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Inquiry into Australia's Human Rights Dialogue Process

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Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade

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The Australia-China Human Rights Dialogue

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> The aim of the dialogues is to hold frank and constructive discussions to demonstrate the commitment of both countries to the talks and the overall strength of their bilateral ties with Australia. Foreword to the Inquiry into Australia's Human Rights Dialogue Process, JSCFADT website

This submission primarily addresses the issue of Australia's human rights dialogue with China, but makes some references to its dialogues with other regional states. In the first section on procedures, it addresses itself to four of the Committee's terms of reference, criticising the lack of:

- Parliamentary participation and oversight;
- Involvement of non-government organisations;
- Reporting requirements and mechanisms; and
- Monitoring and evaluation of outcomes.

In the second section, it analyses one of the results of these procedural weaknesses, the lack of substantive outcomes issuing from the Australia-China dialogue.

In the third section, it discusses the inherent limitations on bilateral dialogue, as opposed to multilateral mechanisms, as a vehicle for achieving human rights improvements. A comparison between bilateral and multilateral monitoring is necessitated by China's precondition to dialogue requiring Australia to refrain from cosponsoring resolutions in the UN Human Rights Commission which are critical of China's human rights. This precondition is yet another aspect of the procedural limitations on the dialogue. It was either explicitly or implicitly agreed to by Australia before the bilateral dialogue commenced in 1997, and has since been met every year. The result has been that Australia, which previously cosponsored the China resolution along with the US and other states, no longer does so. This undertaking, whether explicit or merely implicit, actively undermines well-established UN monitoring mechanisms, as well as undermining Australian sovereignty and values. A second precondition, this time imposed by the Australian side, is that the human rights dialogue should in no way be allowed to disturb its bilateral ties with China. Thus, as the JCFADT website states: 'The aim of the dialogues is to hold frank and constructive discussions to demonstrate the commitment of both countries to the talks *and* the overall strength of their bilateral ties with Australia'. The result of these preconditions is that every year Australia approaches the bilateral dialogue with its hands already tied behind its back. It has no bargaining power: it is able neither to invoke the possibility of international disapproval nor to apply sufficient Australian pressure for fear of destabilising the relationship.

Finally, my submission concludes with recommendations which follow from the above analysis. If the Committee recommends that the bilateral dialogue, despite its shortcomings,

should continue, my recommendation is that it should only do so if the procedural shortcomings listed above are addressed, and an attempt is made to turn the dialogue into a meaningful reciprocal inquiry which also allows Australian human rights shortcomings to be publicly aired. If, on the other hand, an alternative to bilateral dialogue is sought, my recommendations outline the most appropriate methods which will on the one hand protect Australian sovereignty and values, including support for multilateralism, and on the other hand preserve the technical assistance to China which represents the only real contribution made under the present arrangement to the bilateral relationship.

Two of my recent publications attached to this submission form the background to my argument.[1] The first, 'Human Rights: From Sanctions to Delegations to Dialogue', documents the progressive attenuation in Australia's response to China's human rights abuses since 1989 in response to its rise as a global and regional economic and political power. The last and weakest phase is the bilateral dialogue. This chapter also highlights Australia's perception that it has compelling geostrategic reasons to go softly on China's human rights. The second article, 'States Monitoring States', is a comparison between the process and substantive outcomes of the bilateral monitoring of China by the US and by Australia. It analyses the weaknesses inherent in bilateral monitoring and, by contrast, the strengths of multilateral monitoring.

I Procedural weaknesses

The procedural weaknesses of the human rights dialogue process are highlighted by the differences between that process and the previous parliamentary human rights delegations which monitored China's human rights between 1990 and 1992.

The most obvious difference is the lack of transparency and accountability in the current dialogue. The Australian parliamentary delegations exhibited accountability to the parliament and people through the representation of their members, their publicly available reports and the requirement that they report back to Parliament. In the case of the current dialogue, however, there is no such obligation to the public. The dialogue is lacking in most of the vital requirements of accountability, particularly those included in the terms of reference of the current Inquiry: sufficient parliamentary participation and oversight; involvement of non-government organisations; reporting requirements and mechanisms; and public monitoring and evaluation of outcomes.

Thus, my chapter, 'Human Rights', analyses the problem:

> The Australia-China human rights dialogue, which began in Beijing in August 1997, proved to be a major turning point in Australia's policy. It was not as transparent as the human rights delegations of the early 1990s, and no reports were published.[2] It was

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[1] Ann Kent, 'Human Rights: From Sanctions to Delegations to Dialogue', in Nicholas Thomas, ed., *Re-Orienting Australia-China Relations: 1972 to the Present* (London, Ashgate, 2004), 147-162; and Ann Kent, 'States Monitoring States: The United States, Australia, and China's Human Rights, 1990-2001', *Human Rights Quarterly* 23 (August 2001), no. 3, 583-624.

