The Howard Government's Record of Engagement with the International Human Rights System

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I. Introduction

In this article, the Howard government's engagement with the international human rights system will be analysed. The following elements of the Howard government's policies on human rights will be examined: its record regarding formal endorsement of new human rights standards, its relationship with United Nations human rights bodies, and its foreign policies concerning human rights. Its relationship with the major domestic human rights body, the Human Rights and Equal Opportunity Commission (HREOC) will also be discussed, given that body's key role in monitoring Australia's implementation of international human rights standards. It will be demonstrated that the government was rarely influenced by human rights considerations in adopting its various policies.

II. Ratification of Treaties and Endorsement of Declarations

At the time of the election of the Howard government, Australia was a party to all core UN human rights treaties apart from the Migrant Workers Convention.[1] Australia cannot be considered an outlier for its failure to ratify that treaty: no Western country had ratified that Convention by October 2008. Since Howard's election on 2 March 1996, a number of new treaties have emerged, but the government has only ratified half of these.

The Statute of the International Criminal Court (ICC) is not a core human rights treaty, but it is relevant as it is designed to deter and punish the perpetration of some of the most egregious human rights abuses.[2] Australia played a major role in drafting that Statute in Rome in 1998, chairing the prominent Like Minded Group of States dedicated to the creation of such a court.[3] However, Australia's ratification was hindered by divisions within the government, in particular a concern over the threat posed by the ICC to Australia's sovereignty.[4] The Foreign Minister, Alexander Downer, who had publicly committed to ratification,

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1 International Convention on the Protection of the Rights of All Migrant Workers and Their Families, GA Res 45/158 (18 December 1990); (1991) 30 ILM 1521.

2 Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9; 2187 UNTS 90; (1998) 37 ILM 1002.

3 H Charlesworth, M Chaim, D Hovell and G Williams, *No Country is an Island* (2006) 72.

4 Ibid 80.

eventually prevailed within his party after adding a declaration to the instrument of ratification, which indicated that no Australian could be tried by the ICC without the approval of the Australian government. The declaration probably has no international legal effect, but it performed the politically useful act of placating local opposition to ratification.[5] The ICC episode previewed a theme that dominated the Howard government's attitude to international human rights law: an overbearing concern regarding Australia's sovereignty. This issue is discussed in greater detail below. For now one may note that the sovereignty concerns regarding the ICC were misguided.[6] The only 'sovereign right' of Australia possibly undermined by the ICC would be an alleged right to shield its citizens from prosecution for grave crimes despite *prima facie* evidence of guilt.[7]

In 2004, Australia also ratified the Trafficking and Smuggling Protocols to the UN Convention on Transnational Organised Crime.[8] Though these treaties are again not core human rights treaties, they are, like the Statute of the International Criminal Court, designed to deter and punish the perpetration of gross human rights breaches, namely coerced migration.

The other human rights treaties ratified by Australia by the Howard government were the two Optional Protocols to the Convention on the Rights of the Child (CRC).[9] Both were adopted on 25 May 2000, and were ratified by Australia in, respectively, 2006 and 2007.

The Howard government refused to ratify the Optional Protocols to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[10] and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[11] The former refusal was part of its

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5 G Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507, 514-16; see also 533. Indeed, it seems likely that the ICC will never be called upon to decide upon the legal effect of Australia's declarations. The Australian Declaration can be found at [2002] ATS 15.

6 See Joint Standing Committee on Treaties, *The Statute of the International Criminal Court* (2002) [3.13]-[3.31].

7 Charlesworth et al, above n 3, 82.

8 Convention against Transnational Organised Crime, (2001) 40 ILM 335; UN Doc A/55/383 at 25 (2000); UN Doc A/RES/55/25 at 4 (2001), amended by Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, UN Doc A/55/383 at 25 (2000); UN Doc A/RES/55/25 at 4 (2001); (2001); and amended by Protocol Against the Smuggling of Migrants by Land, Sea and Air, GA Res 55/25, annex III, UN GAOR, 55th Sess, Supp No 49, at 65, UN Doc A/45/49 (Vol I) (2001); (2001) 40 ILM 384.

9 Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989); 1577 UNTS 3; (1989) 28 ILM 1456; amended by Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, GA Res 54/263, annex I, 54 UN GAOR Supp (No 49) 7, UN Doc A/54/49 (2000); and amended by Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, GA Res 54/263, annex II, 54 UN GAOR Supp (No 49) 6 , UN Doc A/54/49 (2000).

