Follow-up Report on violations by Australia of ICERD, ICCPR & CAT in individual communications (1994-2014)

by Remedy
AUSTRALIA

remedy.org.au

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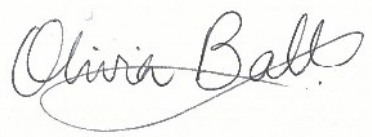
Executive summary

> 'Each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ...'[1]
>
> *International Covenant on Civil and Political Rights* (ICCPR)

Since Australia acceded to the First Optional Protocol to the ICCPR in 1991, the Human Rights Committee has found it to be in breach of the ICCPR in thirty individual cases brought before it. The Committee on the Elimination of Racial Discrimination (CERD) has found a further breach by Australia of its associated treaty (ICERD), and the Committee Against Torture has found two breaches by Australia of the *Convention Against Torture* (CAT), amounting to 33 communications in all. This is a relatively high number, with Australia exceeded by only three other States Parties in the total number of adverse findings arising from individual communications.[2]

Of these, only six cases (18%) have been fully remedied in accordance with Final Views, with partial remedies forthcoming in a further seven cases (21%). Of particular concern are a number of cases of gross violations which are ongoing, where Australia has not acted to end these violations, remedy the victims, or prevent the abuses recurring. These gross violations are predominantly Australia's arbitrary detention of asylum seekers, condemned by the UN no fewer than 19 times in individual communications.

Remedy Australia is a new human rights NGO in Australia founded in response to the high rate of UN communications concerning Australia and Australia's poor response to them. There is a need for systematic monitoring of treaty-body jurisprudence and follow-up activity by civil society to ensure authors obtain the substantive remedies recommended by the Committees. We seek to complement and support the treaty committees in their efforts at follow-up with Australia to achieve compliance with their Views. This, our inaugural Follow-Up Report, seeks to provide the Committees with independent, accurate and up-to-date information on the implementation of each of its Final Views concerning treaty violations by Australia.



Olivia Ball
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1 Art 2(3)(a).

2 South Korea has the highest number, at 119, followed by Jamaica (100) and Uruguay (49).

Contents

Introduction

Thirty-three times in the two decades since 1994 individuals and groups of individuals have had complaints of human rights violations by Australia upheld by United Nations treaty bodies. The first of these, *Toonen v Australia*, was to prove 'a watershed with wide-ranging implications for the human rights of millions of people'.[3] It was an exceptional case, in that the Australian Government was in complete agreement with the Human Rights Committee, and sought in good faith to remedy the violation. By contrast, most authors of successful communications against Australia remain disempowered, isolated and without remedy. They have disappeared from view, along with their case. Meanwhile, pressure on the State Party to comply with its treaty obligations – notably its obligation to provide each successful author with an effective and enforceable remedy – diminishes over time.

This report is based on four years of research which sought to find the authors of these communications and establish what substantive remedy, if any, followed the Views of the Committees. This report represents the first comprehensive assessment of individual communications won against Australia, and appears to be the first systematic empirical study anywhere of petitioners' experience in dealing with the UN human rights Committees and the long-term outcomes of these cases. And it is damning. Only six out of the 33 Australian cases have been fully remedied, and one of those required no action on Australia's part. One-in-five cases have been partially remedied, but the rest have not been remedied at all. Meanwhile, some gross violations identified in individual communications, far from being remedied, continue unchecked.

Establishing contact with authors of successful complaints to determine Australia's compliance with Committee Views has involved a great deal of detective work: years spent pursuing names and contacts, lawyers, friends, sons, nuns and rumours across the Australian continent and around the world. Some of those closest to home proved the most elusive, while one man who had moved abroad happened to contact his

[3] Navi Pillay, 'UN Human Rights Chief highlights Australian sexuality case' video address, uploaded by the Australian High Commission for Human Rights on its YouTube channel, 25 July 2011 <http://www.youtube.com/watch?v=NT5aBa-1bXs>.

Australian lawyer for the first time in a decade, just when the search for him had been abandoned. Remedy Australia met with authors in living rooms, boardrooms, backyards, law offices, public housing estates, in cafes, libraries, in parliament house, maximum-security prison and on a beach. They were asked what remedies they had enjoyed and, where remedies or partial remedies had occurred, what they believed had contributed to achieving them.

One central finding of the research was the importance of civil society support for authors and their causes if they are to obtain the substantive remedies recommended by the UN Committees. There being no systematic monitoring and follow-up by civil society of treaty-body jurisprudence concerning Australia, Nick Toonen, the author of *Toonen v Australia*, and Olivia Ball, the author of this research, have together founded a niche NGO with this precise purpose. Remedy Australia exists to:

- Publicise UN treaty-body decisions concerning human rights violations by Australia
- Monitor progress in implementing effective remedies for these violations
- Support the UN Committees with independent follow-up information on Australian cases
- Advocate for effective remedial action as determined by the UN Committees, including remedies for affected individuals and measures designed to prevent the violation recurring
- Develop and advocate for an effective and transparent national mechanism for receiving, considering and giving effect to past and future UN Views concerning violations by Australia
- Advocate for Australia to ratify further UN human rights complaints mechanisms as they become available
- Mobilise public support for this advocacy.

On this the 20th anniversary of the landmark case *Toonen v Australia*, we submit to the three Committees which have made adverse findings against Australia – CERD, HRC and CAT – this independent Follow-Up Report.

The 33 communications are summarised, along with events subsequent to Final Views, where known, and Remedy Australia's assessment of the degree to which the violations they reveal have been remedied. For ease of reference, cases are grouped by Committee and presented in alphabetical order. We hope this report will serve as a valuable resource, collating and summarising the Committees' work on successful Australian individual communications to date, as well as an up-to-date briefing on Australia's compliance with Committee Views. We will be pleased to assist the Committees further, where possible.

Hagan v Australia

Violation: ICERD art 1

Lodged: 31 July 2002
Concluded: 20 March 2003

Status: **Remedied**

An Aboriginal man alleged that a sign at a football ground in Toowoomba, in regional Queensland, bearing the word 'Nigger' (pictured)[4] breached Australia's obligations under ICERD. The word applied to a grandstand named after a celebrated Caucasian rugby player of the 1920s who was universally known by the nickname 'Nigger' because his surname was Brown.

Hagan alleged the use of the term amounted to racial discrimination under article 1 as well as racial vilification under article 4; its use impinged on his enjoyment of the sports ground on a racial basis, contrary to article 5. He also argued that Australia was obliged under article 2(1)(c) to amend laws having the effect of perpetuating racial discrimination and, under article 7, to take measures, including educational and cultural, to combat prejudice and promote tolerance. The Committee on the Elimination of Racial Discrimination found in his favour, without specifying which articles were breached,[5] and recommended Australia have the sign removed.

Taking advantage of the ambiguity of the Committee's Views, Australia responded by saying it did not propose to have the 'term in question' removed from the sign.[6] In 2006, the Committee expressed 'regret' that Australia had not acted to secure removal of the sign and 'hope' that Australia would reconsider its stance.[7]

> **'The Committee recommends that the State party take the necessary measures to secure the removal of the offending term from the sign in question, and to inform the Committee.'**
>
> **CERD, 2003**

In 2007, four years after CERD concluded the *Hagan* case, and two weeks after Stephen and his wife Rhonda Hagan's documentary film about their 'Nigger Brown' struggle premiered to a packed

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4 Photo: Rhonda Hagan <http://www.creativespirits.info/resources/movies/nigger-lovers>.

5 In its 2006 annual report, CERD retrospectively defined the 'use of [the] offending term on [the] grandstand' as falling 'within article 1' (CERD, *Report on the Elimination of Racial Discrimination*, UNGAOR, 61st sess, UN Doc A/61/18 (2006) 146).

6 'The State party submitted that the petitioner had had the opportunity to bring an action in relation to the display of the sign on the grandstand before the Federal Court of Australia, claiming

audience at the Sydney Opera House,[8] the Toowoomba Sports Ground Trust announced it would demolish the entire structure on which the offending sign appeared, purportedly for reasons unrelated to its name or CERD's Views. The Queensland Government gave an undertaking that nothing else would be named after Mr Brown.

Stephen Hagan (Photo: Olivia Ball)

Mr Hagan's stance was highly unpopular in Queensland. He was nearly bankrupted by the legal process and received death threats and hate mail. But he never stopped his 8-year public campaign to have the sign removed.

Mr Hagan has obtained the substantive remedy he sought, namely removal of the offensive word from a public sign. However, Australia does not appear to have acted to effect its removal. On the contrary, it informed CERD that it would not comply, and cannot be said to have addressed the Committee's Views in good faith.

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a violation of the *Racial Discrimination Act* [*1975* (Cth)] and the *Human Rights and Equal Opportunity Commission Act* [*1986* (Cth)]. It noted that the Committee had not found any violation by Australia of any obligations under the Convention and in light of this fact it does not propose to take measures to secure the removal of the term in question from the sign' (Ibid 146).

7 Ibid.

8 This 26-minute film called *Nigger Lovers* (Creative Spirits 2007) tells of the 'enormous strength, determination and persistence ... of a man being challenged to his limits, receiving death threats and bringing his family close to bankruptcy' and includes an interview with the Australian head of the Ku Klux Klan. *Nigger Lovers* was screened on Australian public television in 2007 and won a clutch of awards. Mr Hagan believes it was the most influential thing they did in their long struggle to obtain compliance with *Hagan v Australia*.
(Rhonda Hagan <http://www.creativespirits.info/resources/movies/nigger-lovers>; The film won the 2007 EnhanceTV ATOM Award, 2007 SBS's Inside Film (IF) Award and 2008 Best International Indigenous Short Documentary, NZ. ABC Indigenous (15 August 2008) <http://www.abc.net.au/indigenous/stories/s2342728.htm>).

A v Australia

Violations: ICCPR arts 2(3), 9(1) and 9(4)

Lodged: 20 June 1993
Concluded: 30 April 1997

Status: **Unremedied**

'A' is a Cambodian man born in 1934. He arrived in Australia by boat in 1989 with his Vietnamese wife and their children, the year the Australian Government declared people fleeing post-genocidal violence in Cambodia to be 'economic refugees'.[9] The family was detained for more than four years in immigration detention. They had no contact with a lawyer for nearly a year and, through transfers between detention centres in different Australian states, lost contact with the legal support they did obtain.

In 1992, they joined with other Cambodian detainees to challenge in the Federal Court of Australia the *Migration Amendment Act 1992* which prevented their release from detention. In 'direct response', the Government 'rushed through'[10] further amendments to the *Migration Act 1958*,[11] consolidating mandatory detention in law and restricting 'compensation for unlawful detention to the symbolic sum of one dollar per day'.[12] The group failed in a constitutional challenge to the amendments.[13]

With the eventual success of the author's wife's refugee claim, the family was released on temporary visas in January 1994, long before the Human Rights Committee (HRC) formed its Final Views.

