Australian Government is firmly of the view that immigration detention 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 programme 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

³⁶ Human Rights Committee, Concluding Observations, Australia 24/07/2002, A/55/40.

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.

14. 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.

15. Australia's system for processing claims for refugee status allows claimants opportunities to seek both merits and judicial review of adverse decisions on their claims. The checks in this system create the potential for delay in finalising proceedings.

Rogerson v Australia, Communication No 802/1998

16. In this communication, the Committee found that a delay of almost two years in the delivery of a final decision by the NT Court of Appeal in relation to contempt of court charges was in violation of article 14(3) (c) of the ICCPR. The Committee considered that its finding of a violation constituted sufficient remedy.

C v Australia, Communication No 900/1999

17. The Committee in this communication considered that Australia was in breach of articles 7, 9(1) and 9(4) of the ICCPR in relation to C's continued detention despite his mental illness. The Committee also expressed the view that if C were deported to Iran, Australia would be in breach of article 7.

18. The Australian Government believes that C's detention did not reach a sufficient level of severity to amount to treatment prohibited by article 7. In finding a breach of article 7 here, the Committee has placed an obligation on States to release detainees who suffer from mental illness per se in order to comply with article 7,

without regard for the circumstances and conditions of each complainant's detention. The conditions of C's detention were appropriate.

19. Australia would not be in breach of article 7 if C was removed to Iran. The Committee incorrectly equated the protection obligation under the Refugee Convention with the implied non-refoulement obligation in relation to article 7 of the ICCPR. The complainant will not be subject to treatment prohibited by article 7 if removed to Iran. Currently there are no plans to remove the complainant from Australia, and the Committee will be informed if this situation changes.

20. The Australian Government believes that C's first period of detention did not breach article 9(1). The detention was reasonable and necessary to ensure the integrity of Australia's migration system. The complainant had adequate opportunity to have the lawfulness of his detention directly determined by a court, therefore there was also no breach of article 9(4). Consequently, no compensation was paid.

Young v Australia, Communication No 941/2000

21. In the Committee's view in this case, Australia had violated article 26 of the ICCPR by denying Mr Young a pension under the *Veterans' Entitlement Act 1986* on the basis of his sexual orientation. The Australian Government did not accept the Committee's Views in this case.

22. Article 26 of the ICCPR provides for a general prohibition against discrimination on a range of grounds including sex or sexual orientation. In accordance with the facts of this case, Mr Young was unable to show that his eligibility for the pension under the Act was based on a distinction on the ground of sexual orientation. In Australia's view, sexual orientation was not the issue in the Young case. Mr Young was not entitled to a pension under the *Veterans' Entitlements Act* because he could not demonstrate that he met the requirements set out in the Act, including the requirement that the veteran's death be 'war caused'. Nor was he able to demonstrate that he was the *de facto* partner of the veteran.

23. The matter was appropriately determined by the Australian Repatriation Commission and the Veteran's Review Board applying the provisions of the Veterans' Entitlement Act.

Baban v Australia, Communication No 1014/2001

24. In its Views in this case, the Committee expressed the view that the detention of the author and his son in immigration detention was 'arbitrary', in breach of article 9(1). The Committee also stated that in its view, the author should have been able to ask an Australian court to consider whether his detention was consistent with the ICCPR. As with similar comments in other communications, the Australian Government does not agree with these views.

25. Immigration detention is an essential element underpinning the integrity of Australia's migration program and the protection of our borders. As a dissenting member of the Committee said, 'States have a right to control entry into their own countries, and may use reasonable legislative judgements to that end.' The Australian Government considers its system of immigration detention one such reasonable legislative judgement.

26. Without immigration detention, it would not be possible to ensure that we are able to remove people who have no lawful authority to be here. It would not be possible to ensure that people who arrive without proper authority are available for health, security and identity checking. Immigration detainees can challenge the lawfulness of their detention. A number of recent cases have demonstrated that in our democratic society, the right to judicial review of immigration detention is a real one.

Cabal and Pasini Bertran v Australia, Communication No 1020/2001

27. This Communication concerned the alleged mistreatment of Mr Cabal and Mr Pasini in a Victorian prison. Mr Cabal and Mr Pasini were in prison awaiting extradition to Mexico on fraud-related charges. Whilst the Committee rejected the bulk of their allegations as inadmissible, it found that the detention of Mr Cabal and Mr Pasini for one hour in a small holding cell, in which they had to take turns

standing up or sitting down, constituted a violation of their right to be treated with respect for their humanity and dignity.

