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Committee on the Elimination of Racial Discrimination

Seventy-seventh session

2–27 August 2010

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 fifteenth to seventeenth periodic report of Australia (CERD/C/AUS/15-17), submitted in one document, at its 2024th and 2025th meetings (CERD/C/SR.2024 and CERD/C/SR.2025), held on 10 and 11 August 2010. At its 2043rd meeting (CERD/C/SR.2043), held on 24 August 2010, it adopted the following concluding observations.

A. Introduction

2. While welcoming the submission of the combined fifteenth to seventeenth periodic report by the State party the Committee notes that the report was not in complete conformity with its reporting guidelines. The Committee expresses its appreciation to the State party for the presentations made by the delegation, both orally and in writing, which provided further insights into the implementation of the Convention.

B. Positive aspects

3. The Committee welcomes the State party's expression of support, in April 2009, to the United Nations Declaration on the Rights of Indigenous Peoples, as a first step in building a sustained and constructive partnership with Indigenous peoples.

4. The Committee notes with satisfaction the National Apology for past negative Government policies issued by the State party on 13 February 2008 to Indigenous peoples and in particular the Stolen Generations, as a first step towards genuine reconciliation and reparations to be made in recognition of the history of gross violations of human rights.

5. The Committee welcomes the ratification by the State party of the International Convention on the Rights of Persons with Disabilities and the related Optional Protocol, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and the standing invitation extended to all thematic special procedures,

noting, in particular, the visits of the Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous peoples as well as the Special Rapporteur on the right to health in 2009.

6. The Committee welcomes the Government's commitment to address Indigenous disadvantage as set out in the six "Closing the Gap" targets.

7. The Committee notes with interest the extensive National Human Rights Consultation between December 2008 and September 2009 showing an overwhelming support for the protection of human rights.

8. The Committee welcomes the contributions of the Australian Human Rights Commission to the Committee's work, as well as the active engagement and contributions from non-governmental organizations.

C. Concerns and recommendations

9. The Committee regrets that insufficient information regarding the concrete measures for the implementation of its previous concluding observations (CERD/C/AUS/CO/14 (2005), CERD/C/304/ADD.101 (2000)) was provided by the State Party. It also regrets that many of the concerns previously addressed to it by the Committee persist and have not resulted in structural change.

The State Party is encouraged to comply with all recommendations and decisions addressed to it by the Committee and to take all necessary steps to ensure that national legal provisions further the effective implementation of the Convention. The Committee also recommends that the State party consider the establishment of a domestic implementation mechanism for the International Convention on the Elimination of All Forms of Racial Discrimination across the federal system.

10. The Committee is concerned by the absence of any entrenched protection against racial discrimination in the federal Constitution and that sections 25 and 51 (xxvi) of the Constitution in themselves raise issues of racial discrimination. It notes with interest the recommendations from the National Human Rights Consultation Report and findings of a significant degree of community support for a federal Human Rights Act to thoroughly address the gaps in the existing model of human rights protection. The Committee also notes information provided on the State party's plans to review all federal anti-discrimination laws, with the intention of their harmonization under the Human Rights Framework. (arts. 1 and 2)

The Committee urges the State party to ensure that the review of all federal anti-discrimination laws considers the gaps in legal and constitutional protections against discrimination and that consequent harmonization does not weaken the Racial Discrimination Act. It recommends that the State party take measures to ensure that the Racial Discrimination Act prevails over all other legislation which may be discriminatory on the grounds set out in the Convention. The Committee also recommends that the State party draft and adopt comprehensive legislation providing entrenched protection against racial discrimination.

11. While taking account of the State party's commitment to the Australian Human Rights Commission (AHRC), the Committee regrets the absence of a full-time Race Discrimination Commissioner since 1999 and notes with concern the challenges the Human Rights Commission faces regarding limited powers, capacity, and funding (art. 2).

The Committee urges the State party to support the proper performance of the AHRC, through adequate financing and staffing, including through the appointment of a full-time Race Discrimination Commissioner. It also recommends that the State party consider expanding the powers, functions and funding of the AHRC.

12. The Committee is concerned that the collection of biometric data for Australian visa applications in ten countries, as part of national security measures, may constitute racial profiling and may contribute to increased stigmatization of certain groups (art. 2).

While acknowledging the State party's national security concerns, the Committee underlines the obligation of the State party to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin. The Committee draws the State party's attention to its Statement on Racial Discrimination and Measures to Combat Terrorism (8 March 2002) and recommends that it undertake sensitisation campaigns against stereotypes associating certain groups with terrorism.

13. The Committee notes with concern the absence of a legal framework regulating the obligation of Australian corporations at home and overseas whose activities, notably in the extractive sector, when carried out on the traditional territories of Indigenous peoples, have had a negative impact on Indigenous peoples' rights to land, health, living environment and livelihoods (arts. 2, 4, 5).