In this oft-cited, 'trail blazing' decision,[14] the HRC found that Australia's system of 'indefinite and prolonged'[15] mandatory detention constitutes arbitrary detention in violation of article 9(1) of the ICCPR, regardless of its lawfulness domestically. Further, the inability of the family to have their detention reviewed by a court violated article 9(4). The Committee said that domestic review of the lawfulness of detention ought to include consideration of Australia's obligations under the ICCPR. The HRC found an added breach of article 2(3) (the right to an effective remedy), despite this not

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9 Mary Crock & Daniel Ghezelbash, 'What is a persecuted Iranian to do?' *ABC News* (online) 25 July 2013 <http://www.abc.net.au/news/2013-07-24/ghezelbash-crock-making-iranian-refugees-disappear-by-decree/4840158>.

10 Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (UNSW Press, 2007) 133.

11 s 54RA(1)–(4) to division 4B.

12 Human Rights Committee, *Views: Communication No 560/1993*, 53rd sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) ('*A v Australia*') [3.8].

13 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

14 As described by Sir Nigel Rodley, Chair of the Human Rights Committee, in his individual opinion appended to the case.

15 *A v Australia* [9.2].

being claimed explicitly by the author.

Australia rejected the Committee's interpretation of the Covenant[16] and refused to compensate the A family.

The HRC has deemed this response from the State Party unsatisfactory and classifies 'follow-up dialogue' as 'ongoing'.[17]

'The author is entitled to an effective remedy. In the Committee's opinion, this should include adequate compensation for the length of the detention to which A was subjected.'

Human Rights Committee, 1997

16 Human Rights Committee, *Report of the Human Rights Committee, vol I*, UN GAOR, 55th sess, UN Doc A/55/40 (10 October 2000) 73–4.

17 Human Rights Committee, *Report of the Human Rights Committee, vol 2*, UN GAOR, 67th sess, UN Doc A/67/40 (30 March 2012), 483–4.

Baban v Australia

Violations: ICCPR arts 9(1) and 9(4)

Lodged: 19 December 2000
Concluded: 6 August 2003

Status: **Unremedied**

An Iraqi-Kurd asylum seeker Heman Baban[18] and his infant son arrived in Australia without travel documents and were detained in an immigration detention centre in Sydney. His refugee claims were rejected. On the day his appeal was denied by the full bench of the Federal Court of Australia, he petitioned the HRC. The Committee issued Interim Views seeking a stay of deportation; Australia complied.

The HRC subsequently found the Babans' detention was arbitrary and not subject to judicial review in breach of article 9 of the ICCPR. The Committee required Australia to provide Mr Baban and his son with 'an effective remedy, including compensation'.[19] However, in 2001, after two years in detention, the pair escaped. After a period in hiding, they left the country and continue to seek asylum elsewhere.[20]

'The State party is under an obligation to provide the authors with an effective remedy, including compensation.'

HRC, 2003

The HRC has deemed Australia's response unsatisfactory and regards follow-up dialogue as ongoing.[21]

Barrister Nicholas Poynder has had no contact with the author since 2012.

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18 Mr Baban's full name is Heman Omar Sharif Baban, and he uses the given name Heman (email from Heman Baban to Nicholas Poynder, 25 May 2012).

19 Human Rights Committee, *Views: Communication No 1014/2001*, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) ('*Baban v Australia*') [9].

20 Email from Heman Baban to Nicholas Poynder, 25 May 2012.

21 Human Rights Committee, *Report of the Human Rights Committee, vol 2*, UN GAOR, 67th sess, UN Doc A/67/40 (30 March 2012), 483–4.

Bakhtiyari and Bakhtiyari v Australia

Violations: ICCPR arts 9(1), 9(4) and 24(1)
and potential violations of arts 17(1) and 23(1)

Lodged: 25 March 2002
Concluded: 29 October 2003

Status: **Unremedied**

A family of Hazara asylum seekers claiming to be from Afghanistan was separated en route to Australia. The father, Ali (pictured[22]), was accepted as an Afghan refugee, released from detention and got a job in Sydney. His wife, Roqaiha, their five children and Roqaiha's brother arrived subsequently and were detained. The Immigration Department did not inform either party of the other's presence in Australia. A complicated sequence of events followed which attracted a great deal of media attention in Australia. Ali was returned to detention and eventually the family was reunited. Australian authorities determined that the Bakhtiyaris' claim to be from Afghanistan was not credible after all, based on the questionable opinion of a single interpreter.[23] Doubt about their origins undermined their entire refugee claim. The family's lawyer Nicholas Poynder says 'everyone' who had dealings with the Bakhtiyaris believed they were Afghans.[24]

Roqaiha's brother Mahzar, who threw himself on razor wire in protest at their detention, was abruptly deported to Pakistan in 2002. Shortly afterwards, the remaining family members lodged a communication with the HRC. The Committee issued Interim Views seeking a stay of deportation. With the assistance of Australian protesters, two of the Bakhtiyaris' sons, then aged 13 and 11, escaped detention and applied unsuccessfully for asylum at the British consulate in Melbourne, before being returned to Woomera detention centre in remote South Australia. Mrs Bakhtiyari and

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22 Photo: Kate Geraghty in 'Bakhtiari Case to Stay Closed Despite Proof', *Sydney Morning Herald* (online) 28 September 2005 <www.smh.com.au/news/national/bakhtiari-case-to-stay-closed-despite-proof/2005/09/28/1127804503772.html>. (The family's surname is rendered in English with a variety of spellings. The present report adopts that used by the HRC.)

23 Julie Macken, 'Lost in Translation: The Dangerous Undercurrents of Refugee Politics', *Australian Financial Review* (online) 25 September 2004 <http://www.afr.com/p/national/item_dLLDbsCtaOqZHzGKGEvPXO?hl>.

24 Russell Vines, *The Man Who Jumped*, a documentary film (Prospero Productions, 2011).

her sons resorted to self-harm as a form of protest (pictured).[25] In 2003, a sixth child was born to the Bakhtiyaris in detention.

The HRC decided that the long-term detention of the family was arbitrary and beyond judicial review, and thus a breach of article 9, and had not been 'guided by the best interests of the children', in violation of article 24. Further, to deport Roqaiha and the children without Ali (who still had legal proceedings pending) would interfere with their right to family, in violation of articles 17 and 23. It proposed that Australia should pay 'appropriate compensation' for these violations.

Australia deported the family to Pakistan in 2004, after which the *Sydney Morning Herald* reported that Afghan authorities confirmed they were Afghan citizens.[26] 'A great injustice was done', says Poynder.[27]

The HRC has deemed Australia's response unsatisfactory and regards follow-up dialogue as ongoing.[28]

The authors' likely location was established by Remedy Australia, but they were not contacted.

'The State party is under an obligation to provide the authors with an effective remedy.

'As to the violation of art 9(1) and (4), continuing up to the present time with respect to Mrs Bakhtiyari, the State party should release her and pay her appropriate compensation.

'So far as concerns the violations of articles 9 and 24 suffered ... by the children, ... the State party is under an obligation to pay appropriate compensation to the children.

'The State party should also refrain from deporting Mrs Bakhtiyari and her children while Mr Bakhtiyari is pursuing domestic proceedings, as any such action ... would result in violations of arts 17(1) and 23(1).'

HRC, 2003

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25 In 2003, 13-year-old Alamdar Bakhtiyari cut the word 'freedom' into his forearm. [Photo: *Sydney Morning Herald* (online) 28 July 2003 <www.smh.com.au/articles/2003/07/27/1059244487137.html>].

26 'Bakhtiari Case to Stay Closed Despite Proof', above n 22.

27 Vines, above n 24.

28 Human Rights Committee, *Report of the Human Rights Committee, vol 2*, UN GAOR, 67th sess, UN Doc A/67/40 (30 March 2012), 483–4.

Brough v Australia

Violations: ICCPR arts 10 and 24(1)

Lodged: 4 March 2003
Concluded: 17 March 2006

Status: **Unremedied**

A 16-year-old Australian boy, convicted of burglary and assault, was transferred to an adult prison after participating in a riot at a juvenile detention centre. He was subjected to solitary confinement, forced nakedness, forced anti-psychotic medication and 24-hour lighting. He attempted to hang himself using his underwear and, when he resisted prison officers' attempts to remove the noose, he was charged with 'failing to comply with a reasonable order' and sentenced to 48 hours further solitary confinement.

Corey Brough in 2011[29]

The HRC found that Brough had been treated inhumanely in violation of article 10 and without the protection due to children, in breach of article 24, and should be compensated. Relevant to the HRC's decision was Brough's additional vulnerability as an Indigenous Australian with a mild intellectual disability.

He has not received any compensation. Follow-up dialogue with HRC is ongoing.

'The author is entitled to an effective remedy, including adequate compensation.

'The State party is under an obligation to ensure that similar violations do not occur in the future.'

HRC, 2006

[29] Photo: Wolter Peeters, *Sydney Morning Herald* (online) 15 January 2011 <http://www.smh.com.au/nsw/trapped-in-the-purgatory-of-remand-20110114-19r9x.html>.

C v Australia

Violations: ICCPR arts 7, 9(1) and 9(4) plus a potential further breach of art 7

Lodged: 23 November 1999
Concluded: 13 November 2002

Status: **Partially remedied**

Mr C, an Assyrian Christian from Iran, came to Australia in 1992, to join family members who had already been accepted by Australia as refugees. He was detained in immigration detention and his refugee application was denied. Acquiring serious mental illness in detention, he was released on health grounds in August 1994. Later that month he submitted a fresh protection application and, in February 1995, he was accepted as a refugee.

However, Mr C was still suffering severe mental health problems and his threatening behaviour while in a delusional state led to his being sentenced to gaol for three-and-a-half years. With the benefit of sound psychiatric care in the prison hospital, he made 'dramatic' improvement and the Immigration Department's own psychiatrist pronounced that he was no danger to anyone. However, as a non-citizen with a custodial sentence exceeding 12 months, he was slated for deportation. Granted parole in December 1998, he was not released, but transferred to immigration detention from whence he challenged his deportation.

The HRC accepted 'unanimous' evidence that immigration detention had been the cause of mental illness in this man with no psychiatric history, that his mental illness was the 'direct cause' of his offending and that, with appropriate medical care, he was unlikely to re-offend. As well as being arbitrary and lacking judicial review, in violation of article 9, his detention became 'cruel, inhuman or degrading treatment' once it was evident that it was causing his deteriorating mental health, a violation of article 7. To deport Mr C to Iran would also breach article 7. The Committee recommended that Australia should not deport Mr C and should pay him 'appropriate compensation' and 'avoid similar violations in the future'.

