



**International Convention on
the Elimination
of all Forms of
Racial Discrimination**

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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Sixty-sixth session
21 February-11 March 2005

**CONSIDERATION OF REPORTS SUBMITTED BY STATES
PARTIES UNDER ARTICLE 9 OF THE CONVENTION**

**Concluding observations of the Committee on the
Elimination of Racial Discrimination**

AUSTRALIA

1. The Committee considered the thirteenth and fourteenth periodic reports of Australia, due in 2000 and 2002 respectively, submitted as one document (CERD/C/428/Add.2), at its 1685th and 1686th meetings (CERD/C/SR.1685 and 1686), held on 1 and 2 March 2005. At its 1699th meeting (CERD/C/SR.1699), held on 10 March 2005, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the report submitted by the State party, which mainly focuses on issues raised in the Committee's previous concluding observations, as well as the additional oral information provided by the delegation.

B. Positive aspects

3. The Committee notes with satisfaction that serious acts of racial hatred or incitement to racial hatred are criminal offences in most Australian States and Territories. It particularly welcomes, in this regard, legislative developments in Victoria and Queensland.

4. The Committee notes with satisfaction that significant progress has been achieved in the enjoyment of economic, social and cultural rights by the indigenous peoples. It welcomes the commitment of all Australian Governments to work together on this issue through the Council of Australian Governments, as well as the adoption of a national strategy on indigenous family violence.
5. The Committee notes with great interest the diversionary and preventative programmes aimed at reducing the number of indigenous juveniles entering the criminal justice system, as well as the development of culturally sensitive procedures and practices among the police and the judiciary.
6. The Committee welcomes the abrogation of mandatory sentencing provisions in the Northern Territory.
7. The Committee welcomes the adoption of a Charter of Public Service in a Culturally Diverse Society to ensure that government services are provided in a way that is sensitive to the language and cultural needs of all Australians.
8. The Committee welcomes the numerous human rights education programmes developed by the Human Rights and Equal Opportunity Commission (HREOC).

C. Concerns and recommendations

9. The Committee, while noting the explanations provided by the delegation, reiterates its concern about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth (Convention, art. 2).

The Committee recommends to the State party that it work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.

10. The Committee notes that the Australian Human Rights Commission Legislation Bill 2003 reforming the HREOC has lapsed in Parliament, but that the State party remains committed to pursuing the reform of the Commission. It notes the concerns expressed by the HREOC that some aspects of the reform could significantly undermine its integrity, independence and efficiency (art. 2).

The Committee notes the importance given by the State party to the HREOC in monitoring Australia's compliance with the provisions of the Convention and recommends that it take fully into account the comments expressed by the HREOC on the proposed reform, and that the integrity, independence and efficiency of the Commission be fully preserved and respected.

11. The Committee is concerned about the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), the main policy-making body in Aboriginal affairs consisting of elected indigenous representatives. It is concerned that the establishment of a board of appointed experts to advise the Government on indigenous peoples' issues, as well as the transfer of most

programmes previously provided by the ATSIC and the Aboriginal and Torres Strait Islander Service to government departments, will reduce the participation of indigenous peoples in decision-making and thus alter the State party's capacity to address the full range of issues relating to indigenous peoples (arts. 2 and 5).

The Committee recommends that the State party take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII. The Committee recommends that the State party reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision- and policy-making relating to their rights and interests.

12. The Committee notes that Australia has not withdrawn its reservation to article 4 (a) of the Convention. It notes with concern that the Commonwealth, the State of Tasmania and the Northern Territory have no legislation criminalizing serious acts of racial hatred or incitement to racial hatred.

The Committee reiterates its recommendation that the State party make efforts to adopt appropriate legislation with a view to giving full effect to the provisions of, and to withdrawing its reservation to, article 4 (a) of the Convention. The Committee wishes to receive information on complaints, prosecutions and sentences regarding serious acts of racial hatred or incitement to racial hatred in States and Territories the legislation of which specifies such offences.

13. The Committee notes with concern reports that prejudice against Arabs and Muslims in Australia has increased and that the enforcement of counter-terrorism legislation may have an indirect discriminatory effect against Arab and Muslim Australians (arts. 4 and 5).

The Committee welcomes the national consultations on eliminating prejudice against Arab and Muslim Australians and wishes to receive more detailed information on the results of such consultations. It recommends that the State party increase its efforts to eliminate such prejudice and ensure that enforcement of counter-terrorism legislation does not disproportionately impact on specific ethnic groups and people of other national origins.

14. The Committee is concerned at reports of biased treatment of asylum-seekers by the media (art. 4).

The Committee recommends that the State party take resolute action to counter any tendency to target, stigmatize, stereotype or profile non-citizens, including asylum-seekers, on the basis of race, colour, descent, or national or ethnic origin, especially by the media and the society at large. In this regard, it draws the attention of the State party to its general recommendation XXX on non-citizens.

15. The Committee notes with concern that it has proved difficult for complainants, under the Racial Discrimination Act, to establish racial discrimination in the absence of direct evidence, and that no cases of racial discrimination, as distinct from racial hatred, have been successfully litigated in the Federal courts since 2001 (arts. 4 and 6).

