

The sovereignty stratagem

Australia's response to UN human rights treaty bodies

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It is a natural reflex to bridle at criticism from the outside — particularly when that criticism charges Australia with violating human rights. However, in Australia's response to decisions by United Nations human rights treaty bodies, this defensive reflex has become more a concentrated campaign of defiance. On paper, Australia is a champion of the international human rights framework. Australia is a party to all the major UN human rights treaties, and has recognised the competence of five of the UN treaty bodies charged with monitoring state compliance with these treaties.¹ Yet while Australia has agreed to the rules and acknowledged the umpire, it consistently refuses to comply with the umpire's decision. While, on paper, Australia contributes significant support to the international human rights framework, in practice, Australia contributes more to the great human rights paradox, referred to by Falk,² that many prominent countries adopting human rights treaties basically believe that human rights are only relevant for other countries. Contrasting Australia's approach to its own human rights issues with its recent approach to countries such as Iraq, Afghanistan and Zimbabwe, it is hard to resist the impression that the Australian government views human rights as an item produced purely for export.

In the context of the three latest decisions against Australia by the UN Human Rights Committee,³ so far greeted by a dismissive silence from the government even beyond the 4 November deadline for response, it is pertinent to assess Australia's relationship with the international human rights framework. In the absence of a domestic human rights framework, the international human rights framework is particularly significant for Australia and Australians.

The first part of this article examines the set of responses consistently employed by the government as a rejoinder to decisions of UN human rights treaty bodies. The inadequate nature of many of these responses is self-evident. Of these, the response used most often and with the greatest effect is that of Australia's sovereignty. The government consistently portrays the international human rights framework as an unjustifiable intervention in Australia's domestic affairs. The second part of the article examines the relationship between Australian sovereignty and the international human rights framework, focusing in particular on the UN Human Rights Committee. This examination makes plain that, while the sovereignty strategy may work on the level of rhetoric, it is legally flawed. Sovereignty is essentially an international legal construct, which is being successfully misused with the effect of stifling community debate about the human rights issues at the heart of the Committee's decisions.

Governmental response to human rights treaty bodies: a potted summary

In its early relationship with the UN human rights treaty bodies, Australia showed a willingness to accommodate advice that it had acted

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inconsistently with fundamental rights under the Covenant, and to take steps domestically to address this. In *Toonen v Australia*,⁴ the first successful complaint against Australia, the Human Rights Committee determined that Tasmanian laws criminalising homosexual practices arbitrarily interfered with Mr Toonen's right to privacy. The then-government's response to this decision was positive, in spite of the political dilemma created by Tasmania's initial refusal to amend the offending statutory provisions. Nevertheless, using its authority under the external affairs power, the Commonwealth Government passed legislation to give effect to the Committee's decision.

Following the change in government in 1996, Australia's relationship with the UN human rights treaty bodies has been on an incremental decline. When considered collectively, our recent response to criticism from the human rights treaty bodies has been more in the nature of a state-sized tantrum. Australia's response has employed the full arsenal of tantrum ploys, from 'did not' to 'you're not the boss of me' to 'we're not playing anymore ... and we want our ball back'. As with most responses of this character, the goal of the response is not to answer the charge, but to deflect attention from it.

'Did not'

The government rejected out of hand the findings of the Human Rights Committee in the second successful complaint against Australia in *A v Australia*. The official response by the government read:

[T]he Government does not accept that the detention of Mr A was in contravention of the Covenant, nor that the provision for review of the lawfulness of that detention by Australian courts was inadequate. Consequently, the Government does not accept the view of the Committee that compensation should be paid to Mr A.⁵

The same approach was taken in response to the recent decision by the Committee on the Elimination of Racial Discrimination ('CERD') in *Hagan v Australia*.⁶ The government refused to follow the Committee's decision, stating that '[t]he Government notes that the committee is not a court and its views are not binding'.

The government correctly states the position that the decisions of the UN treaty bodies are not binding. However, it neglects to temper this broad statement with an acknowledgement that the Committee's decision provide the most authoritative interpretation of Australia's obligations under the *International Covenant on Civil and Political Rights* ('ICCPR'), an instrument that *is* binding on Australia. By failing to follow the Committee's decision, Australia will need to mount a more robust defence than the non-binding nature of the Committee's decisions to avoid the presumption that it is in violation of its binding international legal obligations under the ICCPR.

