



# International Covenant on Civil and Political Rights

Distr.: General  
7 June 2022

Original: English

## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3580/2019\*, \*\*

<i>Communication submitted by:</i>	X
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	25 May 2018 (initial submission) and 11 February 2019
<i>Date of adoption of decision:</i>	26 July 2019
<i>Subject matter:</i>	Disciplinary measures against lawyer for professional misconduct
<i>Procedural issues:</i>	Admissibility – manifestly ill-founded; admissibility – <i>ratione materiae</i>
<i>Substantive issues:</i>	Discrimination; effective remedy; fair trial; freedom of expression
<i>Articles of the Covenant:</i>	2 (1), (2) and (3), 5 (2), 14 (1), 19 and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

1.1 The author of the communication is X, a national of Australia born in 1957. He claims that Australia has violated his rights under articles 2 (1), (2) and (3), 5 (2), 14 (1), 19 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 December 1991. The author is a lawyer and is not represented by counsel.

1.2 On 20 February 2019, the Committee, acting through its Special Rapporteur on new communications and interim measures, determined that no observations from the State party were needed to ascertain the admissibility of the present communication.

#### Facts as submitted by the author

2.1 In 2011, the author was admitted to practise law in the state of New South Wales. He was employed as a junior solicitor at a firm and was subject to supervisory conditions in his practice of the law, as set forth in the Uniform Legal Profession Act of New South Wales.

2.2 Working under the supervision of the principal of the firm, the author was given responsibility for a certain client. On 24 May 2014, the author appeared before the Federal

\* Adopted by the Committee at its 126th session (1–26 July 2019).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



Court of Australia to represent the client in an application for review of a tax liability assessment decision issued against the client in favour of the Australian Taxation Office. On this occasion, the author inadvertently addressed the judge as “Registrar”. The judge replied, “That just put you 20 metres behind the mark.”

2.3 The author lodged a complaint against the judge for this statement to the Chief Justice of the Federal Court. The Chief Justice dismissed the author’s complaint as “trivial” on the ground that the judge was “only joking”.

2.4 With regard to the client’s application for review, the Australian Taxation Office did not file a timely notice of objection to competency, within the period prescribed in Federal Court rule 31.24. However, seven days after the period had expired, the judge against whom the author had lodged a complaint instructed the Taxation Office to file and serve a notice of objection to competency within 14 days. The author asserts that this instruction revealed judicial bias in favour of a government agency. On 30 July 2014, the same judge dismissed the client’s application for review and ordered costs against the client, in favour of the Taxation Office.

2.5 On 31 July 2014, the author sent an email to the judge, requesting reconsideration. The author’s email included the statement that “the Australian public and democratic values require and deserve a higher standard of decision-making ... than that evinced by your reasons”. On 1 September 2014, the Federal Court rejected the appeal that the author had filed on behalf of the client.

2.6 The judge lodged a complaint against the author with the professional standards committee of the Law Society of New South Wales. On 4 March 2015, that committee’s disciplinary body commenced disciplinary proceedings before the New South Wales Civil and Administrative Tribunal, alleging that the author had committed professional misconduct through the “offensive” and “grossly discourteous” statements in his e-mail to the judge. The committee did not explain the quoted terms.

2.7 No misconduct charges were brought against the principal of the author’s firm, notwithstanding laws requiring that supervising solicitors be held responsible for the conduct of junior supervised lawyers.<sup>1</sup>

2.8 On 8 April 2016, the New South Wales Civil and Administrative Tribunal upheld the complaint of professional misconduct against the author and ordered costs against him. In its decision, the Tribunal did not refer to the speech protections in article 19 (3) of the Covenant, despite the fact that the author had raised this argument in his submissions.

2.9 On 6 May 2016, the author appealed the decision of the New South Wales Civil and Administrative Tribunal to the Supreme Court (Court of Appeal) of New South Wales (Full Bench). On 16 December 2016, the appeal was rejected. On 30 March 2017, the author’s application to the High Court for leave to appeal the Supreme Court’s determination was rejected. The author claims that the decision of the High Court is final and that he has exhausted all domestic remedies. The author states that he has not submitted the complaint to any other international mechanism.

## **Complaint**

3.1 The author asserts that the State party violated his rights under articles 2, 5 (2), 14 (1), 19 and 26 of the Covenant by instituting civil disciplinary proceedings against him for alleged professional misconduct, and by finding that he had committed such misconduct by making offensive and grossly discourteous statements in his email to the judge.

