

CHAPTER 9

DIALOGUE WITH THE CERD COMMITTEE

9.1 The Committee's third term or reference for this inquiry asks:

whether dialogue with the CERD [Committee] on the Act would assist in establishing a better informed basis for amendment to the Act.

9.2 The CERD Committee is the body responsible for monitoring the compliance of State parties with the CERD. The CERD Committee consists of a panel of experts elected by State parties to the Convention from among their own nationals. Importantly, Committee members do not represent states but are chosen because of their expertise in the area of international law relevant to the Convention, and sit on the Committee in their personal capacity as experts. They are also required to be of 'high moral standing and acknowledged impartiality'.¹ Thus, the CERD Committee is a useful resource for State parties in seeking to implement their obligations under the Convention.²

Opportunities for Liaison with the CERD Committee

Periodic Reporting and Background to the CERD Committee's Consideration of the Amended NTA

9.3 The main way in which State parties to the CERD, such as Australia, have contact with the CERD Committee is through the consideration of their periodic reports, as described in Chapter 2. In addition, the CERD Committee from time to time issues general recommendations, which provide advice to States parties on the interpretation of their obligations under the CERD. General recommendations are based on the current international law relevant to the Convention.³

9.4 Australia's combined tenth, eleventh and twelfth periodic reports were considered by the CERD Committee at its 56th session in Geneva in March 2000,⁴ in the presence of an Australian delegation led by the Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs and Minister assisting the Prime Minister on Reconciliation.

1 Convention on the Elimination of All Forms of Racial Discrimination, Article 8(1).

2 For the full discussion of the CERD Committee, see Chapter 2.

3 Convention on the Elimination of All Forms of Racial Discrimination, Article 9(2).

4 This was along with further consideration of the situation with respect of Australia's native title legislation, previously considered under the CERD Committee's early warning and urgent action procedure at its 54th and 55th sessions in March and August 1999, respectively. The early warning and urgent action procedure is discussed further below and in Chapter 2.

9.5 Australia is due to present its next periodic report to the CERD Committee in October 2000. The Committee recommended that this report be an updating, rather than a comprehensive, report. In particular, it recommended that the report address the points raised in the Committee's Concluding Observations. Of significant concern to the Committee in its Concluding Observations was the unsatisfactory response to date by Australia to the Committee's decisions, (2)54 and (2)55, on the amendments to the NTA.⁵

9.6 Before the presentation of its combined periodic reports, Australia was significantly overdue in complying with its reporting obligations under the CERD. Australia's last report and appearance before the CERD Committee was in 1994, at which time the Committee considered the original *Native Title Act 1993*.⁶

9.7 The non-Government members of the Parliamentary Joint Committee believe that it is important for Australia to engage constructively in the formal processes of the CERD Committee, which includes keeping up to date with its periodic reporting obligations.

Early Warning and Urgent Action Procedure

9.8 In addition to the periodic reporting procedure, the CERD Committee has the power to request information and consider the situation within the jurisdiction of a State party, through its early warning and urgent action procedure.⁷ It was through the early warning and urgent action procedure that the Committee was able to consider the situation in relation to the amended NTA. It is not necessary that issues which the Committee considers under the early warning and urgent action procedure have been first raised in the State party's periodic reports. For instance, the CERD Committee was able to consider the amended NTA even though, at the time, Australia had not advised it of the amendments to the original NTA.

9.9 An Australian delegation appeared before the CERD Committee at its 54th session in March 1999 at the request of the Committee, acting under its early warning and urgent action procedure. At the conclusion of this session, the Committee raised concerns about Australia's compliance with its obligations under the CERD.⁸

9.10 The situation with respect to Australia's native title legislation was further considered by the CERD Committee at its 55th session in August 1999. The Australian Government did not send a delegation to appear before the Committee, choosing

5 Committee on the Elimination of Racial Discrimination 56th session, 6-24 March 2000 Concluding Observations on Australia, CERD/C/56/Misc.42/rev/3, 24 March 2000.