Mr C's refugee visa was ultimately reinstated and he was released from detention, but he has not been compensated.

'As to the violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation.

'As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran.

'The State party is under an obligation to avoid similar violations in the future.'

HRC, 2002

Cabal and Pasini v Australia

Violation: ICCPR art 10(1)

Lodged: 6 July 2001
Concluded: 7 August 2003

Status: **Partially remedied**

Wealthy Mexican brothers-in-law living in Australia under false identities were subject to arrest warrants in Mexico for major fraud. Arrested in Melbourne in 1998, they were remanded in custody while contesting extradition. They submitted a complaint to the HRC alleging inhuman treatment in Port Phillip Prison, where they were housed not on remand, but in maximum security with convicted prisoners. Only one of a range of complaints was upheld by the HRC, which found that locking the two men in a wire cage with floor area only big enough for a chair constituted a breach of prisoners' right to humane and dignified treatment. (The Vice-President of the HRC issued an individual opinion finding further violations of article 10.)

'Mexico's most wanted man', Carlos Cabal in 2003[30]

Both men were extradited to Mexico before the HRC reached its Final Views, where they appear to have successfully fought the charges against them. Australia has said it would take steps to ensure 'a similar situation does not arise again' – partially remedying the complaint – but does not accept that Cabal and Pasini are entitled to compensation.[31]

The HRC has deemed Australia's response unsatisfactory and regards follow-up dialogue as ongoing.[32]

'The authors are entitled to an effective remedy of compensation for both authors.

'The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.'

HRC, 2003

30 Photo: ABC-TV, *Foreign Correspondent*, 8 July 2003 <http://www.abc.net.au/foreign/stories/s893396.htm>.

31 Human Rights Committee, *Annual Report, vol 1*, UN GAOR, Supp No 40, UN Doc A/64/40 (2009) 127.

32 Human Rights Committee, *Report of the Human Rights Committee, vol 2*, UN GAOR, 67th sess, UN Doc A/67/40 (30 March 2012), 483–4.

Coleman v Australia

Violation: ICCPR art 19(2)

Lodged: 14 January 2003
Concluded: 16 July 2006

Status: **Unremedied**

In 1998, this 26-year-old law student and political activist made a speech – which included reading the text of the *Universal Declaration of Human Rights* – in Townsville's pedestrian mall without a permit (pictured),[33] in breach of a local government by-law. Police present in the mall filmed him, but did not stop him. He was subsequently fined and detained by police for five days for non-payment of the fine. His arguments concerning freedom of assembly and expression were rejected in the District Court and Court of Appeal, and he was denied leave to appeal to the High Court of Australia.

The HRC found that his speech was on subjects of public interest (such as human rights, Indigenous land rights and mining) and his conduct was neither threatening nor unduly disruptive. His arrest, conviction and imprisonment were 'disproportionate' and 'undoubtedly' a violation of his freedom of expression. Australia was asked to quash his conviction, refund his fines and court costs (nearly AU$3000) and compensate him for his imprisonment. It has done none of these.

> **'The State party is under an obligation to provide the author with an effective remedy, including quashing of his conviction, restitution of any fine paid by the author pursuant to his conviction, as well as restitution of court expenses paid by him, and compensation for the detention suffered as a result of the violation of his Covenant right.'**
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> **HRC, 2006**

[33] A still from CCTV footage of Patrick Coleman on the day in question, obtained from police evidence and provided by the author.

D and E v Australia

Violation: ICCPR art 9(1)

Lodged: 1 February 2002
Concluded: 11 July 2006

Status: **Unremedied**

A make-up artist known as D, having participated in the production of pornography in Iran, suffered a beating and short imprisonment. Her husband, E, was also 'repeatedly arrested and questioned regarding his wife'.[34] They fled Iran with their two children, arriving in Australia in 2000. While Australia accepted that D faced the death penalty in Iran because of her activities, it did not accept that her claim fell under the *Refugee Convention*. The family was held in immigration detention for over three years, during which time D and E had a third child. The HRC issued Interim Views requesting a halt to the family's deportation; Australia complied.

The Committee found the family's detention was arbitrary and that Australia should provide an effective remedy, including compensation. The family was eventually granted humanitarian visas to remain in Australia (rather than refugee visas), but has not been paid compensation.

'The State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation.

'The State party is also under an obligation to take measures to prevent similar violations in the future.'

HRC, 2006

[34] Human Rights Committee, *Views: Communication No 1050/2002*, 87th sess, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006) ('*D and E v Australia*'), [2.2].

Dudko v Australia

Violation: ICCPR art 14(1)

Lodged: 1 July 2004
Concluded: 23 July 2007

Status: **Unremedied**

This Russian-Australian librarian and former judge's associate[35] denies she was the woman who, in 1999, assisted a convicted bank robber to escape prison by hijacking a helicopter during a joy-ride over Sydney Harbour and forcing the pilot at gun-point to land in the exercise yard of the prison. Ms Dudko does not deny she was apprehended with the fugitive six weeks later. She was tried and sentenced to ten years' gaol.

Ms Dudko's principal human rights complaint concerned the media frenzy and public comments by judiciary and police, which she believes prejudiced her trial. Before the verdict was handed down, a judge 'who had no involvement in the author's case, gave an interview to the *Daily Telegraph* newspaper in which he effectively declared that the author had committed the offence'.[36] Also, Ms Dudko was denied the right to attend a High Court appeal, at which she was representing herself due to an inability to obtain Legal Aid.

Lucy Dudko dogged by the media as she is released from prison in 2006[37]

The HRC rejected her article 14(1) claim concerning pre-trial publicity as inadequately substantiated,[38] but found a breach of the same provision, namely her right to a fair

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35 Malcolm Brown, 'Desperate Days: The Famous Fugitives File,' *Sydney Morning Herald* (online) 9 December 2011 <http://www.smh.com.au/national/desperate-days-the-famous-fugitives-file-20111209-1omkx.html>.

36 Human Rights Committee, *Views: Communication No 1347/2005*, 90th sess,UN Doc CCPR/C/90/D/1347/2005 (29 August 2007) ('*Dudko v Australia*') [2.2].

37 Photo: *Herald Sun* (online) 1 June 2013 <http://mobile.news.com.au/breaking-news/read-from-fatal-females/story-e6frfkp9-1226654525833>.

38 *Dudko v Australia* [6.3]. Dudko insists that she provided 'volumes and volumes' of newspaper

trial and equality before the law, which includes the right to be present in person during a criminal appeal. The HRC said Australia should provide Ms Dudko with an unspecified remedy.[39] No remedy has been forthcoming.

> **'The State party is under an obligation to provide the author with an effective remedy.**
>
> **'The State party is also under an obligation to ensure that similar violations do not occur in the future.'**
>
> **HRC, 2007**

articles to the HRC as evidence of the prejudicial comments, with the judge's and police officer's remarks highlighted. (Interview with Lucy Dudko (Sydney, NSW, 23 February 2013)).

39 *Dudko v Australia* [9].

Fardon v Australia

Violation: ICCPR arts 9(1), 10(3), 14 and 15(1)

Lodged: 1 March 2006
Concluded: 18 March 2010

Status: **Remedied**

Australian citizen Robert Fardon was held in indefinite 'preventive detention' for nearly ten years beyond the completion of a 14-year prison term for sexual offences (punctuated by two periods of of conditional release of less than 12 months each[40]). Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA) allows prisoners deemed a threat to the community to be gaoled indefinitely. Their 'continuing detention' is reviewed annually by a judge in civil proceedings.[41]

The HRC criticised Australia for failing to adopt 'meaningful measures' for the reformation and rehabilitation of Mr Fardon during the 14 years of his prison sentence, as required by Article 10(3). It found his continued imprisonment without a new conviction to be arbitrary, retroactive and a violation of his fair-trial rights. It constituted a breach of article 15(1), the prohibition on imposing 'a heavier penalty … than the one that was applicable at the time when the criminal offence was committed'. Further, the civil proceedings by which Fardon's continuing imprisonment was reviewed did not meet the due process guarantees required by article 14. An appropriate remedy would include ending his 'preventive detention'.

> **'The State party is under an obligation to provide the author with an effective remedy, including termination of his detention under the DPSOA.'**
>
> **HRC, 2010**

In March 2013, the HRC deemed Australia's response unsatisfactory and described follow-up dialogue as ongoing.[42]

In December 2013, by order of the Queensland Court of Appeal, Mr Fardon was released and transferred to 'supervised accommodation … subject to strict conditions including curfews and electronic monitoring'.[43]

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40 'History of sex offender Robert Fardon', *Brisbane Times* (online) 27 September 2013 <http://www.brisbanetimes.com.au/queensland/history-of-sex-offender-robert-fardon-20130927-2uj2x.html>.

41 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 27.

42 Human Rights Committee, *Report of the Human Rights Committee, vol 1*, UN GAOR, 68th sess, UN Doc A/68/40 (March 2013) 145.

43 'Serial Sex Offender Robert Fardon Released from Brisbane Jail After Court Rejects Bid to Keep Him Behind Bars', *ABC News* (online) 6 December 2013 <www.abc.net.au/news/2013-12-06/sex-offender-robert-fardon-released-from-brisbane-jail/5141464>.

Remedy Australia deems Australia to have failed to respond in good faith to the Committee's Views in *Fardon v Australia*. It did not guarantee the termination of his arbitrary detention, nor any other effective remedy. Rather, the State of Queensland continued vigourously to oppose Mr Fardon's efforts to secure his own release from detention. As a consequence, Mr Fardon suffered an additional three years and nine months in detention beyond receipt of the Committee's Views.

However, the Queensland Court of Appeal recently ordered Mr Fardon be released from detention under the terms of the DPSOA, which the HRC had requested. Instead, he is now a prisoner under the *Corrective Services Act*,[44] residing in supervised accommodation on prison property.

[44] Email from Matilda Alexander, one of Mr Fardon's solicitors, 24 March 2014.

Faure v Australia

Violation: ICCPR art 2(3)

Lodged: 19 June 2001
Concluded: 31 October 2005

Status: **Unremedied**

A young Australian woman receiving unemployment benefits claimed the introduction of a 'Work for the Dole' scheme, whereby welfare payments were made conditional on participation in labour programmes, constituted compulsory labour, in breach of ICCPR article 8(3). The HRC did not agree on that point, but did find that, in failing to provide a general domestic mechanism by which to 'test an arguable claim under ... the Covenant', Australia had violated Bernadette Faure's right to remedy (art 2(3)).[45] The Committee held that 'its Views on the merits of the claim constitute[d] sufficient remedy' in this instance,[46] but that Australia ought to ensure that, in future, 'an effective and enforceable remedy' is available to all within its jurisdiction for any violation of the ICCPR.[47] Australia has not introduced such a remedy.