10 GA Res A/RES/54/4 (adopted 6 October 1999).

11 GA Res A/RES/57/199 (adopted 18 December 2002).

'human rights reforms' adopted in the wake of its spat with the human rights treaty bodies, discussed below.

Regarding the CAT Protocol, Australia voted against adoption of the Protocol in 2002, in company with China, Cuba, Egypt, Libya, Nigeria, Sudan, and Japan.[12] Only the latter state is one which Australia would normally associate itself in adopting human rights policies.[13] The CAT Protocol authorises visits to places of detention by international and national bodies. Australia seemed to object to the idea that the Protocol might authorise unannounced visits by busybody international committees. That concern was perplexing: such visits are only authorised for states that choose to ratify the Protocol, and notice of visits must be given. Australia did not have to take the extreme step of voting against the Protocol, thereby attempting to preclude the establishment of the process for any state, when it could safeguard its perceived interests by simply not ratifying the Protocol.[14]

Two new human rights treaties were adopted by the UN in late 2006, the International Convention on the Protection of all Persons from Enforced Disappearance[15] and the Convention on the Rights of Persons with Disabilities.[16] The Howard government ratified neither, though it must be noted that it had less than a year in which to do so.

Finally, Australia was one of only four governments to vote against the adoption of the Declaration on the Rights of Indigenous Peoples[17] in the General Assembly in September 2007. The other dissenters were Canada, the United States, and New Zealand, all states with significant indigenous populations. Of those states, only Australia had a particular objection to the self determination provisions. In rejecting the Declaration, the Australian Ambassador to the UN, Robert Hill, stated:

> Self-determination applied to situations of decolonization and the break-up of States into smaller states with clearly defined population groups. It also applied where a particular group with a defined territory was disenfranchised and was denied political or civil rights. … [The government] did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and

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12 See UN Doc E/CN.4/RES/2002/33 (2002).

13 D Kinley and P Martin, 'International Human Rights at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466, 470.

14 H Charlesworth, 'A Negative Vote on Torture Puts Australia in Dubious Company', *Sydney Morning Herald* (30 July 2002) <http://www.smh.com.au/articles/2002/07/29/1027926855706.html>.

15 International Convention on the Protection of All Persons from Enforced Disappearance, GA Res A/61/177 (2006); (2007) 14 IHRR 582.

16 International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, GA Res 61/106, Annex I, UN GAOR, 61st Sess, Supp No 49, at 65, 13 December 2006, UN Doc A/61/49.

17 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 13 September 2007, UN Doc A/RES/61/295, (2007) 46 ILM 1013.

political integrity of a State with a system of democratic representative government.[18]

The government's position reflected an outmoded view of the scope of the right of self-determination. It focused on the notion of external self-determination, and failed to recognise the modern notion of internal self-determination, which has been endorsed by the UN treaty bodies and other human rights experts.[19] The government's concern was in any case misguided: Article 46(1) of the Declaration explicitly states that the text could not be construed as authorising dismemberment or impairment of the territorial or political integrity of sovereign states.

Hill added that the government supported 'the full engagement of indigenous peoples in the democratic decision-making process'.[20] This commitment falls far short of the Declaration's requirement in Article 19 that the free and informed consent of indigenous peoples be obtained before adopting legislative or administrative measures that specifically affect them. Indeed, Australia objected to Article 19, as did its fellow dissenters from Canada and New Zealand.[21] However, the government's commitment falls short of even consulting indigenous peoples regarding decisions that affect them, a less controversial aspect of human right law.[22] Hill only committed to indigenous peoples having equal participation rights in all democratic processes, rather than any special rights regarding processes that impacted specifically on them. In Australia, indigenous peoples make up only two per cent of the population, and can therefore be easily outvoted by a majority, even if that majority is hardly affected by the relevant laws, hence the need for special minority rights of consultation if not veto power. Indeed, the Howard government did not adequately consult indigenous peoples over important laws that affected them, such as amendments to native title law in 1998,[23] or the Northern Territory intervention of 2007.[24]

III. Relationship with Treaty Bodies

Australia's human rights record was examined by various UN treaty bodies pursuant to individual complaints processes and reporting processes, discussed in turn below. Australia's experiences under the reporting procedure prompted a

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18 See 'General Assembly Adopts Declaration on Rights of Indigenous Peoples' 13 September 2007, UN Doc GA/10612 <www.un.org/News/Press/docs/2007/ga 10612.doc.htm> (5 April 2008).

