

Human rights remedies: a guide

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Victims of human rights violations in Australia now have another avenue of possible redress This article explains how to use this mechanism.

Australians now have the right to petition the United Nations Human Rights Committee (HRC) for violation of the rights set out in the International Covenant on Civil and Political Rights (ICCPR).¹ While the Australian Government has been obliged to promote and observe the rights set out in Convention since 1980, the ICCPR is not part of Australian law. The consequence is that human rights set out in the ICCPR or other treaties are non-justiciable and cannot found a cause of action in Australian courts.² Until December 1991 individuals alleging violations of the ICCPR had no forum to enforce their rights.³ While signing the First Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol)⁴ does not make the ICCPR part of Australian law, it represents a major step forward for the promotion of human rights in Australia. Australia has lagged behind Europe and South/Central America, where human rights treaties provide the right of petition for individuals. Our counterparts, Canada and New Zealand have provided individuals with the right to petition under the Optional Protocol since 1976 and 1989 respectively, but unlike Canada and New Zealand, Australia has not enforced the right to petition by a domestic Charter or Bill of Rights.

The UN Human Rights Committee (HRC)

The HRC was established in 1976 under the ICCPR. Eighteen independent experts are elected to the HRC for a four-year term. The HRC meets three times a year in Geneva and New York and performs three functions. The first is receiving and considering reports from the states party to the ICCPR on measures the states have adopted to give effect to the rights recognised in the ICCPR and the progress made in the enjoyment of those rights (Article 40). The HRC has actively pursued its role in considering the reports through the

process of 'constructive dialogue' with the representatives of the state. It requires competent representatives to answer questions and discuss various aspects of the state's report.

The second function is the consideration of complaints lodged by one (or more) state party claiming violation of the ICCPR by another state party (Article 41). The HRC has yet to consider an inter-state complaint.

Finally, the HRC may receive communications⁵ from individuals in the jurisdiction of a state which have recognised the right to petition by signing and ratifying the Optional Protocol, where a person claims that their rights, as set out in the ICCPR, have been violated by the state. The individual does not have an automatic right to approach the HRC and it depends on the state's accession to the Optional Protocol. Australia acceded on 25 September 1991 and the Optional Protocol came into force for Australia on 25 December 1991.⁶

The HRC should not be confused with the UN Human Rights Commission. The HRC is established under the ICCPR and its jurisdiction is limited to the ICCPR. The Human Rights Commission is a much older body established by the UN Economic and Social Council (ECOSOC) in 1946. The Commission is made up of 40-plus political representatives of UN members. It receives communications of reports of patterns of gross violations of human rights and its agenda is highly politicised. Its jurisdiction is not limited to the ICCPR.

This article will highlight some considerations which should be addressed when a victim wants to lodge a complaint to the HRC. This is a two-stage process: the first is procedural and involves an assessment of the admissibility of the complaint; and the second deals with the substantive aspects and is called the merits stage.

Stage one: admissibility

The admissibility prerequisites are set out in the Optional Protocol, the ICCPR and the HRC's Rules of Procedure (Rule 90).⁷ The admissibility stage takes between 6 and 12 months, while the entire process may take up to three years depending on the volume of communications received by the HRC. About 50% of communications lodged are found to be inadmissible. Under Rule 91 the HRC may request further information from the author. It is important to put as much information as possible in the communication — all the

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facts relevant to the particular case, but other material such as newspaper reports and commentaries could be included.

Who may complain?

The author of a complaint must be a victim of a violation of any right set out in the ICCPR. The author does not have to be an Australian citizen or even present in Australia, because it is enough to show that he or she is *subject* to the jurisdiction of Australia (Article 1 of the Optional Protocol). Clearly, this includes all resident in Australia, but also individuals outside the territory of Australia.⁸ The exact meaning of subject to the jurisdiction is uncertain. The best guide may be to examine the Australian conflict of laws rules or specific statutes such as the *Migration Act 1958* and *Regulations*.

The author must be an individual person (Article 2). Corporations and groups cannot be victims for the purposes of the Optional Protocol communications.⁹ There is no express provision in the Optional Protocol or the ICCPR for class or representative actions.¹⁰

Under Rule 90(1)(b) the HRC permits non-government organisations and other individuals to lodge a complaint on behalf of the victim if the HRC accepts that the victim is unable to lodge a complaint and the victim has authorised those acting on his or her behalf.