[2] The only publication issuing from it was a brief report, containing an itinerary and a short list of issues raised, by the first parliamentarian to take part in the dialogue, Peter Nugent, who was obliged by parliamentary rules to issue a personal report. See *Report of the*

neither representative nor accountable, being conducted entirely in camera by government officials, who initially included only one China specialist. In response to domestic criticism, efforts were made in subsequent dialogues to include more parliamentary representation: but the most that participants claimed privately was that their dialogue was held at 'a more senior level' than that of the Europeans, and that it had the advantage of establishing continuity. Most notably, the very *pro forma* nature of the bilateral interchange was suggested by the failure of Australian dialogue participants to synchronise their activity with China's European dialogue partners.

Although China sent reciprocal human rights dialogue delegations to Australia in 1998, and again in 2000, their achievements were more symbolic than real. In 1998, a meeting of the Chinese delegates with NGOs and a few human rights scholars was extremely short and the latter were constrained in the questions they were allowed to ask. On the second occasion, no NGO meeting was held, and the opportunity was used by the Chinese delegation to discuss other political issues, such as Australia's support for the Theatre Missile Defence System, in forums outside the dialogue.[3] According to interviewees, in this second visit only one day was devoted to dialogue, and, because the details of future technical assistance had already been worked out, only an hour was spent on this vital issue. Nevertheless, one source commented that on the second visit the Chinese delegation was more relaxed, and, in a meeting with members of the Joint Standing Committee on Foreign Affairs, Defence and Trade, for the first time asked questions about Australia's human rights, in particular about the plight of Australia's indigenous population, the Native Title Act, and the representation of women in the workforce. During the day of dialogue, the Department of Foreign Affairs and Trade handed out a large amount of material on refugees and Australian Aboriginals and, in informal conversation, members of the delegation asked about the incidence of HIV and prostitution in Australia. Otherwise, the exchange in the dialogue process was familiar to Australian ears, particularly on the subject of the continued need for administrative punishment, or reeducation through labour, in China.

Subsequent to my writing of that chapter, the Department of Foreign Affairs posted a seven page summary of the dialogue on its website, which limited itself to a listing of organisations involved on both sides, to the general topics discussed and to the places visited. Interestingly, no reference is made to the alleged reciprocal nature of the dialogue, or to Chinese views on human rights in Australia.[4] The *pro forma* nature of the summary is suggested by the repetition of three sentences, on the first occasion to describe the dialogue in 2002 (page 6) and on the second to describe the dialogue of 2003 (page 7): 'The formal talks in Canberra

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Parliamentary Representative on the Australian Delegation to the Third Round Australia-China Bilateral Human Rights Dialogue, Beijing, 14-21 August 1999 (18 October 1999), 15 pp. Otherwise, the Department of Foreign Affairs and Trade posted a two page summary of the activities of the dialogue since 1997 on its web-site. See Australian Department of Foreign Affairs and Trade, 'Australia-China Human Rights Dialogue: Basic Information -March 2002'. Available at http://www.dfat.gov.au/hr/achrd/aus_proc_dialogue.html. For a 2003 version, see also http://www.dfat.gov.au/hr/achrd/aus_proc_dialogue.html.

3 Interview with human rights expert, Canberra, 7 September 2000.

4 See 'Australia-China Human Rights Dialogue: Basic Information (Updated December 2003)', at http://www.dfat.gov.au/hr/achrd/aus_proc_dialogue.html.

were conducted in a generally constructive and cooperative atmosphere. The dialogue has matured to a point where no subjects are off limits. We were able to raise all our concerns about the human rights situation in China, as well as examine those areas in which progress had been made'. The reader is none the wiser. The emphasis is on process, and no evidence is supplied of progress made, or of any intention to make the process more transparent. This is despite the fact that in the same period that the Australia-China dialogue has allegedly become freer, human rights in China are adjudged to have further deteriorated.[5]

So critical is the dialogue's transparency and accountability deficit that it even inhibits an informed evaluation of the process. If there is no way that citizens can find out what is happening during the dialogue, how can they evaluate it? Even as a scholar of China's human rights, I have only been able to obtain information on the process through access to interviewees who wish to maintain strict confidentiality. And yet, it is this very lack of transparency and accountability in the Chinese government that the Australian government is arguably attempting to redress by means of its dialogue. If Australia is not prepared to be transparent and accountable itself, what kind of message does this send our dialogue partners? At the very least, it gives rise to the suspicion that form rather than substance, and pragmatism rather than principle, are now Australia's defining priorities.