19 See G Marks, 'Avoiding the International Spotlight: Australia, Indigenous Rights, and the United Nations Treaty Bodies' (2002) 2 *Human Rights Law Review* 19, 24-6.

20 UN Press Release GA/10162.

21 Ibid.

22 On the issue of informed consent and informed consultation, see Marks, above n 19, 49-56.

23 Report by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (1998) 12, 31, 35-6, 40-2; Report by the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (1999) 16-26; Report by the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2000) 11-15, 19-20.

24 Report by the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2007) ch 3.

remarkable attack by the Howard government on the treaty system, also discussed below.

(a) Individual complaints process

Under the Howard government, Australia was found in violation of the International Covenant on Civil and Political Rights (ICCPR)[25] on 14 occasions, with one violation each of the CAT and the Convention on the Elimination of all Forms of Racial Discrimination (CERD).[26]

Not all of those cases concerned policies or laws of the Howard government itself. Due to time lags between submission and determination of a case, two cases concerned instances of detention that commenced (and in one case finished) before the Howard government came to power. Some cases concerned the laws and policies of state or territory governments. Therefore, a finding of violation does not necessarily tar the Howard government. It is instead fair to judge its record by reference to its engagement with the treaty bodies during consideration of the cases, and its responses to the 16 decisions.

The Australian authorities generally engaged seriously with the treaty bodies in presenting appropriate arguments regarding admissibility and merits, during their consideration of the relevant complaints. States parties are not always so cooperative: numerous cases are decided without any meaningful participation by the relevant state. Furthermore, Australia always complied with requests for interim measures, notably requests to refrain from deporting a person if requested to do so by a treaty body.[27] On the other hand, Australia's record of implementing treaty body views was poor, as discussed below.

Seven cases concerned Australia's system of mandatory detention for aliens unlawfully in the country, a policy that largely affects asylum seekers. The system of mandatory detention was introduced in 1992 under the Keating Labor government, and was expanded under the Howard government. The Human Rights Committee (HRC), the monitoring body under the ICCPR, found that mandatory detention breached the freedom from arbitrary detention in Article 9(1) of the ICCPR, as well as the right to challenge the lawfulness of detention under Article 9(4). Additional violations were found in two of these cases. In *Bakhtiyari v Australia*,[28] the detention regime was found to breach the rights of child detainees under Article 24 of the ICCPR. In *C v Australia*,[29] the mental harm caused to Mr C by being in detention was found to constitute inhuman treatment in breach of Article 7. Furthermore, Mr C was earmarked for deportation to Iran at the time of his complaint: his proposed deportation would also breach his Article 7 rights.

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25 (16 December 1966) 999 UNTS 171.

26 International Convention on the Elimination of All Forms of Racial Discrimination, (21 December 1965) 660 UNTS 195.

27 In *M.P.S. v Australia* CAT/C/28/D/138/1999 and *Z.T. v Australia* CAT/C/28/D/138/1999, the complainants were deported prior to receipt of interim requests not to do so. Both cases were ultimately inadmissible.

28 CCPR/C/79/D/1069/2002.

29 CCPR/C/76/D/900/1999.

The responses in three of these mandatory detention cases, *A v Australia*,[30] *Baban v Australia*,[31] and *Bakhtiyari*, were found by the HRC to be unsatisfactory.[32] Two other mandatory detention cases, *Shams et al v Australia*[33] and *Shafiq v Australia*,[34] were not listed as 'unsatisfactory' in the 2007 annual report, as follow-up responses were not yet due. The response in *D and E v Australia*,[35] decided in July 2006, was overdue. Nevertheless, it seems unlikely that the Howard government would have given a response in those cases that was anymore satisfactory than those in *A*, *Baban* and *Bakhtiyari*. In all six cases, the relevant breaches were entailed in the mandatory nature of the relevant detentions. The impugned legislation essentially remained in place, and no compensation for breaches was given to the victims in those cases.