A communication and requests for further information should be addressed to: the Human Rights Committee, c/- Centre for Human Rights, United Nations Office, 8-14 Avenue de la Paix, 1211 Geneva 10, Switzerland.

Who is the defendant?

The state will be the defendant to any complaint (Article 1 of the Optional Protocol). This area of human rights law should be viewed as 'public law' in the sense that it refers to the relationship between the individual and the government and not the relationships between individuals, often called private law. Acts between private individuals constituting a violation of human rights law are outside the scope of international review by the HRC and are generally regulated by domestic laws. In reality, the state acts through individuals performing tasks for administration and government of the country. Acts which violate human rights laws must be attributed to the government. Only the state has obligations under the ICCPR to promote human rights in its jurisdic-

tion. The acts of individuals must be attributed to government to found a complaint and often there is a fine line between which acts may or may not be attributable.

What constitutes a violation?

The victim's rights are violated only if it can be shown that she or he was actually affected and therefore suffered personally.¹¹ The HRC cannot consider matters in the abstract or potential violations of the ICCPR. The HRC will not automatically review legislation to determine its compatibility with the ICCPR. Legislation may only be 'tested' if the complaint is lodged by a person affected by the operation of the law.

Exhausting local remedies

A most important aspect in the admissibility procedure is proving that the victim has exhausted all available local remedies to the extent that those remedies are effective and available. The rationale for exhaustion of remedies is that a victim will receive the best redress by the application of domestic laws. Exhaustion of local remedies does not mean that only cases heard by the High Court of Australia can found a HRC complaint. In some cases there will be no remedies to exhaust. In those cases the circumstances of the unavailability of local remedy should be clearly explained. Likewise, if the remedies are ineffective or unnecessarily prolonged, the HRC has held that there will be no need to fully exhaust local remedies. In some cases the lack of a domestic remedy is in itself a violation of ICCPR (Article 2(3)). The requirement to exhaust remedies does not mean obtaining a favourable remedy.

Costs

The HRC does not impose fees for submitting a communication. Costs may be incurred in exhausting local remedies, or preparation of the complaint where the author is assisted by a lawyer. There is no obligation to use a lawyer to prepare a communication. Costs may also be incurred if extra evidence needs to be gathered and the HRC requires further details from the author. There is no provision for 'international' legal aid from the HRC and it is doubtful that Australian legal aid would be available. This has yet to be tested. The Human Rights Centre in Geneva may be approached for additional general information.

Do any time limitations exist?

No time limits exist for a communication to be lodged in relation to when the

violation allegedly occurred. If complaints are old and stale, substantiating a violation is more difficult. Delay may be a factor taken into account by the HRC. An old allegation and inaction by the author could be regarded as an abuse of the right to petition.

The only aspect of time limitation is the date of Australia's accession to the Optional Protocol. The alleged violation must have occurred after 25 December 1991 when Australia ratified the Optional Protocol. Violations which occurred before 25 December 1991, but are continuing, can form the basis of a complaint. In *MT v Spain* 310/1988 adoption of views 11 April 1991, the HRC held that the Optional Protocol is not retrospective.

Checklist for admissibility

The following checklist should assist potential authors to meet the requirements for admissibility when petitioning the HRC:

General aspects

The communication must be in writing.

- It must not be anonymous.
- It must not be an abuse of the right to petition.¹²
- It must not be submitted while the same factual matters are being considered by another international procedure.¹³
- The acts constituting a violation must have occurred *after* 25 December 1991. Violations occurring before December 1991 must be continuing after this date.
- Check whether a reservation attaches to the substantive right forming the basis of the complaint.¹⁴
- The right allegedly violated must be a right set out in the ICCPR. If the 'right' is not in the ICCPR then the communication will be ruled as incompatible with the ICCPR.¹⁵

Specific aspects

- The author must be an individual (not a corporation or group or one person representing a group). This does not prevent a group of individuals each submitting individual communications arising out of the same facts.
- The author must be the victim or someone specifically authorised to lodge the communication for the victim.
- The author must be subject to the jurisdiction of Australia.
- The named defendant is Australia.