Follow-up dialogue with the HRC is ongoing regarding the non-repetition measures recommended.

> **'The Committee is of the view that in the present case its Views on the merits of the claim constitutes sufficient remedy for the violation found.**
>
> **'The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.'**
>
> **HRC, 2005**

45 Human Rights Committee, *Views: Communication No 1036/2001*, 85th sess, UN Doc CCPR/C/85/D/1036/2001 (31 October 2005) ('*Faure v Australia*') [7.4].

46 Ibid [9].

47 Ibid [10].

FKAG et al v Australia

Violation: ICCPR arts 7, 9(1), 9(2) and 9(4)

Lodged: 28 August 2011
Concluded: 26 July 2013

Status: **Unremedied**

The 37 authors of this communication – decided by the HRC a day after the similar case of *MMM et al v Australia* – comprised 36 Sri Lankan Tamils, including three children, one of them born in immigration detention, plus a Burmese man of the Rohingya ethnic minority. They arrived in Australia by boat in 2009 and 2010 and were detained for lack of an entry visa. All were accepted by Australia as refugees.

After between 14 and 24 months in detention, all the adults were denied visas to leave detention because Australia's domestic spy agency, ASIO, determined that they represented an undisclosed security risk. Not knowing why they were deemed a threat, the authors could neither challenge the facts or evidence contributing to the assessments, nor identify any errors of law.

The three children were free to leave, but their parents chose to keep them in detention rather than be separated from them. Allegations concerning the rights of the children and non-interference in the family were dismissed by the Committee.

The fact of the authors' arbitrary and indefinite detention, as well as the conditions of their detention, was causing the authors 'serious, irreversible psychological harm'[48] and a number of them were suicidal. The conditions of their detention included:

> inadequate physical and mental health services; exposure to unrest and violence and punitive legal treatment; risk of excessive use of force by the authorities; and witnessing or fearing incidents of suicide or self-harm by others.[49]

The authors sought immediate release, apology and compensation, but also far-reaching legal reforms relating to Australia's treatment of immigration detainees.

The Human Rights Committee issued repeated interim requests concerning the authors' mental health, which led to no discernible improvement in their conditions.[50] In its Final Views, the HRC found violations of articles 7 (inhuman and degrading treatment) and 9(1) (arbitrary detention) and 9(4) (habeas corpus) for all 37 authors, plus a violation of article 9(2) (the right to be informed of the reasons for one's arrest) for five of the authors. It found that the authors should be released 'under individually

48 Human Rights Committee, *Views: Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011(20 August 2013) ('*FKAG et al v Australia*') [3.12].

49 Ibid.

50 Email from Ben Saul (23 and 25 September 2013).

appropriate conditions' and given 'rehabilitation and appropriate compensation'.[51] Regarding non-repetition, Australia 'should review its migration legislation to ensure its conformity with the requirements of articles 7 and 9, paragraphs 1, 2, and 4 of the Covenant'[52] (that is, the prohibitions on inhuman and degrading treatment and arbitrary detention).

In 2014, 32 of the 37 authors of *FKAG et al* remain in immigration detention.[53] (The Tamil family of two adults and three children were released in 2013[54]). According to their lawyer, Ben Saul, Australia is overdue in responding to the HRC's Final Views and 'none of the Committee's recommendations has thus far been acted upon by the government.'[55]

'The State party is under an obligation to provide the authors with an effective remedy, including release under individually appropriate conditions, rehabilitation and appropriate compensation.

'The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its Migration legislation to ensure its conformity with the requirements of articles 7 and 9, paragraphs 1, 2, and 4 of the Covenant.'

HRC, 2013

As a current and continuing gross violation of human rights, Remedy Australia considers the *FKAG et al* case to warrant the most urgent and concerted follow-up.

51 *FKAG et al v Australia* [11].
52 Ibid [11].
53 Confirmed by Ben Saul, 20 March 2014.
54 Email from Ben Saul, 23 September 2013.
55 Email from Ben Saul, 19 March 2014.

Kwok v Australia

Violations: ICCPR art 9(1) and potential violations of arts 6 and 7

Lodged: 25 November 2005
Concluded: 23 October 2009

Status: **Partially remedied**

A Chinese woman fled China in 2000 when her husband was arrested for corruption offences potentially attracting the death penalty. Ms Kwok Yin Fong was wanted by Chinese authorities for alleged involvement in the 'same set of circumstances'.[56] China sought her forced repatriation from Australia without launching formal extradition proceedings, and Australia was willing to comply.

In 2003, her husband was sentenced to death. Ms Kwok, professing her innocence, claimed she would not receive a fair trial in China and could also be sentenced to death. The HRC issued Interim Views requesting a stay of deportation; Australia complied.

In its Final Views, the HRC found that Australia should not deport Ms Kwok, as the risk to her life 'would only be definitively established when it is too late'.[57] It found potential violations of the right to life and the prohibition on torture.[58] It also found that the six-and-a-half years Ms Kwok spent in Villawood detention centre was arbitrary detention. Australia should not send Ms Kwok to China 'without adequate assurances' from the People's Republic, and should compensate her for 'the length of detention to which [she] was subjected'.[59]

'The author is entitled to an appropriate remedy to include protection from removal to the People's Republic of China without adequate assurances as well as adequate compensation for the length of the detention to which the author was subjected.'

HRC, 2009

Ms Kwok was not refouled (that is, forcibly returned to a place of persecution or danger), but neither has she been compensated. The HRC has deemed Australia's response satisfactory,[60] despite its failure to pay compensation to one of its longest-serving immigration detainees.

Remedy Australia disagrees with this

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56 Human Rights Committee, *Views: Communication No 1442/2005*, 97th sess, UN Doc CCPR/C/97/D/1442/2005 (23 November 2009) ('*Kwok v Australia*') [9.6].

57 Ibid [9.5].

58 A leading commentator on the ICCPR contends that article 7 contains an 'implicit non-refoulement obligation' (Sarah Joseph, 'UN Human Rights Committee: Latest Trends Under the Optional Protocol' (International Service for Human Rights, 9 October 2013) <www.ishr.ch/news/un-human-rights-committee-latest-trends-under-optional-protocol>).

59 *Kwok v Australia* [11].

60 Human Rights Committee, *Report of the Human Rights Committee, vol 2*, UN GAOR, 67th sess, UN Doc A/67/40 (30 March 2012) 484.

conclusion and submits that this case is only partially remedied. Ms Kwok is no longer under threat of deportation, since she has a permanent visa allowing her to remain in Australia. But, consistent the Committee's Views in *Kwok v Australia*, Ms Kwok ought to be compensated for her exceptionally prolonged, arbitrary detention in 'harsh and inhospitable' conditions.[61] The debilitating effects of her detention have persisted at least five years after her release.[62]

[61] Stephanie Peatling, 'Villawood Targeted as Worst in Country', *Sydney Morning Herald* (online) 10 January 2008 <http://www.smh.com.au/news/national/villawood-targeted-as-worst-in-country/2008/01/09/1199554742688.html>.

[62] Personal communication with her lawyer, Mr Ronald Ma (Melbourne, 2 July & 9 November 2012).

Madafferi and Madafferi v Australia

Violations: ICCPR art 10(1) and potential breaches of 17(1), 23(1) and 24(1)

Lodged: 16 July 2001
Concluded: 24 July 2004

Status: **Partially remedied**

Francesco Madafferi is an Italian national and long-term Australian resident married to Anna Maria Madafferi, an Australian citizen. Their four children are Australian citizens.

Mr Madafferi (pictured)[63] had served a two-year prison sentence in Italy in the 1980s, then came to Australia and overstayed his tourist visa. He came to the attention of Australian authorities when he was sentenced by an Italian court in absentia. In the meantime, he had married an Australian and fathered Australian children, but his application for a spouse visa was refused on character grounds. In 2000, the Immigration Minister ordered Mr Madafferi's deportation due to his suspected involvement with the Calabrian mafia, which has 'deeply rooted' links in Australia.[64] Six months later, Mr Madafferi 'surrendered himself to the authorities' and was detained pending deportation.[65] While in detention, Mr Madafferi developed a 'stress disorder' and his youngest child was born. He was eventually admitted involuntarily to a psychiatric hospital for six months.[66]

The HRC issued Interim Views requesting a stay of deportation, which was initially refused. In its Final Views, the Committee found that conditions in immigration detention were inhuman, and that there would be arbitrary interference with the family, in conjunction with treaty provisions protecting the family and children, if Mr Madafferi were to be deported.

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63 Photo: Paul Rovere in Kate Hagan, John Silvester and Paul Millar, 'Court Arrests Lead to Murder Plot Charges', *The Age* (online) 26 March 2009 <http://www.theage.com.au/national/court-arrests-to-lead-to-murder-plot-charges-20090325-9aim.html>.

64 Jo McKenna, 'Mafia Deeply Entrenched in Australia,' *Sydney Morning Herald* (online) 15 March 2010 <http://www.smh.com.au/national/mafia-deeply-entrenched-in-australia-20100314-q67f.html>.

65 Human Rights Committee, *Views: Communication No 1011/2011*, 81st sess, UN Doc CCPR/C/81/D/1011/2001 (26 August 2004) ('*Madafferi and Madafferi v Australia*') [2.7].

66 Ibid [5.9] and (n 13).

In 2005, a new Immigration Minister overturned the deportation order 'on humanitarian grounds'. The HRC has deemed Australia's response to its Views satisfactory.

Remedy Australia maintains that Australia did not act in good faith in this instance, as it initially rejected the Committee's Interim and Final Views and intended to proceed with Mr Madafferi's extradition until extraneous events appear to have intervened. Mr Madafferi was ultimately permitted to remain in Australia, avoiding the potential treaty violations foreshadowed. However, the case is only partially remedied until adequate steps are taken to prevent such violations recurring.

'The State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors.

'The State party is under an obligation to avoid similar violations in the future.'

HRC, 2004

MMM et al v Australia

Violations: ICCPR arts 7, 9(1) and 9(4)

Lodged: 20 February 2012
Concluded: 25 July 2013

Status: **Unremedied**

The nine authors of this communication, which is similar to the contemporaneous case of *FKAG et al v Australia*, comprise six Tamils, including one child, who fled the conflict in Sri Lanka in 2009 or shortly thereafter, plus two Burmese Rohingyas and a Kuwaiti Bedouin man. They arrived in Australia by boat in 2009 and 2010 and were detained for lack of an entry visa. All were accepted by Australia as refugees.