6 Concluding observations of the Committee on the Elimination of All Forms of Racial Discrimination: Australia 19/09/94. A/49/18, paras.535-551.

7 For a discussion on the early warning and urgent action procedure see Chapter 2.

8 Decision (2)54 on Australia.

instead to rely on a written response to the Committee's earlier decision.⁹ It is significant that although the Australian Government has criticised the CERD Committee on the basis that it did not understand the system of government in Australia, on this occasion it turned down the opportunity to appear before the Committee and present this point of view.

Invitation to CERD Committee Members to Visit Australia

9.11 Aside from Australia's continued involvement in the formal monitoring and periodic reporting process under the Convention itself, there is also an opportunity for it to engage informally with CERD Committee members.

9.12 Following Australia being placed under the CERD Committee's early warning and urgent action procedure in August 1998, individual parliamentarians from the Australian Labor Party and the Australian Democrats wrote to the CERD Committee and invited several members to visit Australia.¹⁰ However, CERD Committee members are unlikely to visit a State party without the approval or support of the Government. As the Australian Government objected to this visit, it did not proceed.

9.13 In evidence to this inquiry, Professor Margaret Reynolds explained why she believed a visit by CERD Committee members to Australia was important:

this particular issue has been so closely scrutinised, both at home and in the international community, that we cannot avoid the option of inviting one or two representatives of the CERD Committee to come and tell us why their view is as it is ... sooner or later, whether it is this committee, whether it is the Government, whether it is representatives of non-government organisations, it would be useful to open up that dialogue with indigenous people to include an opportunity for a visit by one or more members of the CERD committee.¹¹

Informing the CERD Committee of Developments in relation to Native Title

9.14 The CERD Committee has expressed an interest in the Parliamentary Joint Committee's inquiry and has requested, pursuant to Article 9 of the CERD, that the Government forward a copy of this report when tabled.¹² It expressed the hope that the

9 *Australia's reply to the CERD Committee findings of 18 March, lodged under Article 9 of the Convention.*

10 Senator John Woodley, *Senate Hansard*, 29 April 1999, p 4522.

11 Professor Margaret Reynolds, *Official Committee Hansard* 23 February 2000, p 118.

12 Committee on the Elimination of Racial Discrimination 56th session, 6-24 March 2000, Concluding Observations on Australia, CERD/C/56/Misc.42/rev/3, 24 March 2000, para 10.

results of this inquiry would assist Australia to re-evaluate its response to the CERD Committee's decisions (2)54 and (2)55.¹³

9.15 Further, as the Hon Elizabeth Evatt, a member of the UN Human Rights Committee, and a former member of the UN Committee on the Elimination of Discrimination against Women (CEDAW), advised:

I believe that the Australian Government should report to CERD as soon as possible about a process of genuine consultation that it is setting up in order to review the Native Title Act to bring it into compliance with CERD, and should at a later time put before the [CERD] committee the results of that consultation and its proposals for amendment.¹⁴

What Dialogue with the CERD Committee Can Offer Australia

9.16 As noted above, the primary value of constructive dialogue with the CERD Committee is in the advice and expertise it has to offer in relation to the interpretation of the obligations under international law, and in particular the CERD. As Dr Sarah Pritchard advised:

My view would certainly be that the CERD Committee offers a valuable resource, not only to the Australian Government but to indigenous groups and other stakeholders, in seeking to explore precisely what are Australia's international legal obligations in the area of native title.¹⁵

9.17 Dr Pritchard further emphasised the importance of viewing Australia's native title legislation in an international context:

It is, I think, important and it is difficult for one to appreciate that the discussion of native title in Australia is not happening in a vacuum. There are related developments happening in many countries which are grappling with the legacies of colonisation, seeking to turnaround centuries of non-recognition of indigenous title. The issues that Australia is grappling with are not unique and the CERD Committee and other UN human rights bodies can offer some independent outside analysis of the international standards that must guide Australia in our attempts to grapple with these issues.¹⁶

9.18 The Government has expressed some concern about the involvement of the CERD Committee in what it views as a wholly domestic matter. For instance, the Prime Minister's response to the CERD Committee's decision (2)54 on Australia was to state that:

13 Committee on the Elimination of Racial Discrimination 56th session, 6-24 March 2000, Concluding Observations on Australia, CERD/C/56/Misc.42/rev/3, 24 March 2000, para 10.

