



## **Submission No 3**

### **Inquiry into Australia's Human Rights Dialogue Process**

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## **SUBMISSION**

### **JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS AND TRADE**

### **INQUIRY INTO AUSTRALIA'S HUMAN RIGHTS DIALOGUE PROCESS**

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This Submission is confined to Australia's bilateral dialogue on human rights with China.

It is a personal submission although my background is that of having attended Non-Government Organization consultations with the Department of Foreign Affairs and Trade on the bilateral talks with China as a representative of Amnesty International Australia. I should add by way of explanation that I was unable to participate in any AIA submission because of my departure overseas and I have completed this submission since my return. It is to be emphasised however that the views expressed are personal and are not necessarily those of Amnesty International Australia.

I have attended each of the NGO consultations on the China dialogue in the last six years and am reasonably well informed on human rights in China.

The chief purpose of the submission is to consider in some detail practical ways in which the dialogue process can be improved.

First it is necessary to form a judgment upon the current effectiveness of the process.

The aim of the dialogue with China introduced by Australia and other countries in about 1997 was to induce China, through diplomatic discussion, to observe basic international human rights norms as embodied in international human rights instruments and recognized by customary international law.

Seven years have passed since the dialogue process with China began. Judged by the criterion set out in the preceding paragraph it has not been successful.

Since the inception of the dialogue human rights in China have worsened in the following areas:

- repression of dissent [The China Democracy Party]<sup>1</sup>

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<sup>1</sup> The China Democracy Party was formed in July 1998 to seek democracy by 'non-violent, rational and peaceful methods'. Its founding members applied to register the Party in accordance with law. The Government proscribed the Party and rounded up members. Leaders were imprisoned for long terms (10 years approx.) No suggestion has ever been made that the movement advocated or practised violence .

- persecution of religious belief [The Falun Gong and unregistered christian churches]<sup>2</sup>
- denial of freedom of expression [the internet offences]<sup>3</sup>
- denial of fair trial procedures [the strike hard campaign]<sup>4</sup>
- repression of minorities [the Uighurs of Xinjiang]<sup>5</sup>

Denial of human rights which prevailed before 1997 have continued:

- Administrative detention<sup>6</sup>
- Torture<sup>7</sup>
- Tibet<sup>8</sup>
- The death penalty<sup>9</sup>

Perhaps of equal significance is that the dialogue process has failed to produce a changed attitude by the Chinese Government towards acceptance of the universality of civil and political human rights. This is confirmed by the reiterated claims to paramountcy of sovereignty in the case of the repression of the China Democracy Party, the defensive denials of Falun Gong persecution and the equally defensive

<sup>2</sup> Persecution of the Falun Gong began in 1998. It had enormous membership. Falun Gong represented non-conforming but entirely non-political belief. A brutal crackdown followed encompassing torture, deaths in custody and detention in re-education camps.

<sup>3</sup> Since the introduction of the internet in the mid-1990's, the Chinese government has closed internet cafes, blocked e-mails, search engines and politically sensitive web sites. By 2000 the Chinese Government had introduced an array of measures for internet control and had begun to imprison and punish those using it for the expression of political opinion. Huang Qi was sentenced to 5 years imprisonment for "inciting subversion of the State" when calling for human rights. Other prisoners of conscience include Ou Yang Yi – disparaging economic strategies and calling for structural reform; Li Yibin – advocating democracy and freedom; Wang Jing – calling for the release of political prisoners. Huang Qi's last message tapped out immediately before his arrest sums up the plight of human rights activists in China: was "The road is still long. Thank you everybody. Thanks for all who make an effort on behalf of democracy in China. They have come. So long."

<sup>4</sup> The current strike hard campaign was begun in April 2001. Its apparent justification was to deal with an irregular decline in public order. It is not known when it will be lifted. It involves relaxation of basic procedures. The impetus is to procure convictions. Hence torture is encouraged or not discouraged and the procedure of Xiafang allows for the delegation of death sentences to a lower Court than the Supreme Peoples Court as required by the Criminal Procedure Law.