Follow-up dialogue regarding *C* was classified as 'ongoing' in 2007. Whilst the mandatory detention issue was not addressed in any more satisfactory a manner than in the other cases, the response was not wholly 'unsatisfactory', as additional issues beyond mandatory detention were partially addressed. For example, *C* had not been deported to Iran, though his immigration status had not been finalised.[36]

Elmi v Australia was a complaint before the UN Committee against Torture. Elmi, who had failed in his attempts to gain a protection visa in Australia, successfully argued that his proposed deportation back to Somalia would breach his rights against *refoulement* under Article 3 of the CAT. In May 2001, Elmi voluntarily left Australia after his second request for asylum failed. The resolution in *Elmi* was regarded as satisfactory by the CAT Committee.[37]

Immigration laws also arose in the context of the proposed deportation of family members of citizens. In *Winata v Australia*,[38] the HRC found that the proposed deportation of a 13-year-old citizen's parents, who had illegally overstayed their visas by many years, would breach family rights under Articles 23(1) and 17(1) of the ICCPR, as well as the rights of the child under Article 24. In 2006, the Winata parents remained in the Australian community, though they had not been granted a visa.[39] Follow-up dialogue regarding the case was listed in 2007 as 'ongoing'.

In *Madafferi v Australia*,[40] the HRC found that the proposed deportation of Madafferi would breach family rights, and the rights of Madafferi's citizen children. It also found that his return to immigration detention from home detention, against medical advice regarding his mental state, breached his rights to

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30 CCPR/C/59/D/560/1993.
31 CCPR/C/78/D/1014/2001.
32 Annual Report of the HRC, A/62/40 Vol I (2007) 101-2.
33 CCPR/C/90/D/1255.
34 CCPR/C/88/D/1324/2004.
35 CCPR/C/87/D/1050/2002.
36 Annual Report of the HRC, A/60/50 Vol I (2005) 121; A/60/50 Vol II (2005) 506.
37 Annual Report of the CAT Committee, A/62/44 (2007) 102-3. This author understands that Elmi left for Saudi Arabia.
38 CCPR/C/72/D/930/2000.
39 Annual Report of the HRC, A/61/40 Vol II (2006) 687.
40 CCPR/C/81/D/1011/2001.

humane treatment in detention under Article 10(1). By 2006, Madafferi had been released from detention and granted a spouse visa. Australia's response was classified as 'satisfactory'.[41]

Young v Australia[42] concerned a complaint about discrimination on the basis of sexuality. Young was refused access to a veteran's dependent's pension as he was the same-sex partner of a deceased war veteran: such benefits only extended to the heterosexual partner of a deceased war veteran. The relevant federal legislation was found to breach the right of equal protection under the law in Article 26 of the ICCPR. Australia rejected the HRC's finding of violation, and refused to amend the legislation. This response was deemed 'unsatisfactory'.[43]

Faure v Australia[44] concerned a challenge to the legislative requirement that unemployed persons be, in certain circumstances, required to perform work in order to receive full employment benefits. The HRC rejected the claim that the practice constituted 'forced labour' contrary to Article 8 of the ICCPR. However, the HRC found that Australia had breached Article 2(3), the right to a remedy in the ICCPR, in conjunction with Article 8, as Faure had had no possibility of challenging the relevant legislation at the domestic level. Australia strongly rejected the HRC's reasoning in *Faure*, noting that the HRC had never previously found a violation of Article 2(3) without an accompanying violation of a substantive provision of the ICCPR. It also noted that the remedy would require Australia to adopt a constitutional bill of rights, in order to permit challenges to the validity of legislation such as the work-for-the-dole laws. The Howard government did not support such a bill of rights. In any case, constitutional amendment in Australia is very difficult, requiring approval at a referendum, so no government could ensure such an outcome. Strangely, the HRC continues to classify the follow-up dialogue regarding *Faure* as 'ongoing', despite Australia's clear indication that it would not implement the views.[45]

Hagan v Australia[46] was a complaint before the UN Committee on the Elimination of Racial Discrimination. It concerned the alleged inherent racial discrimination entailed in the name of the 'Nigger Brown stand' at a Queensland sports ground.[47] The Committee requested that the offending signage be removed. The CERD Committee classifies dialogue regarding this case as 'ongoing'.[48] The grandstand, along with the offending sign, was demolished in September 2008, to make way for a new facility.

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41 Annual Report of the HRC, A/62/40 Vol I (2007) 102.
42 CCPR/C/78/D/941/2000.
43 Annual Report of the HRC, A/62/40 Vol I (2007) 102.
44 CCPR/C/85/D/1036/2001.
45 Annual Report of the HRC, A/61/40 Vol I (2006) 109.
46 CERD/C/62/D/26/2002.
47 The stand was named in 1960 after a local sports hero, whose nickname was 'Nigger'.
48 Annual Report of the CERD Committee, A/61/18 (2006) 146.