14 The Hon Elizabeth Evatt AC, *Official Committee Hansard* 22 February 2000, p 60.

15 Dr Sarah Pritchard, *Official Committee Hansard* 22 February 2000, p 70.

16 Dr Sarah Pritchard, *Official Committee Hansard* 22 February 2000, p 70.

Our official view is that Australian laws are made by Australian parliaments elected by Australian people, not by a UN Committee.¹⁷

9.19 However, taking advantage of dialogue with an international expert body, such as the CERD Committee, does not raise concerns about Australia's sovereignty. The basis for any future dialogue with the CERD Committee should be in order to establish a better informed basis on which to formulate amendments to the Native Title Act that comply with Australia's international obligations under the CERD. As the submission by Dr Donald Rothwell and Ms Shelley Wright stated, ultimately any amendments to the NTA would be a sovereign act by the Australian Parliament.¹⁸ Responding positively to the CERD Committee's decisions on Australia and seeking constructive dialogue with the Committee about Australia's international obligations does not amount to involving an international body in the formulation of domestic legislation.

9.20 In any event, the CERD Committee would arguably not see its role to involve itself in the detail of specific amendments to the domestic legislation of a State party to the Convention. As was noted by FAIRA, who were present in Geneva during the CERD Committee's considerations of Australia's native title legislation:

we certainly do support dialogue with the CERD, but our understanding of the committee is that it would not make itself available to comment in relation to amendments that might be proposed on a part by part basis, in the sense that the committee would consider legislation that is in force. It would not see itself as being a reference or source body for what legislation might be in place.¹⁹

9.21 Further, if Australia wishes to establish itself as a leading member of the international community, it must pay heed to international legal principles and developments in those principles. As noted in Chapter 7, Australia's criticism of the CERD Committee has placed it in alignment with States which blatantly ignore international principles governing the protection of human rights.

Negotiation with Indigenous People a Priority

9.22 Dialogue with the CERD Committee is potentially valuable in improving Australia's understanding of its international obligations. However, it should not be seen as an alternative to genuine negotiations with Aboriginal and Torres Strait Islander peoples with a view to obtaining their consent to the required amendments to the NTA. This is consistent with the CERD Committee's decision (2)54 in which it urged Australia to:

17 As quoted by Senator Nick Bolkus, *Senate Hansard*, 29 April 1999, p 4522.

18 Dr Donald Rothwell and Ms Shelley Wright, Submission 29, p 16.

19 Mr Les Malezer, FAIRA, *Official Committee Hansard* 17 February 2000, p 25.

re-open negotiations with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.²⁰

9.23 As the submission to this inquiry from the Australian Institute of Aboriginal and Torres Strait Islander Studies stated:

dialogue with the CERD Committee should not take the place of consultation and negotiations with Indigenous organisations and institutions in Australia.

Further dialogue with the Committee should not be pursued in the hope that they will be convinced that the Government has successfully balanced competing interests. The CERD Recommendation clearly states that amendments to the *Native Title Act* should have the support of Indigenous peoples as a result of meaningful negotiations.²¹

9.24 No doubt, as discussed above, dialogue with the CERD Committee would assist with Australia's understanding of its international legal obligations. However, as discussed in Chapter 8 and noted in the submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner:

The first priority ... is to establish a better informed basis for amendment through consultation and negotiation with Indigenous people.²²

Hon Warren Snowdon MP
Australian Labor Party
Deputy Chair

Senator John Woodley
Australian Democrats

20 Decision (2)54 on Australia: Australia. 18/03/99. CERD/C/54/Misc.40/Rev.2., para.11.

21 Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission 11, p 35.

22 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission 32, p 26.

Daryl Melham MP
Australian Labor Party

Senator Trish Crossin
Australian Labor Party

Senator Jan McLucas
Australian Labor Party