'Pick on somebody else why don't you'

In response to criticisms contained in the Committee's concluding observations on Australia's periodic report to CERD,⁷ the former Attorney General, Daryl Williams, defended Australia's conduct on the following basis:

If you're comparing [mandatory sentencing laws and treatment of asylum seekers] with arbitrary arrest, detention and execution and having your arms chopped off for belonging to the wrong political party, almost every issue in Australia seems to pale into insignificance.⁸

Similar sentiments were expressed by the Prime Minister:

I mean I'm not going to have a situation where people are denigrating the human rights reputation of Australia. Australia's human rights reputation compared with the rest of the world is quite magnificent. We've had our blemishes and we've made our errors and I'm not saying we're perfect. But I'm not going to cop this country's human rights name being tarnished in the context of a domestic political argument.⁹

The position appears to be that, while Australia is content to be part of an international crusade against the worst violators of human rights, it pays little regard to violation of rights within its own ranks. The effect of this approach is to reduce human rights standards to the lowest common denominator. Indeed, if such an approach were adopted by all developed nations, the result would be that the rights of individuals within developed democracies would truly achieve (to adopt the Attorney General's term) 'insignificance'.

'We're not playing anymore ... and we want our ball back'

CERD's concluding observations also prompted a number of provocative comments from the Prime Minister and members of his Cabinet that Australia might withdraw from the Committee process. In an interview on the *7.30 Report*, Mr Howard said:

Well, we're not denying their [UN treaty bodies] right to criticise if they want to, but we can monitor and control the extent to which we work with the committees. I mean it's a free world, well it's a free world for most, it's certainly a free country in Australia and if people want to criticise this country they have a right to do so, but we're not going to be a part, willingly part of a process where we don't believe proper regard is paid to expressions of view by the elected government.¹⁰

The government subsequently softened its stance, moving towards a commitment to assist in reform of the UN treaty body system. While initial proposals for 'reform' read more in the nature of a steady withdrawal from the system (the first reforms proposed included decisions to take 'a more economical and selective approach' to treaty committees and to refuse to sign the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination Against Women*), Australia remains involved in the process of reform currently being run out of the United Nations.

'You're not the boss of me'

By far the most prevalent mechanism employed by the government to rebut adverse decisions against Australia is the resort to Australian sovereignty as a defence to allegations of human rights violations against Australia.

In response to the CERD Committee's concluding observations on Australia's periodic report, the Prime Minister remonstrated:

Australia decides what happens in this country through the laws and the parliaments of Australia. I mean in the end we are not told what to do by anybody. We make our own moral judgments.¹¹

In a separate interview, the Prime Minister made comments in a similar vein:

I mean, can't these things be resolved by Australians in Australia and not us having to dance attendance on the views of committees that are a long way from Australia ... I mean we are mature enough to make these decisions ourselves.¹²

In a remarkable interview, Australia's Minister for Foreign Affairs exhibited a disturbing perspective on human rights

when he addressed the following thinly-veiled threat to the UN human rights treaty bodies:

If a UN Committee wants to play domestic politics here in Australia, then it will end up with a bloody nose.¹³

In no uncertain terms, this message has issued from the Australian government: we are a sovereign state and international human rights law should keep out of domestic affairs. On the one hand, these quotes, drawn largely from media releases, can be dismissed as political rhetoric. On the other hand, the argument of sovereignty is employed with alarming regularity to oppose Australia's engagement with the international community (most memorably in the brinkmanship over Australia's ratification of the *Rome Statute of the International Criminal Court*) and has considerable persuasive force with the Australian population. The unfortunate effect is that obedience to international human rights norms is being portrayed as in some way 'un-Australian'. Accordingly, it is crucial to unpack the concept of sovereignty, and consider whether it is an adequate response to refute decisions of the UN human rights treaty bodies. The following analysis will focus on one such treaty body, the Human Rights Committee, which possesses the full complement of powers vested in the other human rights treaty bodies.