In *Brough v Australia*[49] and *Cabal and Pasini v Australia*,[50] violations regarding ill-treatment in detention under state laws (New South Wales and Victoria, respectively) were found. *Coleman v Australia*[51] concerned a breach of freedom of expression (Article 19 ICCPR) under Queensland law. An 'unsatisfactory' response was received regarding *Cabal and Pasini*. Though Victorian police had been instructed not to place people in similar conditions of detention again, the complainants themselves received no compensation.[52] In *Brough* and *Coleman*, Australia rejected the HRC's views, though dialogues regarding both cases are currently considered 'ongoing'.[53]

Rogerson v Australia[54] and *Dudko v Australia*[55] concerned breaches of the right to a fair trial under, respectively, Northern Territory and New South Wales laws. No particular follow-up was required in *Rogerson* as the HRC explicitly found that the finding of violation itself amounted to an appropriate remedy. *Dudko* was decided in 2007, so the Howard government will not be involved in follow-up to that case.

Of the 16 violations, only three cases elicited a 'satisfactory' follow-up response from the government: *Rogerson* (where nothing had to be done), *Elmi*, and *Madafferi*. Only five cases are recorded as attracting 'unsatisfactory' responses: *A*, *Baban*, *Bakhtiyar*i, *Young*, and *Cabal and Pasini*. In other cases, follow-up dialogue between Australian and the HRC was listed as 'ongoing', Australia's follow-up response was overdue, or follow-up information was not yet due. Of the 'ongoing' dialogues, only *Winata* was possibly heading towards a 'satisfactory' outcome, and the issue in *Hagan* was resolved after the Howard government left power (at the behest of the Queensland rather than the Federal government).

This author does not believe that all of the relevant HRC decisions are flawless.[56] Furthermore, as was pointed out by the Howard government on numerous occasions, the treaty bodies' decisions are not legally binding. However, they do represent authoritative interpretations of legally binding documents.[57] All governments have a duty to engage with the treaty bodies in good faith. The routine dismissal of the treaty bodies' decisions does not manifest good faith. At the least, rejection of the reasoning in a case should always be accompanied by

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49 CCPR/C/86/D/1184/2003.
50 CCPR/C/78/D/1020/2001.
51 CCPR/C/87/D/1157/2003.
52 Annual Report of the HRC, A/59/40 Vol 1 (2004) 150.
53 Annual Report of the HRC, A/62/40 Vol I (2007) 102.
54 CCPR/C/74/D/802/1998.
55 CCPR/C/90/D/1347/2005.
56 Indeed, this author believes that there are serious grounds to question the decisions and/or reasoning in *Faure*, *Hagan* and *Winata*. See S Joseph, 'Human Rights Committee: Recent Cases' (2006) 5 *Human Rights Law Review* 361, 373-75 (re *Faure*); 'UN Human Rights Treaty Bodies: Recent Cases' (2003) *3 Human Rights Law Review* 291, 298-300 (re *Hagan*); 'Human Rights Committee: Recent Cases' (2001) 1 *Human Rights Law Review*, 305, 313-18 (re *Winata*).
57 S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2nd ed, 2004) [1.51].

detailed explanations and justifications for that rejection. Such detail, for example, accompanied the rejection of *Faure*.[58] Such detail was otherwise rare. And of course, rejection did nothing to redress the substantive violations identified by the Committees in the cases.

(b) Reporting process and response

Whilst the record of the Howard government in following up findings of violation in individual complaints was poor, it was the reporting process under the UN human rights treaties that attracted its greatest ire.

Concluding Observations on Australia were issued in 1997 pursuant to reporting processes under the CEDAW and CRC.[59] Concerns regarding budget cuts to administrative bodies promoting women, continuing disadvantage for indigenous women, and laws that restricted congregations of groups of young people, were raised. Policies regarding criminalisation of sex tourism, the combating of violence against women, universal and free education, and welfare services for children were praised.