<sup>5</sup> In 2003 the authorities continued the international war against terrorism to justify harsh repression in Xinjiang, which continued to result in serious human rights violations against the ethnic Uighur community.

<sup>6</sup> The system of re-education through labour – a form of administrative detention imposed punishment – was first introduced in 1957. It involves detention without charge or trial for up to 3 years renewable for one year in a labour camp.

<sup>7</sup> Torture is endemic in China. But it falls into two categories. (a) There is State encouraged torture. This is where the State endorses the use of torture against those charged with political-type offences. A recent example of this is the Unit 210 formed specifically to repress the Falun Gong and which was given an open hand in the use of torture. Brain washing at Detention centres and Ankang are just extensions of this category of torture (b) Secondly, Torture which forms part of the practice by police or security personnel practice or prison warder in the ordinary administration of justice. In regard to this category there is no reason to doubt that there are higher officials in the Chinese Government who want to end the culture of torture which prevails.

<sup>8</sup> Contacts between Chinese authorities and representatives of the Tibetan Government in exile apparently failed to produce significant policy changes. Releases of high profile prisoners of conscience which had taken place in 2002 was not maintained in 2003. Freedom of religion, association and expression continue to be restricted.

<sup>9</sup> The death penalty continues to be used extensively. With the limited records available Amnesty International recorded 1639 death sentences and 726 executions in 2003 although the true figures are believed to be much higher. Execution is by shooting and increasingly by lethal injection. In March 2003 it was reported that authorities in Yunnan had available 18 mobile execution chambers.

justification of the Tiananmen massacre, as exemplified in the constraints presently imposed on the Tiananmen mothers.<sup>10</sup>

The fundamental problem with the dialogue process in producing any change of attitude is the substantial absence of accountability. So far as Australia is concerned there are several aspects to this.

The first is lack of transparency. The dialogue is confidential. Press releases issued at the end of the dialogue are the only information given to the public. These are limited to generality.<sup>11</sup> Each dialogue is followed by an oral debriefing to selected non-government organizations. The debriefing is in confidence being subject to Chatham House rules. Thus a parliamentary inquiry into the dialogue process such as is presently being conducted by this Committee is unable to consider the validity of criticisms of that process where to do so would require departure from Chatham House Rules.

The second aspect is the present absence of any identifiable body to which 'accountability' is to be made. In our system the executive ordinarily accounts for its actions to the Parliament but insofar as the dialogue talks are secret from Parliament itself, parliamentary accountability is not possible. A relatively recent development is for the Department to provide a confidential debriefing to the Human Rights Sub committee. It is convenient to consider this after examining the nature of the talks and the content of any report on them which should be made. It is sufficient at this point to say that the dialogue process must be subject to some form of adequate parliamentary accountability.

A number of things follow from these considerations.

First, there needs to be a report in writing on each dialogue which is to form the basis for accountability

The dialogue process should be directed to outcomes or conclusions. Stated broadly the report on each annual dialogue need not go beyond that. But the report does need to set out in respect of each item what was the outcome or conclusion regarding it.<sup>12</sup> If we suppose that the item for discussion is administrative detention for re-education a number of possibilities arise. The Chinese side may simply say China does not

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<sup>10</sup> The International Covenant on Civil and Political Rights was signed by China in October 1998 but has never been ratified. At about the same time as its signing repressive measures were being taken against the China Democracy Party. Custody and repatriation, a particular kind of administrative detention which allowed for the arbitrary detention of millions of migrant workers, vagrants, homeless children and others in urban areas, was formally abolished when new rules came into effect in August 2003. Its abolition was prompted by a public outcry about the brutal murder of migrant worker Sun Zhigang while being held in a custody and repatriation centre in Guangzhou City. It was not attributable to the dialogue process.

<sup>11</sup> The one exception to this relates to the Human Rights Technical Cooperation program. As indicated below, this programme is not directed to China's human rights abuses and is in substance an aid project. The degree of detail given about the HRTCP in Press Releases only confirms this distinction. In addition certain parliamentarians have been members of Australian delegations. Useful though this is, it could not seriously be suggested that it constitutes accountability to Parliament.