Australian sovereignty and the Human Rights Committee

Australia's relationship with the Human Rights Committee spans barely a decade. On Christmas Day 1991, the Optional Protocol to the ICCPR entered into force for Australia, granting the Committee the competence to hear complaints from individuals alleging human rights violations against Australia. Since then, the Committee has handed down decisions in 32 claims concerning Australia. Of these, only 11 claims proceeded to a merits determination,¹⁴ with the Committee striking out the other claims on admissibility grounds. Only eight of those claims that proceeded to the merits have been decided against Australia.¹⁵ In light of these statistics, it is perhaps surprising that the Human Rights Committee has recently been the subject of such negative attention in the Australian context. On a legal analysis, it is particularly surprising that the focus of much of this criticism has been the alleged violation of Australian sovereignty occasioned by the Committee's decisions. Indeed, when one examines the framework of the Human Rights Committee, it can be seen that Australia's sovereignty has been comprehensively protected in four main ways.

(1) Australia's signature and ratification of the Optional Protocol

Australia ratified the ICCPR on 13 August 1980. Under Article 2 of that Covenant, Australia voluntarily entered into an obligation 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in [the Covenant]'. On 25 September 1991, Australia voluntarily entered into another commitment, the First Optional Protocol to the ICCPR. Under Article 1 of this Protocol, Australia recognised the competence of the Human Rights Committee 'to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant'.

Signature and ratification of a treaty is a voluntary action under which a state knowingly contracts to uphold certain

obligations. Complying with a treaty does not entail a violation of sovereignty. To the contrary, the World Court described a state's entry into international obligations as 'an attribute of State sovereignty'.¹⁶

It is notable that the Committee consistently refuses to decide any matter relating to events prior to the entry into force of the Optional Protocol for Australia.¹⁷

(2) Requirement for the exhaustion of local remedies

The Committee sets itself up as a measure of last resort to be utilised only when all remedies available within the state have been exhausted. This means that an individual must resort to all legal procedures in Australia before they will be entitled to bring a matter before the Human Rights Committee. In this way, the Committee only provides a remedy where the Australian legal system fails to provide a remedy itself.

The Committee enforces this requirement strictly. In nine of the 32 matters against Australia, the claim or part of the claim was held inadmissible on grounds the complainant had failed to exhaust domestic remedies.¹⁸ For example, the Committee dismissed the claim by Michelle Lamagna on the ground that the domestic remedies, while exhausted in respect of the issue brought before the Committee, had been brought in the name of her company, rather than in her own name.¹⁹ In *A v Australia*,²⁰ the complainant's claim was held partly inadmissible on the ground the complainant had failed to challenge the constitutionality of the statutory provision in question before the High Court of Australia, a remedy that, while available, was considered unlikely to be effective. The Committee held that 'mere doubts about the effectiveness of local remedies or the prospect of financial costs involved did not absolve the author from pursuing such remedies'.²¹

(3) Margin of appreciation doctrine

The 'margin of appreciation' doctrine has been recognised most famously in the jurisprudence of the European Court of Human Rights. The concept recognises that states are entitled to a certain latitude in resolving inherent conflicts between individual rights and national interests on the basis they are best placed to evaluate local needs and conditions.

The Committee's jurisprudence reflects no express adoption of the doctrine; however, several authors note that the rationale underlying the doctrine has been endorsed implicitly in a few cases.²² For example, in *Hertzberg v Finland*,²³ the Human Rights Committee recognised that 'a certain margin of discretion must be accorded to the responsible national authorities' in deciding whether to broadcast discussions related to homosexual relations in the national media. In *Toonen v Australia*,²⁴ the Committee acknowledged Australia's argument that domestic social mores may be relevant to the reasonableness of an interference with privacy. The Committee referred to the State party's recognition that:

[T]here is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation. Given the legal and social situation in all of Australia except Tasmania, the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society.²⁵

The consideration of Australia's particular legal and social situation represents at least an acknowledgement that the domestic context is relevant to the Committee's determination of rights violations.

(4) Non-binding decisions

Finally, Australian sovereignty is protected by the absence of enforcement powers in the Committee. In determining the legal effect of the decisions of the Committee, it is necessary to explore their effect on two levels: the international and the domestic.