28. Under Australia's federal Constitutional system, legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent states. Under this system, prison management is a State responsibility. Accordingly, the Australian Government conveyed the Committee's Views to the State of Victoria, where the contravention is said to have occurred.

29. Corrections Victoria advised that the Melbourne Custody Centre is operated by ACM under contract with the Victoria Police. Corrections Victoria advised that they will liaise with the Victoria Police to address the Committee's adverse finding.

30. As indicated in Australia's submissions to the Committee, the authors of the communication refused the option of being placed in separate single cells and asked to remain together. The Victorian Government advises that it is very unusual for two people to be placed in the cell that was occupied by the authors. This is not standard practice and the Australian Government is not aware of any other case in which it has occurred. Nevertheless, having received the Committee's Views, the State of Victoria has asked the Victorian Police to take any steps necessary to ensure that a similar situation does not occur in the future.

31. After considering the facts of this case, the Australian Government does not accept the Committee's View that the authors are entitled to compensation.

Bakhtiyari v Australia, Communication No 1069/2002

32. This case concerned the Australian Government's decision to remove the Bakhtiyari family from Australia on the basis that they were unlawful non-citizens.

33. The Australian Government welcomed the Committee's Views that Mr Bakhtiyari was not detained arbitrarily in breach of article 9(1) of the ICCPR prior to the granting of his protection visa. In response to the Committee's View that Australia was in breach of its obligations to Mrs Bakhtiyari and the children regarding

arbitrary detention under article 9(1), the Australian Government reiterates its view that immigration detention is not arbitrary.

34. The process of assessment and initial review of Mrs Bakhtiyari's application for a protection visa was completed within six months of her application being made. Detention following that time reflects Mrs Bakhtiyari's efforts to have a more favourable decision substituted by the Minister, and the hearing of domestic legal proceedings relating to her application. Mrs Bakhtiyari was free to leave Australia with her children and her husband at any time while in detention. In these circumstances, the Australian Government maintains that the detention of Mrs Bakhtiyari was reasonable, proportionate and justified.

35. The Committee was also of the view that Australia was in breach of its obligations to Mrs Bakhtiyari and the children under article 9(4). As with similar comments about other communications, the Australian Government does not accept the Committee's interpretation.

36. Concerning the view of the Committee that Australia breached its obligations to the Bakhtiyari children under article 24 of the ICCPR, the Australian Government maintains the view expressed in its submission to the Committee that the children have been afforded protection as is required by their status as minors. The Australian Government affirms its belief that article 24 requirements were met in relation to the Bakhtiyari children through the consideration given to their welfare and the care, facilities and activities provided to them throughout their period of detention.

37. In relation to the Committee's findings of potential breaches of articles 17(1) and 23(1), the Bakhtiyari family was removed from Australia as a family unit.

Madafferi v Australia, Communication No 1011/2001

38. In this communication, the Committee found breaches of articles 7 and 10(1) had occurred due to the return of Mr Madafferi to detention against his doctor's advice. The Committee was also of the view that if Mr Madafferi was removed to Italy without his wife and children, arbitrary interference with the family would occur, in violation of article 17(1), 23 and 24(1).

39. In relation to article 10(1), the Australian Government considers that the decision to detain Mr Madafferi was based on a proper assessment of his circumstances and was proportionate to the ends sought. His detention was in accordance with Australian domestic law and flowed directly from his status as an unlawful non-citizen.

40. Concerning article 17, any removal of the Mr Madafferi would not have interfered with the privacy of his family as individuals or their relationships with each other. Nor would Australia's actions have been unlawful or arbitrary. Any decision to remove him from Australia would have been made in accordance with Australian law and would have been solely aimed at ensuring the integrity of Australia's migration system. Australia's obligation to protect the family under article 23 of the Covenant does not mean that Australia is unable to remove an unlawful non-citizen just because that person has established a family with Australian nationals.

41. The Australian Government also does not accept that Mr Madafferi's removal would have violated article 24, as it would not have amounted to a failure to provide protection measures that are required by the Madafferi children's status as minors. Any separation of the Madafferi children from their father would have arisen as a result of appropriate and lawful action taken by the Australian Government against the complainant following his violation of Australia's migration laws. Therefore there is no obligation to provide him with a remedy.