This lack of accountability also results in monitoring inconsistency, identified by eminent human rights scholars as a major source of monitoring weakness.[6] In terms of vertical consistency over time, Australia's requirements and expectations of China as the target state have gradually changed; and in terms of horizontal consistency, that is, its treatment of all other states, Australia's human rights policies towards Burma, China, and Indonesia have been quite different.[7] In the case of Burma, for instance, until 1999 the Australian government pursued a "benchmark diplomacy" which allocated rewards according to the degree of Burma's compliance, thus invoking the notion of accountability lacking in the monitoring of China. The key to this variation in its policies is strategic interests: in a case such as China, which is strategically important to Australia, the government clearly favours a 'softly, softly' approach in its monitoring.

II Lack of substantive outcomes

The dialogue's lack of accountability mechanisms, both in relation to the Australian public and to Chinese authorities, also means there is no way of testing the effectiveness of monitoring. It exacerbates a second problem, Australia's lack of effective bargaining levers. Because Australia does not produce a report publicising the problems and progress revealed during the dialogue, there is no way it can use the dialogue to influence China's practical compliance. By contrast, the US suspends its human rights dialogue with China where it finds no progress has

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5 See US Department of State, 'China', in Country Reports on Human Rights Practice—2003' (25 February 2004), at www.state.gov/g/drl/rls/hrrpt/2003/27768.htm. Despite continuing new legislation, the report contended, 2003 saw China's 'backsliding on key human rights issues'.

6 See Rhoda E. Howard, 'Monitoring Human Rights: Problems of Consistency', 4 *Ethics and International Affairs* (1990).

7 See Garry Woodard, *Human Rights in Australian Foreign Policy with Special Reference to Cambodia, Burma and China* (Melbourne, Australian Institute of International Affairs, 1991).

occurred. Thus, no talks were held between the US and China in 2003 because China had made no significant progress in human rights.[8]

Underlying the secrecy with which the dialogue is conducted is Australia's sensitivity to its physical position in the Asia-Pacific region. Unlike other middle and "like-minded" powers, its human rights policies in a region lacking human rights awareness are closely intertwined with geopolitics. When China's leaders offered bilateral dialogue to states in exchange for an agreement to cease cosponsoring the China resolution in the UN Human Rights Commission in early 1997, Australian policy makers, who had been subordinating principle to pragmatism since 1993, did not hesitate to move from multilateral monitoring to quiet, bilateral dialogue. Australia's consciousness of its geostrategic fragility has led it to trade off human rights against its national interests. Thus, Australia is also susceptible to the same commercial considerations that have modified US and European policy towards China. However, unlike Australia, the US has continued to support multilateral initiatives.

The sole virtue of the current dialogue is the technical assistance programme, or, as it is now called, the Human Rights Technical Cooperation Program, which has been theoretically linked to it.[9] However, in my opinion this programme should be detached from its formal association with the dialogue, because it lends legitimacy to an essentially empty process which undermines Australian sovereignty and values. It also disguises the dialogue's lack of substantive outcomes. Technically, the association of the two is unnecessary: the details of the Human Rights Technical Cooperation Program are worked out between the two states quite

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[8] Paul Richter, 'Prison Scandal Blunts Human Rights Report', *Los Angeles Times*, reprinted in *Sydney Morning Herald*, 19 May 2004.

[9] The programme of technical assistance that Australia, like the US and Europe, offers China, is more worthwhile than the dialogue. Government pledges of $A300,000 (1997-1998)and $A800,000 (1998-1999) promoted human rights exchanges. Between 1997-2002, these exchanges included thirty-two large and small activities. They included a high-level delegation from the Chinese Ministry of Justice and the Supreme People's Procuracy to study the Australian criminal justice system, looking at specific issues such as police investigation, prison administration, legal aid, structures of decision making, anti- corruption bodies, and the supervision of activities of prison workers. There were visits by Australian judges to the National Judges' College and the visit of a Chinese delegation to Australia for a two-week training course on human rights reporting. Other activities included a domestic violence workshop, a Ministry of Justice Correctional Administration Reform visit, a minority rights seminar, training in rules of evidence, a joint seminar on civil society, training in criminal procedure and a programme of Legal Aid identification. In 2002, the program included a human rights reporting workshop, a prison officer training program in Australia, criminal procedure training, judicial training and a project translating into Chinese books and articles relating to freedom of speech. A number of these worthwhile projects had been recommended by the 1991-1992 delegations and were not an outcome of the dialogue process per se. Such programmes were decided and organised separately from the visits of the dialogue delegations and were not dependent on them. They were designed and implemented through a cooperative venture between Australia's Human Rights and Equal Opportunity Commission (HREOC) and a particular Chinese organisation.For details, see 'Australia-China Human Rights Technical Cooperation Program', at http://www.ausaid.gov.au/publications, accessed 28 May 2002. See also Australian Department of Foreign Affairs and Trade, 'Australia-China Human Rights Technical Cooperation Program: Back Ground Information- November 2001'. Available at http://www.dfat.gov.au/hr/achrd/hrta.html. See also updated 2003 version at same address.