In light of the Committee's general recommendation 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad. The Committee also encourages the State party to fulfil its commitments under the different international initiatives it supports to advance responsible corporate citizenship.

14. Noting with interest the changing demographics of the State party in recent decades, the Committee regrets that its multicultural policy (*Multicultural Australia United in Diversity (2003-2006)*) expired in 2006. It notes with concern reports highlighting ongoing issues of discrimination and inequity in access to and delivery of services experienced by members of certain minority communities including African communities, people of Asian, Middle Eastern and Muslim background, and in particular Muslim women (arts. 1, 2, 5).

The Committee encourages the State party to develop and implement an updated comprehensive multicultural policy that reflects its increasingly ethnically and culturally diverse society. The Committee requests the State party to include in its next periodic report information on its approach to multiculturalism and diversity in national policy. It recommends that the State party strengthen the race and cultural dimensions of its Social Inclusion Agenda, in particular by ensuring adequate resources for the development of strategies that respond to the specific needs of the diverse communities of the State party.

15. The Committee notes with appreciation the acknowledgement by the State party that Aboriginal and Torres Straits Islanders occupy a special place in its society as the first peoples of Australia and also welcomes the establishment of the National Congress of Australia's First Peoples but is concerned this is only an advisory body representing member organizations and individuals and may not be fully representative of Australia's First Peoples. The Committee regrets the limited progress towards Constitutional acknowledgement of Australia's Indigenous peoples, and slow implementation of the principle of Indigenous peoples' exercising meaningful control over their affairs (arts. 1, 2, 5, 6).

Drawing the attention of the State party to the Committee's general recommendation 23 (1997) on the rights of indigenous peoples, the Committee reiterates its recommendation that the State party increase efforts to ensure a meaningful reconciliation with Indigenous peoples and that any measures to amend the Australian Constitution include the recognition of Aboriginal and Torres Strait Islanders as First Nations Peoples. In this regard, the Committee recommends that the State party consider the negotiation of a treaty agreement to build a constructive and sustained relationship with Indigenous peoples. The Committee also recommends that the State party provide the National Congress of Australia's First Peoples with the adequate resources to become fully operational by January 2011 and support its development.

16. The Committee expresses its concern that the package of legislation under the Northern Territory Emergency Response (NTER) continues to discriminate on the basis of race as well as the use of so called "special measures" by the State party. The Committee regrets the discriminatory impact this intervention has had on affected communities including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies (arts. 1, 2, and 5).

The Committee takes notes the State party will complete the reinstatement of the Racial Discrimination Act in December 2010, but is concerned by the continuing difficulties in using the Act to challenge and provide remedies for racially discriminatory NTER measures. It also urges the State party to guarantee that all special measures in Australian law, in particular those regarding the NTER, are in accordance with the Committee's general recommendation No. 32 on Special Measures (2009). It encourages the State party to strengthen its efforts to implement the NTER Review Board recommendations, namely that: it continue to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory; that it reset the relationship with Aboriginal people based on genuine consultation, engagement and partnership; and that Government actions affecting the Aboriginal communities respect Australia's human rights obligations and conform with the Racial Discrimination Act.

17. The Committee reiterates its concern about the State party's reservations to article 4 (a) of the Convention. It notes that acts of racial hatred are not criminalized throughout the State party, pursuant to article 4 of the Convention, and also that the Northern Territory still has not enacted legislation prohibiting incitement to racial hatred (art. 4).

In light of the Committee's general recommendations No. 7 (1985) and No. 15 (1993), according to which article 4 is of mandatory nature, the Committee recommends the State party to remedy the absence of legislation to give full effect to the provisions against racial discrimination under article 4 and withdraw its reservation to article 4 (a) relating to criminalizing the dissemination of racist ideas, incitement to racial hatred or discrimination, and the provision of any assistance to racist activities. The Committee reiterates its request for information on complaints, prosecutions and sentences regarding acts of racial hatred or incitement to racial hatred in States and Territories with legislation specifying such offenses.

18. Reiterating in full its concern about the Native Title Act 1993 and its amendments, the Committee regrets the persisting high standards of proof required for recognition of the relationship between Indigenous peoples and their traditional lands, and the fact that in spite of large investment of time and resources by Indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5).

The Committee urges the State party to provide more information on this issue, and take the necessary measures to review the requirement of such a high standard of proof. The Committee is interested in receiving data on the extent to which the legislative reforms to the Native Title Act in 2009 will achieve “better native title claim settlements in a timely manner”. It also recommends that the State party enhance adequate mechanisms for effective consultation with Indigenous peoples around all policies affecting their lives and resources.