<sup>12</sup> A report was presented by a parliamentary member of the delegation at the first dialogue. Although more informative than Press Releases the Report only listed matters discussed and presented broad statements of the discussion. It did not except in a most general way state or indicate responses by the Chinese to the matters raised in the dialogue. It is though precisely that information which is required if accountability is to be accorded.

propose to do anything about the system because it believes it to be consistent with the fair trial provisions of the *International Covenant on Civil and Political Rights*. Although this might seem a difficult proposition to sustain, if it is nonetheless the Chinese position there is no reason why it should not be included in the report and publicly available. Alternatively, the Chinese delegation might say that China intends to introduce reforms to the system. In that event the delegation can be asked as to the nature of the reforms proposed and when they are expected to be introduced or brought into force. The Chinese response on this should be included in the report unless disclosure would prejudice the contemplated action for reform. The topic of administrative detention may in turn give rise to other sub-topics. Thus, it seems that security personnel --or certain security personnel -- in charge of administrative detention are not subject to criminal sanctions in the event of them using torture or other maltreatment. This is the kind of matter which could be raised if the item for discussion is 'administrative detention'. The Chinese response should be included but without detail. It would be unnecessary to include what may be described as argument in the report, but facts --if they are the point of the item -- should be included. Thus the Committee against Torture expressed concern in its 2000 report at the absence of statistics on torture by China and recommended these be kept. If the Australian delegation were to ask what statistics are currently being kept and whether effect is to be given to the recommendation, the Chinese response should be included in the report. Generally therefore it is suggested any outcome to an item discussed involving action or the refusal of action or any statement of fact should be denoted in the report.

It may not though be appropriate for statements of opinion to be included. To take a possible example --- whilst it is certainly relevant to understand how the Chinese would seek to justify the imprisonment of those using the internet to convey non-violent political opinion (in particular, the government's understanding of the term 'information that subverts the government' under Article 15 of *Measures for Managing Internet Information*, and how that is to be reconciled with Article 19 of the *International Covenant on Civil and Political Rights*) it may justifiably be said that statements of opinion such as these, made by the Chinese delegation in the course of a meeting, should not be included.

Continuity. This is very necessary. That is, the outcome of any item at one annual dialogue should be followed up at the next. If the Chinese delegation were, for instance, to say at a dialogue discussion one year that the government intended to legislate to implement Article 15 of the Convention against Torture (to which China is a Party) so as to exclude evidence obtained by torture, it would be necessary for this to be followed up at the next dialogue discussions and the response noted. There may of course be an explanation if nothing has been done to give effect to what had been stated in the previous year's dialogue. That may be so but it is not right for promised action to be left in indefinite abeyance and for that to be unrecorded.

The Chinese authorities are unlikely to like these or other proposals for greater accountability. China's purpose in entering into the dialogue process was to preserve the monopoly of power exercised by the Chinese Communist Party, on the one hand, and avoid international criticism of human rights restrictions thought necessary for that purpose, on the other. The Chinese Government was shocked by the international outrage which followed the Tiananmen massacre. It was anxious for China to join the

W.T.O. It was faced with annual MFN resolutions in the United States Congress. Above all, it was met with annual resolutions on its human rights performance before the Commission on Human Rights which it took frenetic action to prevent. Accordingly, for the Chinese Government the bilateral dialogue on human rights and its secret and non-accountable character provide a convenient way of ‘managing’ human rights.

In this situation there are several approaches which may be taken in addition to that of informing the Chinese that our system requires the executive to be accountable to Parliament and that a Committee of the Parliament has recommended increased accountability.

The dialogue process is carried on by a large number of countries with China. It has an important international dimension. An approach jointly agreed by a number of countries for increased accountability would carry weight beyond that of any individual country. It is, in any event, timely that dialogue countries should now, after seven years, engage in a review of the process and the steps which should be taken for its improvement. Certain countries seem concerned to achieve this. The United States has been less than happy with recent dialogues. The European Union is hopeful that the dialogue may become more ‘result-oriented’. Accordingly, an agreed multi-nation approach desirable in any event might prove more agreeable to the Chinese.