This is regardless of whether the offending arm of government is a Commonwealth or State department or local government.

The facts of the violation must be described in as much detail as possible.

- Local remedies must be exhausted and details set out.

Stage 2: merits

It should be borne in mind that the HRC is not a court and does not have a bag of exotic remedies. The HRC is not engaged in a 'judicial review' of Australian courts and it is reluctant to interfere with the domestic legal system. The only remedy a victim will obtain from the HRC is a non-binding recommendation called a 'view' under Article 5(4), on the facts surrounding the violations and whether a violation has occurred. Although the HRC has no power to force the state party to take corrective action, it does submit an Annual Report of its activities to the United Nations. Many states shy away from adverse publicity of their human rights record.

Once a complaint is admissible, the HRC considers the communication in the light of 'all written information made available to it' (Article 5(1)). The HRC does not engage in any independent fact finding missions. States are informed of the allegation and have six months to explain or clarify the matter and inform the HRC of any remedial action taken (Article 4).

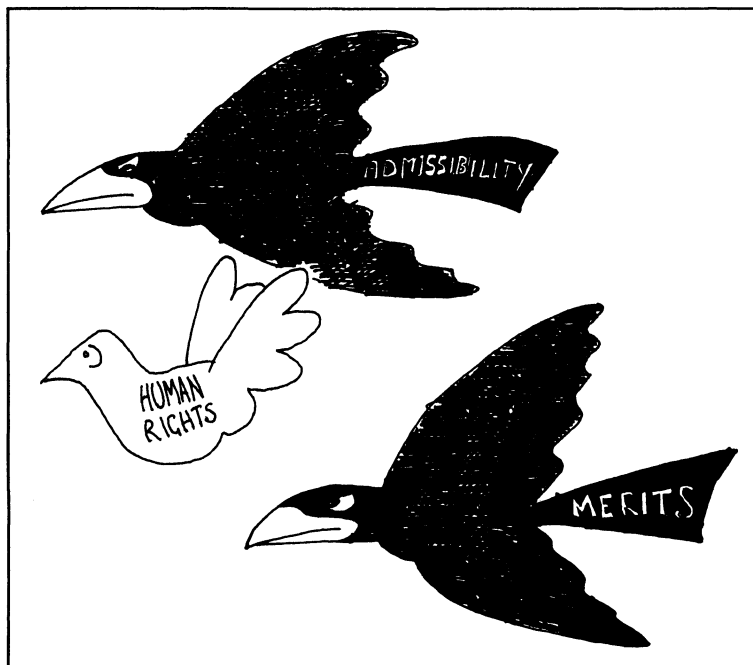
The HRC's consideration is confidential (Article 5(3)) and Rule 86 allows the HRC to suggest interim measures to protect the victim to 'avoid irreparable damage'. Once the state has replied, the HRC assesses if a violation has occurred. Both the state and the author are provided with the HRC's views (Article 5(4)) once the consideration is complete.

Substance of complaint — what human rights can be considered?

The communication must identify the right or rights set out by the ICCPR founding the claim. The facts may support violation of several rights. The

rights set out in the ICCPR include:

- The right of all peoples to self-determination (Article 1(1)).
- The right of all peoples to dispose of their natural resources (Article 1(2)).
- The right to life (Article 6).
- The right not to be subject to torture, cruel treatment or punishment, inhuman treatment or punishment and degrading treatment or punishment (Article 7).
- The right not to be subjected to medical or scientific experimentation without free consent (Article 7).



- The right not to be enslaved (Article 8).
- The right to liberty and security of person (Articles 9 and 10).¹⁶
- The right not to be imprisoned on the ground of inability to fulfil a contract (Article 11).
- The right to free movement and choice of residence (Article 12).
- Rights of aliens in Australia (Article 13).
- Equality before the law — and fair trial (Articles 14-16).¹⁷
- Protection from arbitrary interference with privacy, family, home or correspondence and unlawful attacks on reputation (Article 17).¹⁸
- Freedom of thought, conscience and religion (Article 18).
- Freedom of expression (Article 19).
- The right of peaceful assembly (Article 21).