The Committee, having taken note of the explanations provided by the delegation, invites the State party to envisage regulating the burden of proof in civil proceedings involving racial discrimination so that once an alleged victim has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for differential treatment.

16. The Committee notes with concern the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the *Mabo* case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments roll back some of the protections previously offered to indigenous peoples and provide legal certainty for Government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention (art. 5).

The Committee recommends that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.

17. The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands (art. 5).

The Committee wishes to receive more information on this issue, including on the number of claims that have been rejected because of the requirement of this high standard of proof. It recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.

18. The Committee notes that 51 determinations of native title have been made since 1998 and that 37 of them have confirmed the existence of native title. It also acknowledges the provisions introduced by the 1998 amendments to the Native Title Act regarding indigenous land-use agreements, as well as the creation of the Indigenous Land Fund in 1995 to purchase land for indigenous Australians unable to benefit from recognition of native title (art. 5).

The Committee wishes to receive more detailed information, including statistical data, on the extent to which such arrangements respond to indigenous claims over land. Information on achievements at State and Territory levels may also be provided.

19. While noting the improvement in the enjoyment by the indigenous peoples of their economic, social and cultural rights, the Committee is concerned over the wide gap that still exists between the indigenous peoples and others, in particular in the areas of employment, housing, health, education and income (art. 5).

The Committee recommends that the State party intensify its efforts to achieve equality in the enjoyment of rights and allocate adequate resources to programmes aimed at the eradication of disparities. It recommends in particular that decisive steps be taken to ensure that a sufficient number of health professionals provide services to indigenous peoples, and that the State party set up benchmarks for monitoring progress in key areas of indigenous disadvantage.

20. The Committee, having taken note of the explanations provided by the State party, reiterates its concern about provisions for mandatory sentencing in the Criminal Code of Western Australia. The Committee is concerned at reports of the disparate impact of this law on indigenous groups, and reminds the State party that the Convention prohibits direct as well as indirect discrimination (art. 5).

The Committee recommends that the State party take appropriate measures to achieve abrogation of such legislation, following the example of the Northern Territory. The Committee further stresses the role and responsibility of the Federal Government in this regard under the Convention.

21. The Committee remains concerned about the striking overrepresentation of indigenous peoples in prisons as well as the percentage of indigenous deaths in custody. It has also been reported that indigenous women constitute the fastest-growing prison population (art. 5).

The Committee recommends that the State party increase its efforts to remedy this situation. It wishes to receive more information about the implementation of the recommendations of the Royal Commission on Aboriginal Deaths in Custody.

22. The Committee notes with concern reports of alleged discrimination in the grant of visas against persons from Asian countries and Muslims, and further notes the assurances given by the delegation that no such discrimination occurs (art. 5).

The Committee would like to receive more information on this issue, including statistical data. The Committee reiterates that States parties should ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin.

23. The Committee expresses concern about the mandatory detention of illegal migrants, including asylum-seekers, in particular when such detention affects women, children, unaccompanied minors, and those who are considered stateless. It is concerned that many persons have been in such administrative detention for over three years (art. 5).

The Committee recommends that the State party review the mandatory, automatic and indeterminate character of the detention of illegal migrants. It wishes to receive statistical data, disaggregated by nationality and length of detention, relating to persons held under such detention, including in offshore detention centres.

24. The Committee is concerned at reports according to which temporary protection visas granted to refugees who arrive without a valid visa do not make them eligible for many public services, do not imply any right to family reunion, and make their situation precarious. It is further reported that migrants are denied access to social security for a two-year period upon entry into Australia (art. 5).

The Committee wishes to receive statistical data, disaggregated by nationality, relating to temporary protection visas. It recommends that the State party review its policies, taking into consideration the fact that, under the Convention, differential treatment based on citizenship or immigration status would constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim.

25. The Committee, while acknowledging the efforts undertaken by the State party to achieve reconciliation and having taken note of the 1999 Motion of Reconciliation, is concerned about reports that the State party has rejected most of the recommendations adopted by the Council for Aboriginal Reconciliation in 2000 (art. 6).

The Committee encourages the State party to increase its efforts with a view to ensuring that a meaningful reconciliation is achieved and accepted by the indigenous peoples and the population at large. It reiterates its recommendation that the State party consider the need to address appropriately the harm inflicted by the forced removal of indigenous children.

26. The Committee recommends that the State party take into account the relevant parts of the Durban Declaration and Programme of Action when implementing the Convention in the domestic legal order, in particular in respect of articles 2 to 7 of the Convention, and that it include in its next periodic report information on action plans or other measures taken to implement the Durban Declaration and Programme of Action at the national level.

27. The Committee recommends that the State party's reports be made readily available to the public from the time they are submitted and that the observations of the Committee on these reports be similarly publicized. It suggests that consultations of non-governmental organizations and indigenous peoples be organized during the compilation of the next periodic report.

28. The State party should within one year provide information on the way it has followed up on the Committee's recommendations contained in paragraphs 10, 11, 16 and 17 (paragraph 1 of rule 65 of the rules of procedure). The Committee recommends that the State party submit its fifteenth, sixteenth and seventeenth periodic reports in a single report, due on 30 October 2008.