After periods of detention ranging from 13 and 24 months, they were denied visas to leave detention because Australia's domestic spy agency, ASIO, determined they represented an undisclosed security risk. Not knowing why they were deemed a threat, the authors could neither challenge the facts or evidence contributing to the assessments, nor identify any errors of law.

The authors requested Interim Views, but the Committee declined to intervene.[67] The HRC did, however, meet a request for expedited consideration of the communication on account of pressing mental health concerns. Shortly before the Committee reached its Final Views, Ms MJ and her six-year-old son, who was showing signs of depression, were released from detention because 'a further security assessment [had] yielded new information'.[68]

As in *FKAG et al*, the authors sought immediate release, apology and compensation, but also far-reaching legal reforms relating to Australia's treatment of immigration detainees.

The HRC found violations of articles 7 (inhuman and degrading treatment) and 9(1) (arbitrary detention) and 9(4) (habeas corpus) for all authors. It recommended

> **'The State Party is under an obligation to provide all authors with an effective remedy, including release under individually appropriate conditions for those authors still in detention, rehabilitation and appropriate compensation.**
>
> **'The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its Migration legislation to ensure its conformity with the requirements of articles 7 and 9(1) and (4) of the Covenant.'**
>
> **HRC, 2013**

67 Email from their lawyer, Ben Saul, 23 and 25 September 2013.

68 Human Rights Committee, *Views: Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013) ('*MMM et al v Australia*') [8.1].

the authors still in detention be released and that they all be given 'rehabilitation and appropriate compensation'.[69] As regards non-repetition, Australia 'should review its migration legislation to ensure its conformity with the requirements of articles 7 and 9 of the Covenant'.[70]

In 2014, seven of the nine authors of this communication remain in detention.[71] According to their lawyer, Ben Saul, Australia is overdue in responding to the HRC's Final Views and 'none of the Committee's recommendations has thus far been acted upon by the government.'[72] Since these seven people remain in arbitrary detention, and none has received rehabilitation or compensation, Remedy Australia considers this case unremedied.

As a current and continuing gross violation of human rights, Remedy Australia considers the *MMM et al* case to warrant the most urgent and concerted follow-up.

69 Ibid [12].
70 Ibid.
71 Confirmed by Ben Saul, 20 March 2014.
72 Email from Ben Saul, 19 March 2014.

Nystrom v Australia

Violations: ICCPR arts 12(4), 17 and 23(1)

Lodged: 22 December 2006
Concluded: 18 July 2011

Status: **Partially remedied**

This case concerns a Swedish-Australian family: immigrant Britt Nystrom and her two adult children, Annette Turner and Stefan Nystrom.[73] Britt is a permanent resident of Australia; Annette is Australian by birth, but her younger brother was born during a visit back to Sweden in 1973. He entered Australia when only 27 days old and had never been abroad since. The family assumed Stefan was a naturalised Australian.

Mr Nystrom's parents separated when he was five and he had little further contact with his father. From about the age of eight or ten, Stefan began hearing voices and has suffered ongoing psychiatric symptoms throughout his life.[74] From the age of ten, he began offending, mostly misdemeanours, but also some 'serious and odious crimes',[75] usually under the influence of alcohol. At 13 he became a ward of the state and, as his guardian, the state failed to regularise his citizenship.

Britt Nystrom with a photo of her son, Stefan[76]

[73] Stefan is the named author, while all three are alleged victims. Only his rights were ultimately deemed to have been violated.

[74] Interview with Annette Turner (Melbourne, 10 February 2013).

[75] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 433 [49] (Emmett J).

[76] Photo: Richard Cisar-Wright, *Herald Sun* (online) 25 April 2012 <www.heraldsun.com.au/news/breaking-news/goverment-ignores-un-ruling-on-swedish-man-stefan-nystrom/story-e6frf7jx-1226338293839>.

In 2004, seven years after his last offence, during which time he had been law-abiding, steadily employed and recovering from his alcoholism, the Immigration Minister cancelled Mr Nystrom's permanent visa on character grounds. Now aged 30, he was detained in prison (rather than an immigration facility) for eight months, pending deportation. An appeal to the Federal Court found him to be 'an absorbed member of the Australian community with no relevant ties elsewhere'.[77] He was released and resumed gainful employment. The Minister appealed successfully to the High Court and, in November 2006, Mr Nystrom was re-arrested and put in immigration detention where he was held in solitary confinement for seven weeks.[78] Sweden made representations to Australia opposing his deportation on humanitarian grounds. The HRC, however, declined to seek an interim stay of deportation[79] and Mr Nystrom was deported on 27 December 2009. His mother and sister were denied the opportunity to see him off. Mr Nystrom initially received unemployment benefits from the Swedish state and rented a flat, but resumed drinking and, in the years since, he has variously been homeless, in homeless shelters, in prison and in psychiatric care.

The Committee found Mr Nystrom's initial imprisonment by Australia pending deportation was proportionate, therefore not arbitrary. His deportation constituted arbitrary interference with his right to family as protected by articles 17 and 23, but not that of his mother or sister who were not uprooted.[80]

Article 12 of the ICCPR states that '[n]o one shall be arbitrarily deprived of the right to enter his own country' [sic]. In a landmark finding, the HRC concluded that although Mr Nystrom is not an Australian citizen, 'his own country' is nonetheless Australia. His expulsion was arbitrary – especially as it occurred so long after his offending – and he should be permitted and materially assisted to return to Australia.

Responding belatedly,[81] Australia 'respectfully disagreed' that it had violated any provision of the ICCPR and refused to 'allow or facilitate Mr Nystrom's return to Australia'.[82] However, it did inform the HRC of policy reforms to guard against repetition, requiring that any future decision to cancel a person's visa on account of criminal conviction give 'greater weight'

'The State Party is under an obligation to provide the author with an effective remedy, including allowing the author to return and materially facilitating his return to Australia.

'The State party is also under an obligation to avoid exposing others to similar risks of a violation in the future.'

HRC, 2011

77 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 143 FCR 420, 429 [29] (Moore and Gyles JJ).*

78 The UN Special Rapporteur on Torture has said solitary confinement 'should not exceed seven days' (*Baban v Australia*, n 7, quoting UN Doc E/CN.41/1986/15,[151]).

79 *Nystrom v Australia* [1.2]. The Committee does not state in its Final Views why it declined this request for Interim Views.

80 Ibid [7.11]–[7.12].

81 Australia's published response to the HRC is undated, but it was more than nine months after the Final Views and the State Party is required to respond within six months (Human Rights

to the length of their residence in Australia:

> In some circumstances, it may be appropriate for the Australian community to accept more risk where the person concerned has, in effect, become part of the Australian community owing to their having spent their formative years, or a major portion of their life, in Australia.[83]

After further correspondence between the parties and the Committee, Australia stated in July 2012 that it had 'made clear its legal position' and did 'not believe that further consideration of the matter would be fruitful or constructive', describing its own conduct as 'good faith engagement' with the Committee.[84]

In October 2012, the HRC found Australia's response unsatisfactory and 'suspended' dialogue on the matter of *Nystrom v Australia*.[85]

Mr Nystrom remains in Sweden. His right to family and his right to return to his own country remain in continuous violation from December 2009 to the present. Given this is a current, not a past, violation, and given Mr Nystrom's mental illness and destitution in Sweden, Remedy Australia considers this case a serious and urgent matter requiring remedy. It urges the Committee to resume follow-up as a matter of priority.

Annette Turner, Stefan Nystrom's sister (Photo: Olivia Ball)

Committee, *Report of the Human Rights Committee*, vol 2, UN GAOR, 67th sess, UN Doc A/67/40 (30 March 2012) 484).

82 Attorney-General's Department, *Response of the Australian Government to the Views of the Committee in Communication No 1557/2007, Nystrom et al v Australia* (undated) <http://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/NystrometalvAustralia-AustralianGovernmentResponse.pdf> [14].

83 Ibid [14], [15].

84 Human Rights Committee, *Report of the Human Rights Committee, vol 1*, UN GAOR, 68th sess, UN Doc A/68/40 (March 2013) 147.

85 Ibid 148.

Rogerson v Australia

Violation: ICCPR art 14(3)(c)

Lodged: 20 April 1996
Concluded: 15 April 2002

Status: **Remedied**

English-Australian barrister Andrew Rogerson was practising in the Northern Territory (NT) of Australia and receiving treatment for bipolar mood disorder ('manic depression'). A client cancelled Mr Rogerson's retainer then took out a restraining order against him. Mr Rogerson resisted attempts to serve the restraining order, later claiming 'his deranged behaviour [was] indicative of his poor mental state at the time'.[86] In 1992, he was found in contempt of court and his practising certificate was cancelled. Complaining in his UN petition that his appeal to the NT Court of Appeal took two years, he said he suffered a 'destroyed career, broken health and de facto bankruptcy'.[87]

The HRC dismissed a number of Mr Rogerson's complaints against Australia, but found that he had suffered a violation of his right to be tried without delay. The Committee regarded its finding of a violation constituted 'sufficient remedy' and recommended no substantive remedies.

'The Committee considers that its finding of a violation of the rights of the author under article 14(3)(c), of the Covenant constitutes sufficient remedy ...'

HRC, 2002

Ironically, the *Rogerson* decision was the slowest of all those concerning Australia, taking six years to be concluded. By then, Mr Rogerson had returned to the UK, where he resumed practice as a barrister.[88]

The HRC did not recommend any action on Australia's part and has declared the case satisfactorily concluded.[89] The author cannot be located.

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86 Human Rights Committee, *Views: Communication No 802/1998*, 74th sess, UN Doc CCPR/C/74/802/1998 (3 April 2002) ('*Rogerson v Australia*') [5.2].

87 Ibid [3.1].

88 Email from John McCormack, Rogerson's former lawyer (31 May 2011).

89 Human Rights Committee, *Report of the Human Rights Committee, vol I*, UN GAOR, 57th sess, UN Doc A/57/40 (2002) 119.

Shafiq v Australia

Violations: ICCPR arts 9(1) and 9(4)

Lodged: 5 November 2004
Concluded: 31 October 2006

Status: **Partially remedied**

A young Bangladeshi man fled his homeland fearing reprisals from a banned political party. Having been left at an orphanage as a child, Mr Shafiq has no birth certificate or identity papers, no knowledge of his origins or even a surname.[90] Bangladesh has no record of him and denies he is a citizen, rendering him effectively stateless.

Australia detained him on his arrival in 1999 and, disbelieving his refugee claim, tried unsuccessfully to deport him. Mr Shafiq became mentally ill in detention, to the point of hospitalisation. A psychiatric medication given to him caused Mr Shafiq to contract diabetes – a known side-effect of the drug – rendering him insulin-dependent for life.