- The right to participate in public affairs, vote and have access to public service (Article 25).
- Freedom of association and joining trade unions (Article 22).
- Prohibition of discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 26).
- The right of minority groups to enjoy their own culture, religion and language (Article 27).¹⁹

The scope of these rights is subject to interpretation. Some of them have inbuilt limitations, for example, freedom of speech under Article 19. Limitations on rights may be made by a state party making derogations or reservations to its obligations. In other cases, the application of the doctrine of 'margin of appreciation' implies limitations.²⁰ A guide to how the HRC defines these rights can be found in the *Annual Reports and Selected Decisions* where its views are published. The HRC's General Comments are part of its function of receiving state reports under Article 40. These comments detail the approach of the HRC

on particular rights.

Other avenues for international supervision

If your circumstances do not satisfy the strict admissibility requirements, there are other avenues for bringing international attention to a human rights problem. The HRC should be seen as one avenue of a network of international bodies established to deal with human rights issues. Seeking redress from an international body is not new.

Specialist UN bodies include:

- the Committee on the Elimination of Racial Discrimination (CERD) under the *Convention on the Elimination of All Forms of Racial Discrimination*;
- CEDAW, the Committee established under the *Convention on the Elimination of All Forms of Discrimination Against Women*;
- the Committee created under the *Convention on the Rights of the Child*;

- the UN Torture Committee (CAT) established to hear complaints from victims of torture under the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment*;
- UNESCO deals with complaints of discrimination in education; the International Labour Organisation (ILO) handles employment issues;
- the UN High Commissioner for Refugees monitors refugee problems;
- the recently formed Committee on Economic Social and Cultural Rights which receives reports from the states on their compliance with the *International Covenant on Economic Social and Cultural Rights*.

UN Human Rights Commission

The Human Rights Commission was established in 1946, under the auspices of the UN Economic and Social Council (ECOSOC). On 27 May 1970, Resolution 1503 passed which allowed a Sub-Commission of the Human Rights Commission to receive reports of a 'consistent pattern of gross violations' of human rights. Complaints can be lodged by anyone with sufficient knowledge of a gross violation, and not just victims. Authors can be non-governmental organisations (NGOs) or groups or people with direct, reliable knowledge, providing they are acting in good faith. The Commission is not limited to violations under the ICCPR and can address alleged violations of rights under the other UN human rights conventions. The results are usually political remedies rather than individual redress.

Conclusion

We often forget that Australia's international obligations are relevant to domestic problems. While the HRC may assist the development of human rights law in Australia, it does not substitute for a domestic bill of rights.²¹ As one member of the HRC has said: 'The most effective implementation of human rights requires an interplay between international obligation and domestic commitment'.²²

This article is designed as a guide to using international human rights 'remedies'. While a complaint to the HRC is often a last resort, it does offer Australians the opportunity to draw international attention to human rights problems and hopefully will assist Australian human rights jurisprudence.