Also, the Chinese authorities may find it more acceptable if the report on each annual dialogue were considered by the Human Rights Subcommittee rather than Parliament generally. This would be the more so as recently the oral reporting by the Department on each annual dialogue has become part of current arrangements.

There are advantages, independently of Chinese reactions, for at least preliminary consideration of the dialogue to be undertaken by the Human Rights Subcommittee. This course enables analysis of the discussions in some detail and provides a degree of continuity and expertise which would generally facilitate accountability. Certain specific procedures are however required for this to be satisfactory. First, the kind of report in writing on outcomes and conclusions foreshadowed above needs to be presented to the subcommittee as a basis for its consideration. Secondly, for a critical survey of the dialogue to be carried out, relevant non-government organizations should be able to attend at the presentation of the departmental report in order to give views to the subcommittee or answer questions which it might ask. One advantage of NGO attendance is that NGO’s could bring to the subcommittee’s attention matters of relevance which had not been raised in the course of the dialogue. Relevant non-government organizations in this context would be those selected for attendance at confidential debriefings on the talks and which also had provided the Department with briefing material for the dialogue.

One advantage of Human Rights Subcommittee consideration is that it could deal more flexibly with the issue of confidentiality than if a ministerial or departmental report were, in the first instance, presented to Parliament. There seems to be no case for blanket confidentiality. Any claim for confidentiality in the report regarding a particular item should be decided by the Australian and Chinese delegations. But the subcommittee could set out rational criteria by which the Australian delegation should

be guided eg.national security considerations or that intended action would be prejudiced by disclosure.

The subcommittee would report to Parliament on each year's dialogue. The report would comprise a general assessment. In its report to the subcommittee would consider and identify those items in respect of which confidentiality had been agreed upon. Parliament would be able to consider the subcommittee's report.

The possibility remains that the Chinese Government would absolutely reject national accountability or any relaxation in the secrecy of the talks. Such an attitude would seem less likely if the approach to China were to be multinational by dialogue countries. If however Chinese absolute objections were to be treated by dialogue countries as controlling the bilateral human rights dialogue process would in effect, as at present, be limited to the observance of those civil and political rights considered by the Chinese Government to be consistent with preservation of the plenary authority of the Chinese Communist Party. Because of the secrecy of the dialogue process this inherent and substantial limitation is not publicly apparent. In that sense the dialogue process can easily become a pretence. In its report for 2003, Amnesty International stated "there were concerns that the international community was taking a 'softer' line on China by confining its human rights concerns to private dialogue sessions rather than public scrutiny". This moderately expressed statement is unquestionably accurate. As a result we have the tendency, shrewdly noted by China's most famous prisoner of conscience, Wei Jing Sheng, that "the Chinese human rights concept has not moved towards the universal standards of human rights. On the contrary, the human rights values of western politicians have moved closer to those of communist China".

The Human Rights Technical Cooperation Program with China is not to be confused with the bilateral dialogue discussed above. It is in substance an aid programme confined to assisting in the provision of rule of law infrastructure. It is not directed to China's human rights violations.<sup>13</sup> It is a very good program, well administered by the Human Rights and Equal Opportunity Commission. As a matter of convenience it may be that parliamentary accountability should be carried out concurrently with that of the dialogue but functionally that is not necessary. The Bilateral Dialogue process generally is directed to the observance by China of its international human rights obligations and in a practical sense has become a substitute for accountability before the United Nations Commission on Human Rights. The Technical Cooperation Program is not concerned with this and functionally could be examined through the ordinary Senate Estimates Committee process but in the end how that is done is simply a matter of convenience.

13<sup>th</sup> June 2004

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<sup>13</sup> The one possible gloss on this concerns the second category of torture mentioned in footnote No.7 – that is torture which is not State encouraged. In this instance police and prison officer training would assist in eliminating the culture of torture.