Faure v Australia, Communication No 1036/2001

42. The author of this communication alleged that the requirement that she take part in the work for the dole program constituted forced or compulsory labour in breach of article 8(3) of the ICCPR. The author further alleged that the refusal by HREOC to consider this claim was in breach of her right to an effective remedy under article 2(3).

43. The Committee found a violation of article 2(3) of the ICCPR, even though it found no violation of article 8(3), in relation to the allegation of forced or compulsory

labour. It found that article 2 requires a State party to provide an effective remedy to ensure that the individual rights under the ICCPR are upheld. The Committee found that such a remedy must be available even when there is no violation of the right established, as in this case.

44. As far as the Australian Government is aware, this is the first occasion on which the Committee has found that there can be a violation of article 2 in the absence of a breach of an article containing a substantive guarantee. The Australian Government does not agree with the Committee's interpretation of article 2, nor the view that a violation of article 2 occurred. In the view of the Australian Government, and in accordance with the Committee's previous jurisprudence, there must be a breach of a right before article 2 may be invoked to require a State to provide an effective remedy. This was not the case in *Faure*.

Brough v Australia, Communication No. 1184/2003

45. The Committee found in this communication that given Mr Brough's juvenile status, his disability and his status as an Aboriginal, his treatment—namely his confinement to a safe cell without the opportunity to communicate, his exposure to artificial light for prolonged periods and the removal of his clothes and blanket—in an adult correctional centre was in violation of articles 10(1), 10(3) and 24(1) of the ICCPR. The Committee considered that, even though no complaint under article 24 was made, it was essential to accord the author treatment appropriate to his age.

46. As mentioned earlier, prison management is a State responsibility. Accordingly, the Australian Government conveyed the Committee's Views to the State of New South Wales, where the contravention is said to have occurred.

47. The Australian Government does not accept the Committee's conclusions that administrative remedies open to Mr Brough were not effective and that it would have been futile for him to avail himself of the available judicial remedies. The Australian Government believes that the availability of these remedies and the author's failure to

avail himself of them constitutes a failure to exhaust domestic remedies as required under article 2 of the Optional Protocol.

48. Australia also disagrees with the view of the Committee that Mr Brough's treatment amounted to breaches of articles 10 and 24, and considers that he was dealt with in a manner appropriate to his age, Indigenous status and intellectual disability, with due consideration to the challenges presented by his behaviour and the risk he presented to himself, other inmates and the security of the correctional facility. Mr Brough had been involved in a serious incident in a juvenile detention facility and had a long-term pattern of self-harming behaviour. His transfer to another detention facility was based on a thorough assessment of his needs and was the least restrictive option for ensuring his own safety and that of other inmates and staff.

49. Accordingly the Australian Government also does not accept that the author is entitled to compensation or other remedy. A range of programmes and support are available to Mr Brough in detention, and although the Australian Government remains convinced that his human rights were not breached by its actions, a number of changes have been introduced since 1999 to enhance the management of offenders with complex needs.

50. In the case of *Hendrick Winata and So Lan Li v Australia*, *Communication No 930/2000*, the Committee found a potential violation.

51. In this case, the Committee considered that the removal of unlawful non-citizens Mr Winata and Ms Li to Indonesia—with or without their teenage son, Barry Winata, an Australian citizen—would amount to interference with the family, as it would result in substantial changes to their long-settled family life, and would consequently violate articles 17, 23(1) and 24(1).

52. The Australian Government does not accept that there would be a breach of articles 17, 23(1) or 24(1) if the complainants are removed to Indonesia. As noted earlier, the Australian Government does not accept that it should refrain from enforcing its migration laws in cases where unlawful non-citizens are said to have

established a family life. Australian migration laws allowing removal of unlawful non-citizens are not arbitrary. If the complainants are removed, it will be a direct result of their having overstayed their visas and their unlawful status in Australia, not a result of Australia failing to provide adequate measures of protection to children within its jurisdiction.

53. Mr Winata and Ms Li are currently living unlawfully in the Australian community, and are the subject of an outstanding request under section 417 of the *Migration Act 1958* for the Minister for Immigration to use the discretionary power to allow them to remain in Australia. This request will be processed if and when they are located.

54. Until then, it is not possible for further action to be taken on their case. In the meantime, there are no plans to remove them from Australia. If this situation changes, the Australian Government will inform the Committee.