3.2 The author’s email to the judge contained political statements protected by article 19 of the Covenant. Permissible restrictions on freedom of expression under article 19 (3) of the Covenant do not apply to these statements. Specifically, the author’s statements were sent to the judge in his private chambers, and did not damage his reputation, or present any risk of disturbing public order, or any threat to national security or to public health or morals. The

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<sup>1</sup> The author cites the Legal Profession Act 2004, sect. 141; and the Uniform Legal Profession Act, sect. 35.

domestic tribunal determined that the impugned statements of political opinion made by the author were offensive, without explaining the basis for this finding. The judiciary has impermissibly protected its own decisions from criticism by citizens. In its Views on communication No. 1157/2003, *Coleman v. Australia*, the Committee considered, in circumstances similar to the ones in the present matter, that the author's statements of political opinion were protected under article 19 of the Covenant.<sup>2</sup>

3.3 In violation of article 2 (1) of the Covenant, the State party selectively and exclusively targeted the complainant based on his status as a junior supervised lawyer, and on the basis of his political opinion expressed in the letter to the judge.

3.4 In breach of article 2 (2) of the Covenant, the State party failed to adopt laws or measures necessary to give effect to the rights recognized in the Covenant, in particular the rights protected by article 19.

3.5 In violation of article 2 (3) of the Covenant, the State party failed to provide adequate remedies and a competent forum for redress of the violation of the author's rights under article 19 – by preferring to protect the interests of government officials rather than give effect to the author's rights under article 19, and by failing to enact legislation consistent with article 19.

3.6 In violation of article 5 (2) of the Covenant, the State party enabled and perpetuated the existence of laws and regulations derogating from, limiting and destroying the author's article 19 rights, in the form of statutory and common law tests for professional misconduct, and in so doing they have unnecessarily limited the operation and significance of article 19 and the rights thereunder for purposes not recognized by article 19 (3).

3.7 In violation of article 14 (1) of the Covenant, the author was denied a hearing before an independent and impartial tribunal in civil penalty proceedings.

3.8 In violation of article 26 of the Covenant, the State party did not treat the author equally before the law. It selectively and exclusively proceeded against him on the basis of his gender and on the basis of his ethnicity and professional status as a junior worker, while failing to prosecute the firm's principal for his failure to discharge his supervisory obligations towards the author.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

4.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

4.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

4.3 Regarding the author's claim under articles 2 and 5 (2) of the Covenant, the Committee recalls that articles 2 and 5 of the Covenant lay down general obligations for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.<sup>3</sup> These claims are therefore inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

4.4 The Committee takes note of the author's claims that the State party has violated his rights under articles 14 (1) and 26 of the Covenant, by denying him a hearing before an independent and impartial tribunal in a matter concerning a civil penalty, and discriminating against him on the basis of gender, professional status and ethnicity. However, the Committee considers that the author has failed to sufficiently substantiate these claims for the purpose

<sup>2</sup> CCPR/C/87/D/1157/2003.

<sup>3</sup> See, inter alia, *Wackenheim v. France* (CCPR/C/75/D/854/1999), para. 6.5; and *Kh.B. v. Kyrgyzstan* (CCPR/C/120/D/2163/2012), para. 10.4.

of admissibility, and that the claims are therefore inadmissible under article 2 of the Optional Protocol.

4.5 The Committee also takes note of the author's claim that the State party has violated his rights under article 19 of the Covenant by finding that he committed professional misconduct for expressing political opinions in an email to a judge and by failing to establish and enforce domestic laws to protect his rights under article 19. However, the Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate both the facts and the evidence, and the application of domestic legislation in the case in question, unless it is shown that their evaluation was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>4</sup> The Committee considers that the information available to it does not demonstrate that the conduct of the judicial proceedings in the author's case suffered from such deficiencies. Rather, the information suggests that the measures taken by the State party were based on law and aimed at protecting the integrity of the judiciary as an element of the public order, and that the sanction imposed on the author was proportionate to the professional misconduct he had been found guilty of. Accordingly, it declares the author's claims under article 19, and article 2 read in conjunction with article 19, inadmissible under article 2 of the Optional Protocol.<sup>5</sup>

5. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to the author.

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<sup>4</sup> See the Committee's general comment No. 32 (2007). See also *Tyvanchuk et al. v. Belarus* (CCPR/C/122/D/2201/2012), para. 6.6.

<sup>5</sup> Having thus concluded, the Committee does not deem it necessary to examine the issue of whether the author exhausted domestic remedies, as required by article 5 (2) (b) of the Optional Protocol.