References

1. See de Zayas, A. and others, 'Application of International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee', (1985) 28 *German Yearbook of International Law* 9, reprinted by UN Secretariat, for a general review of the use of the Optional Protocol. Also see: Charlesworth, H., 'Australia's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights', (1991) 18 MULR 428 for a recent analysis on the significance of accession for Australia.
2. See *Re Mathieson and Department of Employment Education and Training* 1990 20 ALD 253 [Article 10(3) of the ICCPR], *Re Jane* (1988) 94 FLR 1 [Article 7 of ICCPR], *Jago v District Court of New South Wales* [1988] 12 NSWLR 558 [Article 9] and *Simsek v McPhee* (1982) 56 ALJR 277. Justice Kirby as President of the New South Wales Court of Appeal has often referred to provisions of the ICCPR and European Convention for the Protection of Human Rights and Fundamental Freedoms.
3. The ICCPR is contained in Schedule One to the *Human Rights and Equal Opportunity Commission Act* 1986. While the Act creates powers for the Human Rights and Equal Opportunity Commission (HREOC) to investigate and conciliate alleged breaches of rights contained in the ICCPR, the Act does not create justiciable rights for individuals. HREOC has intervened in cases where ICCPR issues are involved — *Re Jane* above and *Re Marion* (unreported).
4. (*First*) *Optional Protocol to the International Covenant on Civil and Political Rights*, Australian Treaty Series 1991, No. 39.
5. ICCPR and the HRC use terms unfamiliar to Australian law: a 'communication' is the written complaint to the HRC alleging a violation; the 'author' is usually the victim of violation and the person lodging a complaint; the 'right to petition' is the right to lodge a complaint; 'views' refers to the decision of the HRC in relation to the communication. A view is an analysis of the facts and the law which substantiates an allegation and the HRC's recommendations.
6. O'Neill, Glenn, 'International Law: Australia Catches Up Quietly' (1991) 16(6) *LSB* 298.
7. To prepare a communication, the author and those assisting the author's preparation will need to be aware of the following materials: The Optional Protocol, the ICCPR, the Rules of Procedure of HRC, *Human Rights Committee Selected Decisions Under the Optional Protocol*, CCPR/C/OP, 2 volumes, HRC General Comments and Annual Reports of HRC which include reports of HRC's views.
8. *EMEH v France* Communication 409/1990, admissibility decision 2 November 1990.
9. *Group of Associations for the Defence of the Rights of Disabled Persons v Italy*, *Selected Decisions* (1990) Vol. 2, 47; *Ominayak, Chief of Lubicon Lake Band v Canada* 67/1984 (1990) Vol. 2; *EHP on her own behalf et al v Canada*, *Selected Decisions* Vol. 2; *JRT and WG Party v Canada*, *Selected Decisions* Vol. 2. In two recent communications 360/1989 and 361/1989 newspaper companies alleged violations. The HRC found the communications inadmissible because the companies had no standing under the Optional Protocol. This is in contrast to the situation under the European Convention where corporate entities have lodged human rights complaints.
10. *AD — Mikmaq Tribal Society v Canada* 78/1980 *Selected Decisions* Vol. 2, p.23; *Kütok v Sweden* 197/1985; 1988 Report HR Committee GAOR 43rd Session; *Lovelace v Canada* 24/1977 *Selected Decisions* Vol. 1, p.83.
11. *Aumeeruddy Cziffra v Mauritius* Communication No. 35/1978, HRC 1983 Report, or *Selected Decisions*, Vol. 1, p.67.
12. Article 3 of the Optional Protocol. This usually covers situations where the allegation is not adequately substantiated or the author's purpose in petitioning is in bad faith. The author should avoid abusive language in the communication!
13. A communication will be inadmissible if the victim is seeking redress for the same human rights violation at the same time in another international forum. This prerequisite will not be relevant to most Australian complaints as individuals suffering a violation in Australia do not have rights to complain to other international forums, such as the European or the Inter-American systems. Subject to this, a potential author needs to carefully consider when and how he or she wishes to bring their complaint to international attention so that a communication to the HRC will not be barred.
14. States, under international law, in some circumstances can make reservations to Treaties. A reservation has the effect of qualifying the treaty obligation of that state and restricting the full benefit for the individual. While Australia has removed many of the reservations to the ICCPR, this is something which needs to be considered especially in the area of fair trial. The Treaties Section of the Department of Foreign Affairs and Trade can be contacted for guidance or reference on reservations made by Australia.
15. If a right is not contained in the ICCPR then the HRC cannot hear a complaint about its alleged violation. *OJ v Finland* Communication 419/1990 which concerned property rights was held to be inadmissible.
16. This Article covers many areas such as rights on arrest, the right to be informed of charges, the right to challenge detention, and standards of treatment while in detention. There has been a substantial HRC jurisprudence on this issue.
17. Like Article 9, Article 14 has a comprehensive list of matters on the minimum standards to ensure a fair trial.
18. Family and children's rights are also recognised in Articles 23 and 24.
19. See cases listed in ref. 10.
20. It is beyond the scope of this article to discuss how all these types of limitations operate. See Higgins, R., 'Derogations under Human Rights Treaties', (1976-1977) *BYIL* 281.
21. Charlesworth, above, at p.431.
22. Professor Higgins is a member of the HRC and Special Rapporteur of new cases. Higgins, R., 'Some Thoughts on the Implementation of Human Rights' (1990) 5(3) *Interights Bulletin*, pp.52-53.