In 1998, the Committee on the Elimination of Racial Discrimination (CERD Committee), pursuant to its urgent action procedures, called for a report from Australia in respect of its amendments to the Native Title Act 1993, which rolled back native title rights. Australia was the first Western country to be requested to submit an emergency report to any of the treaty bodies.[60] The CERD Committee subsequently found that the amendments discriminated against indigenous people on a number of grounds. Australia rejected the findings in March 1999, with Attorney-General Daryl Williams describing them as ‘an insult to Australia and all Australians as they were unbalanced’.[61]

In 2000, Australia had dialogues with four of the treaty bodies pursuant to the normal course of periodic state reporting, including, again, the CERD Committee.[62] As with all states, the resultant Concluding Observations outlined positive and negative comments on Australia’s record of implementation of the relevant treaty. On the positive side, highlighted issues included progress regarding the enjoyment of women’s rights, the general high standard of living in Australia, and the amount of expenditure aimed at improving social and economic conditions for indigenous peoples. Highlighted negatives included the native title legislative amendments, mandatory detention of refugees, mandatory sentencing regimes in the Northern Territory and Western Australia, indigenous disadvantage, the lack of statutory maternity leave, the types of restraints used in prisons and the use of force by police, the need for greater rights of review of Ministerial decisions that could

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58 Annual Report of the HRC, A/61/40 Vol II (2006) 690-82.

59 Concluding Observations of CEDAW Committee, A/52/38/Rev.1, Part II [365]-[408] (1997), Concluding Observations of CRC Committee, CRC/C/15/Add.79 (1997).

60 Marks, above n 19, 39.

61 Daryl Williams, ‘United Nations Committee misunderstands and misrepresents Australia’ (Press Release, 19 March 1999) as reported by Marks, above n 19, 41.

62 Concluding Observations by CERD A/55/18 (2000), Concluding Observations by HRC, A/55/40 (2000), Concluding Observations by CESCR Committee, E/2001/22; Concluding Observations by CAT Committee, A/56/44 (2001).

impact on rights against *refoulement*, and the general absence of legislative protection for human rights in Australia.

The government's reaction was unprecedented in its hostility. On 30 March 2000, just after the issuance of the 2000 Concluding Observations from the CERD Committee, the Foreign Minister announced a review of Australia's engagement with the treaty bodies, as the government was 'appalled at the blatantly political and partisan approach taken by the' CERD Committee.[63] In August 2000, after the HRC issued its Concluding Observations, the outcome of this review was announced in a joint media release by the Ministers for Foreign Affairs, Immigration and Multicultural Affairs, and the Attorney-General.[64] The government would take 'strong measures' to 'improve the effectiveness' of the treaty bodies, which, in its opinion, needed 'a complete overhaul'. The Ministers noted that the treaty bodies had to 'ensure recognition of the primary role of democratically elected governments and the subordinate role of' non-governmental organisations (NGOs), and act within their mandates. Third, the government would take a 'robust approach' to its interaction with the treaty bodies in order to 'maximise positive outcomes for Australia'. Australia would not accede to unwarranted visits by UN human rights experts, and it would reject unjustified requests to stay deportations.[65] It would refuse to ratify the Optional Protocol to CEDAW. Amidst the hostility to the human rights treaty system were some welcome suggestions: Australia would work to 'improve coordination between the Committees' and also help to redress the inadequate administrative support for the treaty bodies.

Treaty-body reform was overdue by 2000.[66] Indeed, Australia has been an active agent in prompting appropriate reforms since that time. From 2001, Australia hosted three workshops[67] designed to address 'key reform issues', including the need for greater coordination between the treaty bodies, and the creation of 'best practice' reporting guidelines.[68] Reform of the treaty bodies is in fact an ongoing dynamic process that must continue.

Nevertheless, the tone of the press releases, particularly those of 1999 and 2000, was unjustified. The package of strategies was designed to 'ensure that Australia [got] a better deal from the UN treaty committees', which implied that the

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63 Alexander Downer, 'Government to review UN Treaty Committees' (Press Release, 30 March 2000) <http://www.foreignminister.gov.au/releases/2000/fa024_2000.html>.

64 Alexander Downer, Daryl Williams, and Philip Ruddock, 'Improving the Effectiveness of the United Nations Committees' (Joint Press Release, 29 August 2000) <http://www.foreignminister.gov.au/releases/2000/fa097_2000.html>.

65 Despite this statement, the Howard government abided by all requests for interim measures, to this author's knowledge.

66 See, eg, A Bayefsky, 'Reform of the UN Human Rights Treaty System: Universality at the Crossroads' (2001) <http://www.bayefsky.com/tree.php/id/9250>.

67 Alexander Downer, Daryl Williams, and Philip Ruddock, 'Australian Initiative to Improve the Effectiveness of the UN Treaty Committees' (Joint Press Release, 5 April 2001) <http://www.foreignminister.gov.au/releases/2001/fa043a_01.html>.