19. While welcoming recent initiatives taken by the State party in order to increase access to justice by Indigenous Australians, the Committee is concerned that the recent funding increase for Aboriginal legal aid may be inadequate to address the continued limited access by Indigenous peoples to legal specialist and interpretation services in a sustainable manner (art. 5, 6).

The Committee encourages the State party to increase funding for Aboriginal legal aid in real terms, as a reflection of its recognition of the essential role that professional and culturally appropriate Indigenous legal and interpretive services play within the criminal justice system. Moreover, it recommends that the State party strengthen training for law enforcement personnel and the legal profession in this regard.

20. While welcoming the endorsement of National Indigenous Law and Justice Framework by all Australian Governments, the Committee reiterates its concern about the disproportionate incarceration rates and the persisting problems leading to deaths in custody of a considerable number of Indigenous Australians over the years. The Committee expresses concern in particular about the growing imprisonment rates of Indigenous women as well as the substandard conditions in many prisons (art. 5, 6).

Taking into account the Committee’s general recommendation 31 (2006) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party dedicate sufficient resources to address the social and economic factors underpinning Indigenous contact with the criminal justice system. It encourages the State party to adopt a justice reinvestment strategy, continuing and increasing the use of Indigenous courts and conciliation mechanisms, diversionary and prevention programs and restorative justice strategies. and that, in consultation with Indigenous communities, it take immediate steps to review the recommendations of the Royal Commission into Aboriginal Deaths in Custody, identifying those which remain relevant with a view to their implementation. The Committee also recommends that the State party implement the measures outlined in the National Indigenous Law and Justice Framework. The Committee encourages the State party to ensure the provision of adequate health care to prisoners.

21. The Committee welcomes the new national approach to preserve Indigenous languages but is concerned that no additional financial resources have been committed by the State party nor received by the Maintenance of Indigenous Languages and Records program for this new approach. The Committee is also highly concerned by the recent abolition of bilingual education funding by the Northern Territory Government in light of the precarious condition of many Indigenous languages, and the lack of adequate opportunities for children to receive instruction in or of their language (art. 2, 5).

The Committee encourages the State party to allocate adequate resources for the new national approach to preserve Indigenous languages. It recommends that the State party, in consultation with Indigenous communities, hold a national inquiry into the issue of bilingual education for Indigenous peoples. The Committee also recommends that the State party adopt all necessary measures to preserve native languages and develop and carry out programmes to revitalize indigenous languages and bilingual and intercultural education for Indigenous peoples respecting cultural identity and history. In line with the UNESCO Convention against Discrimination in Education, to which Australia is a party, the Committee encourages the State party to consider providing adequate opportunities for national minorities to the use and teaching of their own language.

22. While recognizing the steps taken by the State party to address socio-economic disadvantages of Indigenous people, the Committee reiterates its serious concern about the continued discrimination faced by Indigenous Australians in the enjoyment of their economic, social and cultural rights (art. 5).

The Committee reiterates its recommendation that the State party ensure that resources allocated to eradicate socio-economic disparities are sufficient and sustainable. It recommends that all initiatives and programmes in this regard ensure the cultural appropriateness of public service delivery and that they seek to reduce Indigenous socio-economic disadvantage while advancing Indigenous self-empowerment.

23. The Committee is concerned by information related to the personal security of international students, and in particular, the series of racially motivated assaults of Indian students, including one death, in the state of Victoria. It regrets the failure by the Government and police (both at a state and federal level) to address the racial motivation of these acts, as well as the lack of available national data on the prevalence of migrants as victims of crime (arts. 2, 4, and 5).

The Committee recommends that the State party further intensify its efforts to combat racially motivated violence, including by requiring law enforcement authorities to collect data on the nationality and ethnicity of victims of such crimes and ensuring that judges, prosecutors and the police consistently apply existing legal provisions which consider the motive of ethnic, racial or religious hatred or enmity an aggravating circumstance. It recommends that the State party provide updated statistical data on the number and nature of reported hate crimes, prosecutions, convictions and sentences imposed on perpetrators, disaggregated by age, gender and national or ethnic origin of victims.

24. The Committee is concerned that “Excised Offshore Places” such as the immigration detention facilities on Christmas Island are removed from the operation of Australia’s migration legislation and that asylum seekers arriving by boat or intercepted before reaching the mainland without a valid visa are subject to differential processing arrangements and denied the full protections of the application and review procedures available on the mainland. The Committee is also concerned by the continued suspension of the processing of refugee status assessment procedures for applicants from certain countries, notably for Afghan asylum seekers, which lacks a legislative basis and is inconsistent with article 5 of the Convention. It regrets that the Australian High Court has found that it is lawful for a stateless person to be detained indefinitely. Finally, the Committee is concerned that children are still kept in detention-like conditions in various remote areas and at times, separate from their parents (art. 1, 2, 5).

