

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Program 1.1

Question No. 111

Senator Boyce asked the following question at the hearing on 26 May 2011:

Incarceration of Indigenous People with cognitive impairment:

Does such incarceration breach any domestic human rights legislation such as the Disability Discrimination Act, the Racial Discrimination Act or the or international human rights treaties to which Australia is a signatory such as the International Convention on the Rights of Persons with a Disability, the International Convention on the Elimination of Racial Discrimination or the International Covenant on Civil and Political Rights?

The answer to the honourable senator's question is as follows:

The Department is unable to provide legal advice to the Committee, however provides the following information on Commonwealth discrimination legislation and Australia's obligations under the relevant international Conventions.

Under the *Racial Discrimination Act 1975* (Cth), it is unlawful to discriminate on the basis of race, colour, descent, or national or ethnic origin. Section 10 of the *Racial Discrimination Act 1975* (Cth) provides a general right to equality before the law. It confers upon any person of a particular race, colour, or national or ethnic origin who is denied by any law any right enjoyed by others of a different race, colour, national or ethnic origin, an entitlement to enjoy that right to the same extent as those others.

Under the *Disability Discrimination Act 1992* (Cth), it is unlawful to discriminate against people with a disability in areas of public life.

Australia also has obligations under international Conventions, including the Convention on the Rights of Persons with Disabilities (CRPD). Under Article 14 of the CRPD, Australia has an obligation to ensure that persons with disabilities, on an equal basis with others:

- (a) Enjoy the right to liberty and security of person;
- (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

Australia also has an obligation to ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

In Australia's initial report under the CRPD, submitted to the United Nations in December 2010, the Government emphasised that it is committed to ensuring that no one in Australia is deprived of their liberty on the basis of their disability.

Under Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), Australia has an obligation to ensure that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Articles 2 and 26 of the ICCPR protect against discrimination on the basis of prohibited grounds. Under Article 2(1) of the ICCPR, Australia has an obligation to ensure to all individuals within its territory and subject to its jurisdiction the rights in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Under Article 26 of the ICCPR, Australia also has an obligation to ensure that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) also provides an obligation under international law to prohibit racial discrimination.

Under Article 5 of CERD, Australia has undertaken to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law. The *Racial Discrimination Act 1975* (Cth) implements Australia's obligations under CERD.