68 Alexander Downer and Daryl Williams, 'Australia to Host Human Rights Treaty Workshop' (Joint Press Release, 25 June 2002) <http://www.foreignminister.gov.au/releases/2002/fa095_02.html>.

Concluding Observations were somehow unfair. However, none of the criticisms should have taken the government by surprise.[69] All had been the subject to considerable domestic debate, and had been the subject of criticism by Australia's major human rights institution, HREOC (discussed below).

The government was clearly aggrieved at the level of attention paid by the Committees to NGO submissions. Daryl Williams stated the CERD Committee in 2000 had 'relied almost exclusively on information provided by non-government organizations', which in his view represented 'a serious indictment of [its] work'.[70] In fact, the Committees did not rely only on NGOs in crafting their criticisms: they relied also on HREOC, a statutory body with particular human rights expertise.

In any case, it is disconcerting that the government should vigorously impugn NGOs and 'special interest groups'. It took many years, and much debate within the treaty bodies for NGO information to be openly used by Committee members in dialogues with states parties. During the Cold War, members from Eastern bloc states had argued vehemently against the use of such material.[71] Had that view prevailed, the system of scrutiny within the treaty-body system would have been fatally undermined. Governments are inevitably tempted to paint rosier pictures of their human rights compliance than exists in reality, and may even attempt to shield certain issues from Committee scrutiny. It is therefore necessary for the Committees to hear alternative views on those policies and laws.

Many NGOs are focused solely or largely on the implementation of certain human rights, and have developed significant expertise in that area. The Committees are focused solely on the extent to which governments have implemented their obligations under the relevant treaty. Governments, on the other hand, are not so focused on the implementation of human rights: they are inevitably influenced by political, ideological and/or economic expediencies, which might conflict with international human rights law.[72] For example, the harshness of the mandatory detention regime played a significant role in deterring many asylum seekers from coming to Australia. This aspect of the laws was perceived to be popular, and therefore desirable for a government seeking re-election, and it also achieved the government's goal of limiting the number of illegal arrivals in Australia. However, such considerations are largely irrelevant to a consideration of the human rights compatibility of the policy. Given the differing motivations and mandates of governments, NGOs, and the treaty bodies, it is not surprising if the treaty bodies may generally favour the views of some NGOs over those of governments.

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69 S Zifcak, *Mr Ruddock goes to Geneva* (2003) 21-2, 43-4.

70 Daryl Williams, 'CERD Report Unbalanced' (Press Release, 26 March 2000) as cited by H Charlesworth, 'Human Rights: Australia versus the UN', *Democratic Audit of Australia*, Discussion Paper 22/06, August 2006, 4 <http://democratic.audit.anu.edu.au/papers/20060809_charlesworth_aust_un.pdf>.

71 See S Joseph, 'New Procedures Concerning the Human Rights Committee's Examination of State Reports' (1995) 13 *Netherlands Quarterly of Human Rights* 5, 6 fn 7.

72 Joseph, Schultz, and Castan, above n 57 [1.111].

Two general concerns of the government were evident in the following statement from Prime Minister Howard on the ABC's '7:30 Report' in August 2000:

> In the end, most of these issues, indeed all of them in the eyes of most Australians, should be resolved in Australia …
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> It isn't really the business of a UN committee when we clearly have a democratic system in this Government and everybody's given an opportunity to put their view.
>
> It's not really the business of a UN committee to come along and say "We think that's wrong, even though your parliament has agreed to it and we think you ought to change it."
>
> That might be appropriate if you were dealing with a country that didn't have a robust democracy, didn't have a free press and didn't have an incorruptible judicial system, but it's not appropriate for a country like Australia.[73]

The Howard government clearly felt that its views as the government of Australia deserved particular respect from the Committees, considering the comparably appalling human rights records of many other states. For example, Daryl Williams stated in March 2000 that it was 'unacceptable that Australia, … a model member of the UN, [was] being criticised in this way for its human rights record.'[74] These statements imply that Australia's human rights violations are either non-existent, or are not serious enough to warrant international intention. They imply that the international human rights system is designed to target 'them', the 'real' human rights abusers, rather than 'us'.

The existence of states with far worse human rights records does not immunise Australia from scrutiny. Australia has voluntarily ratified numerous human rights treaties, and therefore is bound in international law to implement the minimum standards contained therein. That assessment involves a comparison of Australia's record with those minimum requirements, rather than a comparison of Australia with other states.[75] It is absurd, for example, to suggest that the existence of routine murder and torture in state X means that a single act of torture in Australia is therefore excusable.