independently from the dialogue, even though, to maintain the fiction, there is a passing reference to it during the talks, and the programme itself is administered by the Human Rights and Equal Opportunity Commission (HREOC), not the Department of Foreign Affairs.

III Bilateral Monitoring versus Multilateral Monitoring

I have summarised my argument on the weaknesses inherent in bilateral monitoring in my article in the *Human Rights Quarterly*. This compares US monitoring of China's human rights with Australia's. While the US approach is seen as preferable to Australia's, in comparison to multilateral monitoring, both are found wanting. [10] This is not only because multilateral monitoring has greater authority and legitimacy in the eyes of the state under criticism, but also because it plays a pivotal role in reintegrative shaming. This process, understood in this context as a resolution in the UN Human Rights Commission drawing attention to a state's abuse of human rights but at the same time commending the state for any human rights improvements, is effective whether or not the resolution is subsequently adopted.[11] This is because the adverse publicity associated with the draft resolution is as powerful a deterrent as the number of states that support it.

By contrast, bilateral monitoring lacks the capacity to shame, particularly, as I have observed, if it is not transparent and accountable. As I point out in my 2001 article:

> In an era of globalization, universal human rights are judged to transcend state borders and fragment state sovereignty. International human rights treaties and multilateral human rights organizations play an increasing role in regulating state activity and exert a socializing impact on recalcitrant states. Recent research suggests that bilateral pressures are low on the scale of effectiveness in comparison to multilateral pressures.[12] Despite this, individual states continue to assume an ongoing role in monitoring each other's human rights performance... [This is because] China is insisting on the efficacy of the bilateral mechanism of its human rights dialogue with the United States (US) and many other Western states, in preference to the potentially humiliating experience of a critical China resolution in the UN Human Rights Commission.
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> This dialogue experience, described by China as turning "confrontation" into "cooperation," is an essentially nonintrusive exercise which eschews resort to bargaining, shaming, sanctions, and even to publicity. However, as the Chinese description makes clear, its effects are palpable--they provide, quite simply, an alternative model for monitoring any state's human rights, which is, moreover, determined by the target state. The shape of things to come is suggested by the recent diminution of the monitoring role of the UN Human Rights Sub-Commission, and the alteration in the monitoring procedures of the UN Human Rights Commission.[13] ....

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10 Kent, 'States Monitoring States', 583-584, 624.

11 For exposition of this theory, see John Braithwaite, *Crime, Shame and Reintegration* (Cambridge, Cambridge University Press, 1989).

12 Ann Kent, *China, the United Nations and Human Rights: The Limits of Compliance* (Philadelphia, University of Pennsylvania Press, 1999).

13 For instance, one of the proposals of the UN Human Rights Commission Working Group to the Human Rights Sub-Commission at its August 1999 session was to forbid the

Bilateral monitoring of human rights differs from multilateral monitoring in that it begins as a unilateral initiative which, although it may be accepted in part by the target state, is not based on any formal agreement or on any mutually agreed standard. It is ad hoc, undefined and informal ...Because bilateral, or unilateral, monitoring ... lacks the collective, consensual, historical, and institutionally based authority of multilateral mechanisms, its impact on China depends either on the significance of bilateral bargaining chips or, in the case of middle powers, on the quality of the role model. In the US case, bargaining chips in the shape of MFN produced specific Chinese concessions: but the instrumental nature of China's compliance was reflected in the close correlation between those concessions, such as the release of political prisoners, and the key dates of MFN decision making. In Australia's case, its quality as a role model deteriorated over time. In this way, both large and middle power monitoring proved fallible. Ultimately, the effectiveness of bilateral monitoring founder[s] on the mismatch between China's authoritarian political system, which lack[s] popular accountability, and the democratic political systems of the monitoring powers, which depend[s] on such accountability. China [i]s able to trade bargaining chips on the basis of its national interests, and comparative power balance, rather than according to the needs of its citizens, in the confident knowledge that it h[olds] the trump card...