After seven-and-a-half years in immigration detention, Mr Shafiq became Australia's longest-serving detainee. The HRC found his detention was arbitrary and that he had been denied habeas corpus. It recommended he be released and compensated.

'The State party is under an obligation to provide the author with an effective remedy, including release and appropriate compensation.'

HRC, 2006

Finally released in 2007 on a 'removal pending' visa,[91] Mr Shafiq believes he would soon die if deported, due to the difficulty he would have obtaining insulin in Bangladesh. Years later, his immigration status remains unchanged.

The HRC maintains follow-up dialogue with Australia.

Remedy Australia deems this case as partially remedied, since Mr Shafiq was released from detention a matter of months after the Committee reached its Final Views. However he has not been compensated.

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90 He adopted a given name (Danyal) after arriving in Australia, but is still known simply as Shafiq.

91 Introduced in 2005, Removal Pending Bridging Visas free detainees 'who have been cooperating with efforts to remove them from Australia, but whose removal is not reasonably practicable at that time.' Holders of this type of visa are permitted to work and access Medicare. (Department of Immigration and Citizenship, *Australian Immigration Fact Sheet 85: Removal Pending Bridging Visa* (28 February 2011) <http://www.immi.gov.au/media/fact-sheets/85removalpending.htm>).

Shams et al v Australia

Violations: ICCPR arts 2(3), 9(1) and 9(4)

Lodged: 9 February–25 May 2004
Concluded: 20 July 2007

Status: **Unremedied**

Eight unrelated young men from Iran, fearing persecution for a range of reasons, arrived in Australia by boat and were detained. Represented by the same lawyer, each submitted a communication to the HRC between February and May 2004, containing similar allegations concerning their treatment in detention and their fear of refoulement. Australia responded to all eight cases together, and the HRC, in its Final Views, did the same, hence eight independent communications became *Shams et al.*

The Committee found that all the authors had suffered arbitrary detention in excess of four years, had been denied habeas corpus and the right to remedy and that each should be compensated for the length of his detention. Seven were ultimately found by Australia to be refugees, while the eighth was given a humanitarian visa.

> **'The authors are entitled to an effective remedy. In the Committee's opinion, this should include adequate compensation for the length of the detention to which each of the authors was subjected.'**
>
> **HRC, 2007**

The refugee legal service which represented these men disbanded before the HRC issued its Final Views and none of the authors, nor the lawyer involved, was aware of the outcome of the case. Seven of the eight men have now been located and told about their UN communication. None of them remembered the communication being made on their behalf or knew anything about it. A couple had come across the decision online when searching for their own name, but did not appreciate its meaning or significance. All of them strongly dispute Australia's claims, recounted in the decision, about conditions in immigration detention. Some of them have initiated legal proceedings to secure compensation. To briefly summarise each case and its current status:[92]

[92] Human Rights Committee, *Views: Communication Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (11 September 2007) ('*Shams et al v Australia*')

Saeed Shams[93] was a civil engineering student and taekwondo champion who impulsively joined a street protest over the quality of the urban water supply. Police opened fire on the crowd and Mr Shams was arrested. In gaol, he was beaten and kept in solitary confinement, apparently to force a confession. When brought to trial with a number of others, Mr Shams managed to escape. He went into hiding until he could leave Iran.

Mr Shams was arbitrarily detained by Australia for four years and six months, prior to being recognised as a refugee. He initiated a compensation claim against Australia in 2008. In 2014, the case remains unresolved, but Mr Shams' lawyer is confident it should go to mediation soon and that the medical evidence in support of of his case is strong.[94]

Kooresh, who prefers his surname is not used, was a student of building design and drafting and father of a one-year-old daughter when he fled Iran fearing persecution for his support for an illegal political movement called Pan-Iranism. A fellow member whose arrest prompted Kooresh's departure was (he later learned) beaten to death.

Kooresh was arbitrarily detained by Australia for four years and eight months, prior to being recognised as a refugee. He has initiated a compensation claim against Australia.

[One of the *Shams* cases is not summarised here at the author's request.]

93 His given name is misspelled in the HRC decision. It should have two Es.

94 Personal communication with Tony Kerin of law firm Johnston Withers (19 March 2014).

Payam Saadat (pictured) was arrested and tortured when his secret conversion to Zoroastrianism was discovered. While anyone born Zoroastrian (or Jewish or Christian) is tolerated by the Iranian State, it is illegal for Muslims to abandon their faith in favour of another. His family paid his bail and he fled the country.

Payam Saadat in 2012 (Photo: Olivia Ball)

Mr Saadat arrived in Australia in 2000 and was arbitrarily detained for four years and four months, before being accepted as a refugee.

Behrouz Ramezani was a truck driver working for the Iranian government when he discovered corruption: human remains exhumed from civilian cemeteries presented to bereaved families as the remains of soldiers killed in the Iran–Iraq war. In disgust and disillusionment, Mr Ramezani refused to keep quiet about it. He was forced to flee, leaving behind his wife and young daughter.

Mr Ramezani arrived in Australia in 2000 and was arbitrarily detained for four years and three months, before being accepted as a refugee, during which time his family in Iran concluded he must have died.

Behzad Boostani arrived in Australia in 2000 and was arbitrarily detained for four years and eight months, before being accepted as a refugee. Owing to a compensation claim pending, further details about Mr Boostani remain in confidence, at his request.

Mehran Behrooz[95] arrived in Australia in 2001 and was arbitrarily detained for three years and 11 months before being accepted as a refugee. In legal proceedings before successive South Australian courts and the High Court of Australia, Mr Behrooz testified that the conditions in immigration detention were harsh, inhumane and punitive.[96]

In 2012, Mr Behrooz learned about the HRC's Views in *Shams et al v Australia* and engaged a lawyer to commence a compensation claim on his behalf.

Woomera immigration detention centre, where at least some of the Shams et al *detainees were held. Described by former Australian Prime Minister Malcolm Fraser as a 'hell-hole', it closed in ignominy in 2003.*[97]

Amin Houvedar Sefed is the only *Shams et al* author who cannot be located. He arrived in Australia in October 2000 and was arbitrarily detained for four years and 11 months. Despite obtaining a permanent humanitarian visa in 2005,[98] reports suggest Mr Sefed may have since left Australia.

Follow-up dialogue regarding the *Shams et al* cases is ongoing.

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95 His given name is misspelled in the HRC's Final Views. It is Mehran, not Meharn. In his High Court decision, it is spelled Mahran.

96 Justice Kirby invoked the ICCPR to contend that administrative custody must not breach human rights:

> [I]t has long been established by the authority of this Court that statutes are to be interpreted and applied so as to be in conformity with international law ...
> [T]he ICCPR contains provisions relevant to the detention of 'unlawful non-citizen[s]' under the [*Migration*] *Act* and the conditions in which (and time during which) such persons might be so detained. Relevant requirements are found in Art 9 of the ICCPR. This is concerned with the right to liberty and security of the person and the right to be exempt from arbitrary detention and to bring proceedings without delay in respect of the lawfulness of detention. Article 10(1) of the ICCPR contains the requirement that persons deprived of their liberty must 'be treated with humanity and with respect for the inherent dignity of the human person'. By art 7 it is provided that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Both by the common law, and by force of such provisions of international law, infringement of these rights is not lawful in this country unless sustained by 'a clear expression of an unmistakable and unambiguous intention' in valid legislation.

Behrooz v Department of Immigration and Multicultural and Indigenous Affairs (2004) 219 CLR 486, 529 [126], 530–1 [128] (footnotes omitted).

97 ABC Radio National, 'Fraser Seeks Leave to Visit Woomera', *AM*, 12 December 2000 <http://www.abc.net.au/am/stories/s222722.htm>;
Photo: Project SafeCom Inc <http://www.safecom.org.au/media-250602.htm>.

98 *Shams et al v Australia* [2.6].

Tillman v Australia

Violations: ICCPR arts 9(1), 14 and 15(1)

Lodged: 9 October 2007
Concluded: 18 March 2010

Status: **Remedied**

In a case parallel, but unrelated, to *Fardon v Australia*, this Australian man has been gaoled a number of times over a '30-year history of worsening sex offences'.[99] In 2007, at the conclusion of a ten-year sentence, the New South Wales Attorney-General used new legislative provisions[100] to obtain a Supreme Court order to keep Ken Tillman, presumed a continuing threat to the community, in 'preventive detention' a further year under conditions identical to his imprisonment. During this time he participated in a treatment programme for sex offenders,[101] which he had previously refused to do, and he petitioned the UN, represented by a nun who visited him throughout his imprisonment. His communication was drafted by legal academic and barrister Prof Patrick Keyzer.

In 2008, Mr Tillman was released under a supervision order requiring him to wear an electronic monitoring device and comply with 35 other conditions. His lawyer described it as akin to house arrest.[102]

'The State party is under an obligation to provide the author with an effective remedy, including termination of his detention under the *Crimes (Serious Sex Offenders) Act*.'

HRC, 2010

In 2010, the HRC found Mr Tillman had suffered arbitrary detention, penal in character, yet ordered by civil proceedings lacking due process, under legislation retroactively applied, without a fresh trial. It suggested an effective remedy should include his release from prison, which had already occurred. The HRC has deemed this response unsatisfactory and follow-up dialogue ongoing.[103]

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99 'NSW Govt to Challenge Tillman's Release', *Sydney Morning Herald* (online), 24 April 2007 <http://www.smh.com.au/news/National/NSW-govt-to-challenge-Tillmans-release/2007/04/24/1177180632534.html>.

100 *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 17(1b).

101 Ian Freckelton and Patrick Keyzer, 'Indefinite Detention of Sex Offenders and Human Rights: The Intervention of the Human Rights Committee of the United Nations' (2010) 17 *Psychiatry, Psychology and Law*, 345, 347.

102 'Sydney Sex Offender Back into Custody', *Sydney Morning Herald* (online), 3 May 2007 <news.smh.com.au/national/sydney-sex-offender-back-into-custody-20070503-at3.html>.

103 Human Rights Committee, *Report of the Human Rights Committee, vol 1*, UN GAOR, 68th sess, UN Doc A/68/40 (March 2013) 148.

Toonen v Australia

Violations: ICCPR arts 2(1) and 17(1)

Lodged: 25 December 1991
Concluded: 31 March 1994

Status: **Remedied**

Nick Toonen was a gay Tasmanian in a state where consenting sex between adult men in private was still criminalised with a penalty of up to 21 years' gaol. The provision was last enforced in 1984[104] and rights activists were determined to have it repealed.

Mr Toonen (pictured), who was the first person to petition any of the UN human rights treaty bodies concerning Australia, submitting his communication on the day the ICCPR-OP1 entered into force for Australia. He alleged that criminalising consensual sexual contact between men in private was a violation of his right to privacy and that the only effective remedy would be repeal of the relevant provisions of the Tasmanian *Criminal Code*.

