



CASE STUDIES:

Complaints involving Australia

SEXUALITY UNDER THE ICCPR

Human Rights Committee Communication No. 488/1992 (Toonen v Australia)

In 1991, Nicholas Toonen, a homosexual man from Tasmania, sent a communication to the Human Rights Committee. At that time, homosexual sex was criminalised in Tasmania. Toonen argued that this violated his right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). He also argued that because the law discriminated against homosexuals on the basis of their sexuality, it violated Article 26. As a result of his complaint to the Human Rights Committee, Toonen lost his job as General Manager of the Tasmanian AIDS Council (Inc), because the Tasmanian Government threatened to withdraw the Council's funding unless Toonen was fired. The Human Rights Committee did not consider Toonen's communication until 1994, but it ultimately agreed that because of Tasmania's law, Australia was in breach of the obligations under the treaty. In response to the Commission's view, the Commonwealth Government passed a law overriding Tasmania's criminalisation of homosexual sex.

A copy of the Committee's findings is available at:

<http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>

Human Rights Committee Communication No. 941/2000 (Young v Australia)

In 1999, Mr Edward Young took a complaint against Australia to the Human Rights Committee. Under the then Australian veterans' entitlements laws, same-sex couples were not entitled to the same veterans pensions as opposite-sex couples. The Committee found that Mr Young had been discriminated against under Article 26 of the ICCPR and was entitled to an effective remedy, including the reconsideration of his pension application. The Committee noted that the State party [Australia] is obliged to ensure that similar violations of the Covenant do not occur in the future.

A copy of the Committee's findings is available at:

<http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/3c839cb2ae3bef6fc1256dac002b3034?OpenDocument>

IMMIGRATION UNDER THE ICCPR

Human Rights Committee Communication No. 560/1993 (A v Australia)

In 1993, a Cambodian asylum seeker, identified only as A, complained to the Human Rights Committee that Australia had violated his rights under the ICCPR by detaining him in immigration detention for more than four years. The Human Rights Committee agreed that Australia had violated Article 9 of the Convention because A had been subject to arbitrary detention and denied an effective opportunity to have the lawfulness of his detention reviewed by a court. The Committee stated that Australia should pay compensation to A, but unlike in the Toonen case, the Australian Government rejected the Human Rights Committee's view and refused to pay compensation to A.

A copy of the Committee's findings is available at:

<http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument>

Human Rights Explained

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Human Rights Committee Communication No. 1050/2002 (D & E v Australia)

In 2002, an Iranian family, including two young children, made a complaint to the Human Rights Committee that Australia had violated their right to be protected from arbitrary detention under the ICCPR by detaining them for three years and two months in Curtin Detention Centre. Their application for asylum had been refused twice and the Minister had declined to exercise his discretion to grant a favourable outcome under s 417 of the Migration Act 1958 (Cth).

In its submissions to the Committee; Australia argued that the complaint was inadmissible because, *inter alia*, the family had not exhausted all possible domestic avenues, in particular those available to it in the form of judicial review to the Federal Court or the High Court of Australia. The Committee did not accept this submission, noting that because Australia's High Court has held the policy of mandatory detention constitutional, this remedy would not have been effective. As a result, it was not necessary for the family to have pursued a judicial review claim in the Courts before the Committee could hear the family's claim.

The Committee agreed that the family's detention was in breach of Article 9(1) of the ICCPR, reaffirming its previous jurisprudence that detention will become arbitrary if it continues beyond the period for which a State Party can provide appropriate justification. The Committee observed that in this particular case 'whatever justification there may have been for an initial detention' Australia had failed to demonstrate that the detention was justified for such an extended period or that compliance with Australia's immigration policies could not have been achieved by less intrusive measures.

The Committee further found that the allegation that the prolonged detention of children breached Article 24(1) of the ICCPR was insufficiently substantiated in light of Australia's efforts to provide educational and recreational programs for children in immigration detention.

A copy of the Committee's findings is available at:

<http://www.unhcr.ch/TBS/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/9dbcb136a858ebc5c12571cc00532f41?OpenDocument>

THE RIGHTS OF THE CHILD UNDER THE ICCPR

Human Rights Committee Communication No: 1069/2002 (Bakhtiyari v Australia)

In 2003, the Bakhtiyari family lodged a complaint with the Committee on the basis *inter alia* that the Australian Government had violated the rights of the child as enunciated in Article 24(1) of the ICCPR as a result of the Bakhtiyari children being kept in immigration detention for two years and eight months.

The Committee agreed with the applicant. It held that the principle - that in all decisions affecting a child his/her best interests shall be a primary consideration - forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State - as required by Article 24(1) of the ICCPR.

The Committee observed that in this case the children had suffered demonstrable, documented and on-going adverse effects of detention up until the point of release on 25 August 2003. It also noted that detention was arbitrary and thus violated Article 9, paragraph 1, of the ICCPR.

As a result, the Committee considered that the measures taken by the State Party had not been guided by the best interests of the children, and thus revealed a violation of Article 24(1) of the Covenant, namely the children's right to such measures of protection as required by their status as minors up that point in time.

A copy of the Committee's findings is available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/8662db397d948638c1256de2003b3d6a?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/8662db397d948638c1256de2003b3d6a?Opendocument)

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COMPLAINTS ABOUT AUSTRALIA TO THE CAT COMMITTEE

Committee against Torture Communication No: 120/1998 (Elmi v Australia)

In 1998 Mr Sadiq Shek Elmi, a failed asylum seeker, lodged a complaint with the Committee against Torture. He claimed that his deportation to Somalia would constitute a violation of Article 3 of the Convention against Torture, because he was a member of a minority clan which had a well-documented history of persecution in Mogadishu. There was evidence that other members of his family had been targeted by that clan.

The Committee determined that Australia had an obligation to refrain from forcibly returning Mr Elmi to Somalia or to any other country where he runs a risk of being expelled or returned to Somalia because of the danger of him being subjected to torture in Somalia. The Committee noted that the majority clan in Mogadishu could be regarded as exercising de facto control, and was therefore responsible for any acts of torture for the purposes of the Convention. Mr Elmi was subsequently permitted to stay in Australia.

A copy of the Committee's findings is available at:

<http://www.unhcr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/b054cbf1e34a6c278025679a003c37ec?OpenDocument&Highlight=0,Elmi>