Thus, the lack of consistent and authoritative standards, the problems posed by democratic accountability, or lack of it, the significance of power, and the enduring obstacles presented by sovereignty, bedevil both large and middle power monitoring. The evidence is clear: pitting state against state cannot deliver the internalization of norms by a monitored state, particularly if it is powerful. Unless a critical mass of consensual state opinion, expressed through United Nations (UN) or regional human rights bodies and forums, can be arrayed against an offending state, with the inbuilt socializing process that implies, normative adjustment is unlikely to occur. At the most, bilateral monitoring achieves temporary, superficial, and instrumental change and, at worst, as has been the case with China, erodes the power, influence, and efficacy of the most effective monitoring agencies--multilateral human rights institutions.

IV Recommendations

Despite Australia's protestations of concern about China's human rights, it is undeniably the case that an effective policy with substantive outcomes is currently precluded by the lure of the China market and by Australia's geostrategic sensitivity to China's power in the region. For this reason, the government continually emphasises the *process* of dialogue rather than its outcome.

Sub-Commission from adopting resolutions relating to country situations. See David Weissbrodt, Mayra Gomez, Bret Thiele, 'An Analysis of the Fifty-first Session of the United Nations Sub-Commission on the Protection and Promotion of Human Rights', 22 *Human Rights Quarterly* 834 (August 2000). In addition, in a letter on 17 April 2000 to Commission members, Human Rights Watch noted that while in 1987, nearly half (47%) of all resolutions on human rights abuses in specific countries adopted by the Human Rights Commission were voted upon, by 1999 the number had dropped to 29%. See *UN Human Rights Commission Urged to Vote on Abuses*, Human Rights Information Network, 17 April 2000.

If the Committee supports the continuation of bilateral monitoring, my recommendation is that it should only continue under conditions that do not threaten Australia's own sovereignty and liberal-democratic values. That is, the process of dialogue must reflect Australia's support for transparency and responsible government. It must not, as the current dialogue does, bend our own national rules of engagement. It must conform to the normal standards of parliamentary participation and oversight; involvement of non-government organisations; reporting requirements and mechanisms; and public monitoring and evaluation of outcomes.

However, since the Chinese side has hinted that dialogue would end if Australia were to return to multilateral mechanisms such as the cosponsorship of the China resolution in the UN Human Rights Commission, we should also ask if dialogue is worth the national sacrifice. What advantage does it represent, apart from a fig leaf decorating Australia's pursuit of its national interests of trade and security? What, more importantly, are its disadvantages? Is it acceptable that Australia should renounce its normal support for multilateralism by accepting China's pre-condition for dialogue? The US, for one, has managed to continue its human rights interaction without doing so. I would argue that, just as the US and China are currently managing their own complex relationship by accepting their differences in some areas and capitalising on their agreement in others, so Australia and China should do likewise. A relationship should never be so important that it undermines the sovereign power of one of the partners, as the Chinese government would be the first to acknowledge. The challenge for Australia is thus to reorient its human rights policy on China and return to its traditional emphasis on multilateralism and on the indivisibility of civil, political, economic and social rights. [14]

There are a number of avenues the Australian government could explore. Greater policy effectiveness would be ensured by abandoning the formalistic dialogue with China on human rights and returning to Australia's previous practice of supporting multilateral mechanisms and cosponsoring human rights resolutions in multilateral human rights forums. Such a reorientation would restore the missing components of transparency, accountability and integrity to the Australia-China relationship. Put bluntly, it would have the effect of untying Australia's hands. At the same time, in a spirit of reciprocity, and as a practical contribution, the government could usefully expand its human rights technical cooperation program in China, offering training to its citizens in labour standards and social safety nets as well as in the principles of the rule of law, and inviting Chinese experts to Australia to contribute their insights to the solution of Australia's human rights problems. The Federal government could also address the tension between promoting human rights in China and doing business with China by encouraging the adoption of mandatory codes of conduct by all foreign corporations operating in China.[15] This would provide palpable proof of Australia's regard for China and for the rights of its citizens. To be effective, Australia's human rights activity would also need to be coordinated with that of other middle-power, like-minded states. In such ways Australia, together with other like-minded states, could exert a beneficial influence on human rights in China, while at the same time safeguarding its sovereignty and remaining true to its own traditions and values.

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[14] See also Peter Van Ness, 'Conclusion', in Peter Van Ness, ed., *Debating Human Rights: Critical Essays from the United States and Asia* (London: Routledge, 1999), 278-281.

[15] See, in particular, Michael A. Santoro, *Profits and Principles: Global Capitalism and Human Rights in China* (Ithaca: Cornell University Press, 2000).