(*Photo: Olivia Ball*)

Both the Commonwealth of Australia and the Tasmanian Government responded to the complaint; Australia agreed with Mr Toonen, noting that homosexuality had been decriminalised in all other Australian jurisdictions. The Tasmanian Government defended its laws, however, on public health and moral grounds. Mr Toonen believes the embarrassment he caused the Tasmanian Government cost him his job: the Government threatened to withdraw funding from his employer, the Tasmanian AIDS Council, if it did not sack him.[105]

The HRC agreed that the laws were an arbitrary interference with Mr Toonen's right to privacy and that an effective remedy would require the repeal of those laws. It also established that the prohibition on discrimination on the basis of 'sex' found in articles 2(1) and 26 includes sexual orientation.

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104 Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) ('*Toonen v Australia*') [6.3].

105 Milan Nord, 'Toonen Paved the Way,' *Tidningen Kom Ut* (Come Out Magazine, Sweden) <http://www.tidningenkomut.se/2010/12/toonen-won-in-the-un/>.

Australia responded to this landmark decision by enacting the *Human Rights (Sexual Conduct) Act 1994* (Cth) which effectively decriminalised consenting sexual activity between adults throughout Australia and prohibited laws that arbitrarily interfere with the sexual conduct of adults in private. Tasmania subsequently amended its *Criminal Code*, which made it consistent with the Committee's Views.

The HRC deems Australia's response satisfactory.

'The author is entitled to a remedy. In the opinion of the Committee, an effective remedy would be the repeal of sections 122 (a) and (c) and 123 of the Tasmanian *Criminal Code*.'

HRC, 1994

Winata and Li v Australia

Violations: Potential breaches of ICCPR arts 17(1), 23 and 24(1)

Lodged: 11 May 2000
Concluded: 26 July 2001

Status: **Partially remedied**

Indonesian citizens Hendrick Winata and So Lan Li arrived in Australia separately in the 1980s and overstayed their visas, undetected. In 1988 they had a son, Barry, who obtained Australian citizenship on his tenth birthday. The next day, his parents applied for refugee status, claiming a fear of 'persecution in Indonesia owing to their Chinese ethnicity and Catholic religion'.[106] Their application was rejected and the Immigration Department ordered their deportation.

The HRC found that to deport Mr Winata and Ms Li would arbitrarily interfere with their family and breach Australia's obligation to protect families and children. Australia rejected the Committee's Views, but did not deport Mr Winata and Ms Li.[107] Eventually, the couple obtained permanent residency in Australia.[108]

Follow-up dialogue with HRC is reportedly ongoing. Perhaps the Committee remains to be satisfied regarding non-repetition measures.

'The State Party is under an obligation to provide the authors with an effective remedy, including refraining from removing the authors from Australia before they have had an opportunity to have their application for parent visas examined with due consideration given to the protection required by Barry Winata's status as a minor.

'The State party is under an obligation to ensure that violations of the Covenant in similar situations do not occur in the future.'

HRC, 2001

106 Human Rights Committee, *Views: Communication No 930/2000*, 72nd sess, UN Doc CCPR/C/72/D/930/2000 (26 July 2001) ('*Winata and Li v Australia*') [2.2].

107 Australia's interim response proposed that Mr Winata and Ms Li would have to leave the country and wait in a 'queue' for a parent visa. Given such visas are in 'high demand,' with only a 'limited number' granted each year, 'it would be some time' before the applicants could expect to return to Australia. The HRC was subsequently advised that Winata and Li had not been required to leave the country after all (Human Rights Committee, *Report of the Human Rights Committee, vol I*, UN GAOR, 57th sess, UN Doc A/57/40 (2002) [232]).

108 Personal communication with the couple's immigration lawyer, Anne O'Donoghue (Sydney, NSW, 14 February 2013).

Young v Australia

Violation: ICCPR art 26

Lodged: 29 June 1999
Concluded: 18 September 2003

Status: **Remedied**

Australian man Edward Young (pictured) was in a same-sex relationship with World War Two veteran Larry Cain for 38 years until the latter's death in 1998. Young was denied the state pension paid to the dependants of war veterans who have died of war-related causes. The *Veterans' Entitlements Act 1986* (Cth) explicitly stated that eligible partners are of the opposite sex to the veteran, and this was the reason given for refusing Mr Young's application.

Edward Young in 2011 (Photo: Olivia Ball)

The *Toonen* case had established sexual orientation as a proscribed ground for differentiation under article 26, and the HRC found in Mr Young's favour. It suggested Mr Young's application for the pension be reconsidered without prejudice, and the law amended, if necessary.

Australia rejected the Committee's Views and did nothing to remedy Mr Young's case. A change of government in 2007, however, led to the amendment of 68 instances of

same-sex discrimination in federal legislation[109] in a broad range of areas including veterans' entitlements, and the new government cited *Young v Australia* as an influencing factor.[110]

Mr Young has still not received the pension, however, as the Department of Veterans' Affairs now contests his claim that Mr Cain (pictured, in 1943) died of war-related causes. While there are numerous precedents supporting Mr Young's claim,[111] the dispute is now a question of medical evidence.

'The author is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law.

'The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.'

HRC, 2003

The HRC has deemed Australia's response unsatisfactory and follow-up dialogue ongoing.

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[109] Penny Sharpe, member of the New South Wales state parliament, cites a higher figure of 85 amendments to Commonwealth legislation (in her nomination of Edward Young for the award of Officer of the Order of Australia, 15 May 2012, 1).

[110] At the tabling of the *Same-Sex Relationships Bill* in the House of Representatives, Melissa Parke MP said,

> With this bill, the Rudd Labor government is saying to Edward Young, and to all those who find themselves in similar situations, that this Government respects the undertakings it has made in international law and will ensure that such injustices are not perpetuated.

(*Hansard*, 23 September 2008 <www.melissaparke.com.au/Speeches/house-debates-same-sex-relationships-equal-treatment-in-commonwealth-laws-general-law-reform-bill-2008-230908.html>).

[111] Mr Young's partner Larry Cain took up smoking as a teenager in the Australian army and smoked to the end of his life, when he suffered a stroke and damaged heart valve. There are Australian veterans' widows who have successfully claimed the dependants' pension on the basis of a tobacco addiction acquired during military service leading to fatal illness, and the Department of Veterans' Affairs has accepted these cases as 'war-caused' deaths. As *Young v Australia* states:

> 'Under Australian jurisprudence, veterans who died from a smoking related illness have been found to have died from a war-caused injury ... if the reason for smoking was related to enlistment in the army. ... even when the connection between the veteran's death and his war-caused injury was made only posthumously' [para. 5.10].

A similar claim concerning high salt consumption has also been accepted as a war-related death. (Ewan Gilbert & Matt Eaton, 'Widow awarded Army pension over late husband's love of salt', *ABC News* (online) 2 January 2014 <www.abc.net.au/news/2014-01-02/qld-widow-awarded-army-pension-over-late-husbands-salt-addiction/5182214>).

Chun Rong v Australia

Violation: CAT art 3 (actual and potential)

Lodged: 15 March 2010
Concluded: 5 November 2012

Status: **Unremedied**

This Chinese Falun Gong practitioner was a leader of the spiritual movement in his village when, in 1999, Falun Gong was banned in China. Thousands of practitioners have since been gaoled, interned or committed to psychiatric hospitals for the criminally insane.[112] When a member of Ke Chun Rong's group was detained, he organised a number of Falun Gong practitioners to protest at the police station. In 2001, Mr Ke[113] was himself detained for 16 days. '[I]nterrogated and tortured nearly every day', he was 'told to renounce his beliefs and give up the names of those who practised Falun Gong with him'.[114] Another practitioner 'organised the payment of bribes to secure his release'.[115]

In 2004, Mr Ke left his wife and two sons and travelled to Australia on a business visa. He applied for asylum, but his negligent migration agent did not present crucial evidence of his claims, notify him of an interview he was expected to attend at the Refugee Review Tribunal, or represent him in court.[116] His refugee claim was rejected. Australia did 'not dispute that Falun Gong practitioners in China have been subjected to torture', but did not believe Mr Ke was a Falun Gong practitioner or that he was 'detained or mistreated' as he claimed,[117] despite his physical scars and diagnosis of post-traumatic stress disorder.

Mr Ke exhausted domestic remedies by seeking unsuccessfully to re-submit a fresh refugee application. After four years living freely in the community, he was arrested for overstaying his visa and detained for what would ultimately be two-and-a-half years. He believes fellow detainees who observed his continuing Falun Gong practice in detention in Australia must have informed on him since returning to China, because pressure on his family resumed. In November 2012, his wife was detained for four or five days.[118]

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112 US Department of State, *International Religious Freedom Report for 2011* (September 2011) <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dlid=192619>.

113 The author's name is Ke Chun Rong. His representative, Veronica Spasaro, says his family name is Ke, not Chun Rong (email from Ms Spasaro, 24 July 2013).

114 Karen Barlow, 'Advocates "Appalled" by Handling of Chinese Refugee's Case', *ABC News* (online) 16 April 2013 <www.abc.net.au/news/2013-04-15/advocates-appalled-by-australias-handling-of-refugee-case/4630876>.

115 Committee Against Torture, *Views: Communication No 416/2010*, 49th sess, UN Doc CAT/C/49/D/416/2010 (5 November 2012) ('*Chun Rong v Australia*') (n 6).

116 Ibid [2.8].

117 Ibid [4.5], [7.5].

118 Barlow, above n 115.

Uniting Church members in Sydney assisted Mr Ke to petition CAT, which found a breach of article 3 in that Australia had 'failed to duly verify the complainant's allegations and evidence through … effective, independent and impartial review', and that Australia would breach article 3 if it proceeded to refoule Mr Ke to China.

Australia did 'not necessarily accept the conclusion', but is reported to have said it may allow the author to 'make a further application for a Protection Visa'.[119]

'The Committee against Torture concludes that the deportation of the complainant to China would constitute a violation of article 3 of the Convention.'

CAT, 2012

In March 2014, his former representative confirmed that the Minister for Immigration did allow Mr Ke to apply for a visa under Australia's complementary protection provisions.[120] He has been released into 'community detention' to await the outcome of his application.[121] This means he is provided with housing and a small allowance to live freely in the community, but is not permitted to work.[122] Remedy Australia has been unable to establish the outcome of his visa application.

Given CAT's assessment in *Chun Rong v Australia*, Australia remains in potential violation of art 3 for as long as Mr Ke remains at risk of deportation to China. Since torture and cruel, inhuman or degrading treatment or punishment are regarded as gross violations of human rights,[123] Mr Ke's case remains of utmost concern.