Recalling its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee reiterates its view that States parties 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. It recommends that the State party:

(a) review its mandatory detention regime of asylum seekers with a view to finding an alternative to detention, ensuring that the detention of asylum seekers is always a measure of last resort and is limited by statute to the shortest time reasonably necessary, and that all forms of arbitrary detention be avoided;

(b) expedite the removal of the suspension on processing visa applications from asylum seekers from Afghanistan and that it take the necessary measures to ensure standardized asylum assessment and review procedures and equal entitlement to public services by all asylum seekers, regardless of country of origin or mode of entry;

(c) develop appropriate reception arrangements, in particular for children;

(d) ensure in its domestic law, in accordance with article 5 (b), that the principle of *non-refoulement* is respected when proceeding with return of asylum-seekers to countries;

(e) accompany any changes in the processing of asylum claims with adequate protection standards for those asylum seekers whose protection is suspended.

(f) continue its cooperation with UNHCR in regard to the above.

25. The Committee regrets that no steps have been taken by the State party with regard to the Committee's previous recommendation that the State party envisage reversing the burden of proof in civil proceedings involving racial discrimination to alleviate the difficulties faced by complainants in establishing the burden of proof (arts. 4 and 5).

The Committee recommends that as part of its harmonisation of federal anti-discrimination laws, the Racial Discrimination Act be amended, as far as civil proceedings are concerned, to require the complainant to prove *prima facie* discrimination, at which point the burden shifts to the respondent to prove no discrimination existed.

26. While noting with interest the range of compensation payment schemes that have been implemented or recommended for implementation in the State party, the Committee regrets the absence of appropriate compensation payment schemes for Stolen Generations and Stolen Wages, which is inconsistent with article 6 of the Convention (art. 6).

The Committee reiterates its recommendation to the State party to address appropriately and through a national mechanism past racially discriminatory practices including through the provision of adequate compensation to all involved.

27. The Committee reiterates that education plays a crucial role in promoting human rights and combating racism and notes with interest the national curriculum initiative for schools. However, it is concerned that the historical position, importance and contributions to Australian society of Indigenous peoples and those of other groups protected under the Convention may not be properly reflected in the proposed curriculum (art. 5, 7).

The Committee recommends that the State party take the necessary measures to ensure that the national curriculum conveys an accurate message regarding the

contribution of all groups protected under the Convention to Australian society and reflects the principle of full participation and equality. In light of article 7 of the Convention, it also recommends that the State party include human rights education in the national curriculum. The Committee also encourages the State party to ensure that an anti-racism strategy be established under the new Human Rights Framework and that an education program for all Australians, as per the recommendations of the Human Rights Consultation Report, with particular reference to combating discrimination, prejudice and racism be adopted.

28. Bearing in mind the indivisibility of all human rights, the Committee encourages the State party to consider ratifying those international human rights treaties which it has not yet ratified, in particular treaties the provisions of which have a direct bearing on the subject of racial discrimination, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the Optional Protocol to the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment; and ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

29. In light of its general recommendation No. 33 (2009) on follow-up to the Durban Review Conference, the Committee recommends that the State party give effect to the Durban Declaration and Programme of Action, adopted in September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, taking into account the Outcome Document of the Durban Review Conference, held in Geneva in April 2009, when implementing the Convention in its domestic legal order. The Committee requests that the State party include in its next periodic report specific information on action plans and other measures taken to implement the Durban Declaration and Programme of Action at the national level.

30. The Committee recommends that the State party continue consulting and expanding its dialogue with organizations of civil society working in the area of human rights protection, in particular in combating racial discrimination, in connection with the preparation of the next periodic report.

31. The Committee recommends that the State party's reports be made readily available and accessible to the public at the time of their submission, and that the observations of the Committee with respect to these reports be similarly publicized in the official and other commonly used languages, as appropriate.

32. In accordance with article 9, paragraph 1, of the Convention and rule 65 of its amended rules of procedure, the Committee requests the State party to provide information, within one year of the adoption of the present conclusions, on its follow-up to the recommendations contained in paragraphs 11, 16, 23 above.

33. The Committee also wishes to draw the attention of the State party to the particular importance of recommendations 18, 22 and 26 and request the State party to provide detailed information in its next periodic report on concrete measures taken to implement these recommendations.

34. The Committee recommends that the State party submit its 18th and 19th periodic reports in a single document, due on 30 October 2012 taking into account the guidelines for the CERD-specific document adopted by the Committee during its seventy-first session (CERD/C/2007/1), and that it address all points raised in the present concluding observations. The Committee also urges the State party to observe the page limit of 40 pages for treaty-specific reports and 60-80 pages for the common core document (see harmonized guidelines for reporting contained in document HRI/GEN.2/Rev.6, para. 19).