At the domestic level, the decisions of the Committee have no direct legal effect. They cannot be enforced under the Australian legal system. Rather, domestic bodies have discretion to use the decisions to effect changes in domestic law in two ways. First, decisions of the Committee provide an impetus for the Commonwealth to invoke the external affairs power under s 51(xxix) of the *Constitution* (the external affairs power) to legislate to bring Australian law into conformity with the ICCPR (as happened in the *Toonen* case). Secondly, decisions of the Committee may be used by Australian courts as a persuasive source of interpretation of the Covenant, as a permissible influence on judicial interpretation of statutes and the common law.²⁶ The exercise of discretion by domestic bodies cannot be said to violate Australia's sovereignty. To the contrary, such a decision would amount to an exercise of sovereignty.

Equally, at the international level, the decisions of the Committee are not formally legally binding on Australia. The Committee cannot enforce compliance with its decisions, nor instruct Australia as to the measures it must take to comply. Instead, the Optional Protocol framework leaves states with a measure of discretion as to the measures they may take in response to the Committee decisions. Indeed, the Committee process is more justifiably criticised for being overprotective of State sovereignty.

Used effectively, the decisions of the Committee provide an important and persuasive guide to the interpretation of the ICCPR. The fact that these decisions are non-binding does not amount to a licence to ignore the decisions, or erect straw-man arguments to distract attention from them. States parties performing their obligations under the Optional Protocol in good faith will publicise the decisions so as to encourage informed debate on the issue of rights protection within the domestic population. Moreover, as discussed above, Australia's discretion to refuse to comply with the Committee's decisions should be exercised with careful regard to the fact that failure to comply with the decision attracts the presumption that Australia is in violation of its obligations under the ICCPR, obligations that are binding on Australia under international law.

Conclusion: Taking sovereignty out of the equation

It can be seen that, if the decisions of the Human Rights Committee are to be attacked, it should not be on the ground of violation of Australia's sovereignty. When the concept of sovereignty is unpacked, little is revealed except that sovereignty does not provide a normative roadmap for the means and extent to which human rights should be recognised by the Australian political and legal system.

The government's use of sovereignty is not merely incorrect: it is disingenuous. Sovereignty has for too long been used as a decoy to deflect attention from Australia's human rights violations. This is brought into stark relief when one considers two recent decisions finding human rights violations, one by an international committee and one by a domestic court. In April in *Hagan v Australia*,²⁷ the

CERD Committee found that the use of the word 'nigger' on a grandstand in Toowoomba was racially offensive and should be taken down. The government refused to follow the Committee's decision on the basis that Australian courts had considered the issue, and that the government was 'confident that Australia's domestic processes, which found no racial discrimination in this case, are second to none in the world'.²⁸

Yet, in August this year, when an Australian court found that the detention of children amounted to a violation by Australia of its human rights obligations, the government's defence of the Australian judicial system transformed into an attack on it. In response to the decision by the Family Court in *B and B v Minister for Immigration and Multicultural Affairs*,²⁹ the former Minister for Immigration retorted that the courts were acting 'in excess of their power' and that 'arrangements that the parliament intended should operate [were] being unwound by judicial actions'.³⁰ Mr Ruddock has made similar comments in relation to the Federal Court and High Court. At a meeting of the Commonwealth Lawyers' Association in London, he stated that it should be the parliament that decided Australia's laws, not what he termed 'unelected and irresponsible officials' of the courts.³¹ This exposes that the government's concern is not with sovereignty. It is with any body that dares to question Australia's compliance with human rights.

In the human rights context, sovereignty has become a red herring with a poisonous bite, used by the federal government to distract attention from some of the more fundamental issues involved in the balance between human rights and government policy. This is not to cast the government as entirely ill-intentioned. When human rights comes up against hip-pocket, or other issues of concern to the majority of Australians, it will often be more economical, efficient and less complex for our policy-makers to pursue policy aims without concerning themselves with human rights protection. However, respect for human rights is not a question of politics to be weighed up in the political balance. It is a question of international law, compliance with which underpins our status as a responsible member of the international community.

If the government is serious about resolving human rights issues in Australia, it will take steps to incorporate human rights protections into our domestic legal system to avoid the need to resort to international committees. Until then, decisions of the Human Rights Committee, and other UN treaty bodies, will remain important contributions to the dialogue relating to Australia's respect for human rights. Indeed, they must be better utilised to inform domestic debate about the human rights violations implicated in government policy. It is time for the government to address the question of alleged violation of human rights as a domestic issue requiring explanation on grounds other than sovereignty. In this way, the challenge of implementation of human rights may come to be regarded as a new priority of domestic policy, not an ornament of foreign policy.

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