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119 Ibid.

120 Since 2012, Australia has issued Protection Visas to applicants who, though they may not fit the *Refugee Convention* definition, engage Australia's non-refoulement obligations under ICCPR and CAT. (Department of Immigration and Border Protection, 'Fact Sheet 61a' (2014) <http://www.immi.gov.au/media/fact-sheets/61a-complementary.htm>).

121 Emails from Frances Milne of Balmain for Refugees, 10 & 17 March 2014.

122 Department of Immigration and Border Protection, 'Fact Sheet 83: Community Detention' (2014) <https://www.immi.gov.au/media/fact-sheets/83acommunity-detention.htm>.

123 The UN Special Rapporteur on the Right to Reparation suggests a list of human rights abuses that may be considered 'gross' violations:

> genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.

(Theo Van Boven, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms', UN Doc E/CN4/Sub2/1993/8 (1993), principle 1).

Elmi v Australia

Violation: Potential breach of CAT art 3

Lodged: 17 November 1998
Concluded: 14 May 1999

Status: **Unremedied**

A Somali asylum seeker from a persecuted ethnic minority resisted refoulement because he feared torture by the Hawiye clan dominant in his home town of Mogadishu. Somalia was a 'failed state' engulfed in civil war, the Communist dictatorship having collapsed. Sadiq Elmi's refugee claim was rejected by Australia and he petitioned the Committee Against Torture to prevent his deportation. CAT found that, in the absence of a conventional government, the Hawiye clan was exercising quasi-governmental control, at least in the capital, and the threat of torture by this clan could, under these circumstances, fall under the Convention (article 1). Therefore, Australia would violate article 3 if it deported Mr Elmi to Somalia.

Sadiq Elmi in a security van bound for the airport in Australia's second attempt to deport him to Somalia, in defiance of CAT's interim request. The deportation was disrupted by civil society action and abandoned.[124]

Australia responded, not by issuing him with a refugee visa, but by allowing Elmi to re-apply for asylum from the beginning, keeping him in detention throughout. His second application for asylum also failed and, in January 2001, after more than three years in detention, Elmi 'chose' to leave Australia, 'heading in the general direction of Somalia.'[125] His destination and present whereabouts are unknown.

Given Mr Elmi appeared to leave Australia voluntarily, and reportedly withdrew his communication, CAT has considered the case closed.[126]

Remedy Australia, however, questions the voluntariness of Mr Elmi's departure from Australia. A voluntary departure cannot be refoulement, but only if truly voluntary.

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[124] Photo: Ross Swanborough (Perth, 1998).

[125] Susan Kneebone, *The Refugees Convention 50 Years On: Globalisation and International Law* (Ashgate: Burlington, VT, 2004), 190.

[126] Committee Against Torture, *Report of the Committee Against Torture 2006-07*, UN Doc A/62/44 <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/62/44&Lang=E> 103.

The 'principle of voluntariness ... follows directly from the principle of non-refoulement,' says the UNHRC and, as such, 'is the cornerstone of international protection.'[127] The UNHCR's *Handbook on Voluntary Repatriation* deems that in situations where people are 'subjected to pressures and restrictions and confined to closed camps, they may choose to return, but this is not an act of free will.'[128] Where people are 'being subjected to arbitrary detention or severely restrictive detention regimes,' Amnesty International, likewise, has 'serious concerns about whether returns can be truly voluntary.'[129] 'Failed' asylum seekers subject to mandatory detention in Australia have very little choice. Mr Elmi's choices appeared to be to end his prolonged detention by agreeing to leave, or else endure indefinite detention until forced deportation.

Remedy Australia considers Australia did not act in good faith in the matter of *Elmi v Australia*. The Committee Against Torture advised Australia that 'substantial grounds exist for believing that [Mr Elmi] would be in danger of being subjected to torture if returned to Somalia.'[130] Beyond his eligibility for complementary protection under the Torture Convention, the implication of CAT's decision in *Elmi* was that Mr Elmi also had a valid claim under the terms of the *Refugee Convention*: one which CAT deemed to be a well-founded fear of persecution on the basis of his ethnicity. Yet Australia did not appear to take account of this view, nor the sources on which it was based, in reviewing Mr Elmi's refugee claim. Australia rejected his second refugee claim in spite of this finding.

'The Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Somalia.

... in the prevailing circumstances, the State party has an obligation ... to refrain from forcibly returning the author to Somalia or to any other country where he runs a risk of being expelled or returned to Somalia.'

CAT, 1999

While Mr Elmi's fate is unknown, given that the State Party arranged for his departure from Australia, it must know, and ought to make public, his destination when he boarded that flight in January 2001, to permit an assessment of whether Mr Elmi was returned 'to Somalia or to any other country where he [ran] a risk of being expelled or returned to Somalia.'[131] Until this information is made available, Australia's compliance with CAT's Final Views in *Elmi v Australia* remain in doubt.

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127 UNHCR, *Handbook on Voluntary Repatriation: International Protection* (Geneva, 1996) 10.

128 Ibid.

129 Amnesty International, 'Statement to the 86th Session of the Council of the International Organization for Migration' (20 November 2003) 2.

130 Committee Against Torture, *Views: Communication No 120/1998*, 22nd sess, UN Doc CAT/C/22/D/120/1998 (25 May 1999) ('*Elmi v Australia*') [6.9].

131 *Elmi v Australia* [7].

Conclusion

Elizabeth Evatt, former member of the Committee on the Elimination of All Forms of Discrimination Against Women and the Human Rights Committee, characterises Australia's compliance with Committee Views on individual communications as 'abysmal'.[132] Remedy Australia deems only six out of 33 Australian cases (18%) to have been fully remedied.

In some instances, outcomes appear ambiguous. *Young* and *Elmi*, for instance, could be said to have met with compliance in one sense, but these cases did not meet the aims or, arguably, secure the rights of, their authors. A number of authors who achieved their aims (eg Madafferi & Madafferi and Hagan) did so in spite of, rather than because of, their UN communication. Meanwhile, follow-up on *Kwok* has been concluded by the HRC, on the basis of poor advice, and at the expense of justice. Remedy Australia considers the case only partially remedied.

In Remedy Australia's estimation, as outlined in this report, 82% of individual communications upheld against Australia have been only partially remedied or, more often, not remedied at all. In at least three of these cases, Australia has not acted to end the violations identified, let alone make amends; rather, the abuses are ongoing at the time of writing. This includes gross violations of human rights such as the indefinite and prolonged arbitrary detention of 39 people (FKAG et al and MMM et al) and a man at risk of being deported to a place he may face torture (Ke Chun Rong). Remedy Australia considers these unremedied or only partially remedied current abuses to be in the most urgent need of the Torture and Human Rights Committees' attention, as cessation is the first obligation of the right to remedy:

Current human rights violations

Unremedied	1. FKAG et al
	2. MMM et al
	3. Ke Chun Rong[133]
Partially remedied	4. Stefan Nystrom

[132] Interview with Elizabeth Evatt, now a member of Remedy Australia's Advisory Council (Sydney, NSW, 26 March 2013).

[133] The outcome of Mr Ke's application for a complementary protection visa is unknown. If he is still at risk of deportation to China, Australia remains in potential violation of CAT and his case (*Chun Rong v Australia*) is unremedied. If he has obtained a permanent visa, his case has been remedied.

No less important is the unfulfilled right to an effective remedy of the authors of 17 complaints to HRC and CAT (52%) concerning human rights violations which have ceased, but have not been remedied or prevented from recurring:

Unremedied past violations

1. Mr A
2. Heman Baban
3. Ali & Roqaiha Bakhtiyari
4. Corey Brough
5. Patrick Coleman
6. D & E
7. Lucy Dudko
8. Bernadette Faure
9. Saeed Shams
10. Kooresh
11. *Shams et al* [name withheld]
12. Payam Saadat
13. Behrouz Ramezani
14. Behzad Boostani
15. Mehran Behrooz
16. Amin Houvedar Sefed
17. Sadiq Shek Elmi (CAT)

To be considered fully remedied, the author must have obtained the substantive remedies recommended by the Committee (if any), plus the State Party must have taken genuine steps to prevent the violation recurring, where requested by the Committee. (Thirty-six percent of Final Views in these successful Australian cases were silent on the question of non-repetition measures.)

In addition to *Nystrom v Australia*, six further communications have resulted in partial remedy, often after considerably delay. Typically, the abuse complained of has ended, or threat of potential violation is averted, but there has been no effort at restitution or reparation, or implementing effective non-repetition measures. Thus, significant remedies remain outstanding in these cases:

Partially remedied past violations

Incomplete individual remedy (no measures requested to prevent repetition)	1. Kwok Yin Fong
	2. Shafiq
No individual remedy, but non-repetition measures taken	3. Cabal & Pasini
Individuals remedied, but without non-repetition measures	4. Madafferis
	5. Winata & Li
Incomplete individual remedy, without non-repetition measures	6. Mr C

Of the 33 Australian cases resulting in findings of treaty violations, only six (18%) have been fully remedied:

Fully remedied

Individual remedy & non-repetition measures	1. Hagan (CERD)
	2. Nick Toonen
	3. Edward Young
Individual remedy, with no non-repetition measures requested	4. Robert Fardon
	5. Ken Tillman
No remedial action required	6. Andrew Rogerson

Of these, only the response to *Toonen* was a case of unimpeachably good faith compliance, as evidenced by federal law reform in response to the HRC's Views and, ultimately, Tasmanian reforms. In the *Rogerson* case, no remedial action was required of the State Party, while in *Hagan*, the State Party rejected CERD's Views and Mr Hagan secured his objective through dogged campaigning. In *Fardon*, the courts, rather than the State Party, effected the author's release into a modified form of detention that appears to comply with the HRC's specified remedy.

It is important to note that Australia has been far more inclined to cooperate with some (though not all) of the Committees' Interim Views – notably by halting deportations – and this has been vitally important to the petitioners concerned. This suggests that it is worth authors seeking, and Committees issuing, interim requests in Australian communications. Authors benefit from requesting interim measures when drafting communications – in circumstances where a risk of irreparable harm can be demonstrated – as Interim Views may be more timely and more likely to attract compliance by Australia and therefore more useful than any Final Views, which are likely to meet a cooler reception.

As difficult as it is for authors to secure a substantive remedy consequent to having their treaty-body communication upheld, the task of ensuring that Australia

implements effective non-repetition measures is greater. These are goals Remedy Australia has set itself, as well as advocating for the State Party to deal more transparently and positively with any future jurisprudence concerning Australia. We commend the Committees for their work on individual communications and welcome dialogue to enable us to support and cooperate with you as best we can.