Australia was not victimised by the Committees. Much of the adverse comments by the Committees arose pursuant to routine reporting mechanisms under the treaties, which apply to all states parties. It was admittedly unfortunate that Australia encountered four committees in 2000, but that scheduling was partly caused by Australia's failure to submit periodic reports on time. The Concluding Observations followed a pattern common to all states: positive and negative aspects of Australia's record were noted. As with all states, the list of negatives tended to be longer than the list of positives, probably because there is a greater urgency for a state to address violations, rather than to bask in plaudits. Regarding individual

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73 See transcript of interview with John Howard, 30 August 2000, <http://www.abc.net.au/7.30/stories/s169672.htm> (1 April 2008).

74 Williams cited by Charlesworth, above n 70, 4.

75 See Charlesworth, above n 70, 5.

complaints, the Committees consider the merits of all admissible complaints: they do not choose the complaints that come before them.

The 'urgent action' request by the CERD Committee in 1999 was an exception, where Australia was singled out for scrutiny. That request concerned an issue of monumental significance, rollback of native title rights, to an underprivileged racial group, indigenous peoples in Australia. Human rights abuses do not have to equate with mass murder and torture before they can be deemed serious and deserving of special attention, especially for those who are suffering from them.

Democratic governments such as Australia can and do commit serious human rights breaches. During the Howard years, Australia was guilty of such abuses, despite the government's apparent refusal to countenance that possibility. These breaches included long-term compulsory detention of people (including children) who were often genuine refugees without any individualised consideration of the need to detain them, and the continued poor socio-economic conditions of indigenous peoples in one of the wealthiest countries in the world.

Finally, Australia and other liberal democracies must set an example for other states. Indeed, China reportedly requested information on Australia's rejection of CERD recommendations in bilateral discussions (discussed below), indicating that it 'was keeping a close eye on any instance of Australia's failure to respect the authority of UN treaty committees'.[76] If liberal democratic states were exempt from or subjected to less scrutiny by the Committees, it is difficult for them to argue that other states should respect human rights law.[77] Such a situation would be entirely counterproductive: it would help to justify recalcitrant arguments that the human rights regime is a neo-colonial system dominated by Western values of little relevance to non-Western states.

A second government concern, evident in the above statements of John Howard, was that the treaty bodies' criticisms undermined Australia's sovereignty. Such arguments are redolent of sentiments commonly expressed by China or Burma, rather than Australia. Such arguments undermine the international human rights system: the system was designed by states in the exercise of their collective sovereignty[78] to elevate human rights to the international plane to ensure that human rights abuses could not be shielded by state sovereign power. Such arguments are in any case legally wrong. Australia has voluntarily ratified most of the UN human rights treaties, and is therefore bound in international law to observe the standards therein, and to comply with the processes therein.[79] Those processes expose all states parties to criticism.

After the government's explosive response to the Committees in 2000, it adopted a lower-key approach. Indeed, it arguably fulfilled its threat to disengage from the Committees. It gave little publicity to the views of the treaty bodies in

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76 A Kent, 'States Monitoring States: the United States, Australia, and China's Human Rights, 1990-2001' (2001) 23 *Human Rights Quarterly* 583, 617-18.

77 See also Kinley and Martin, above n 13, 476.

78 Charlesworth et al, above n 3, 90.

79 See also Kinley and Martin, above n 13, 473-76.

individual communications (most of the cases concerning Australia were decided after 2000) and rarely implemented those views. Similarly, it gave little publicity to Concluding Observations issued by the treaty bodies after 2000.[80] The government's tactic of silence, compared to its intemperate outbursts in 1999 to 2000, diverted media attention away from the Committees. The government thus avoided domestic scrutiny over its multiple failures to address the Committees' concerns.[81]

IV. Relationship with other UN Human Rights Bodies

(a) Commission on Human Rights and Human Rights Council

Australia sought and gained election to the UN Human Rights Commission from 2003 to 2005. It was elected Vice-Chair in 2003, and served as Chair of the Commission in 2004. The position of Chair is rotated through the various UN groups, so Australia was clearly chosen by other states in the 'Western Europe and Other' group to chair the session, which is evidence of esteem from those nations. Australia took the responsibility for drafting resolutions on the role of national institutions, such as HREOC, in protecting human rights.[82]

This author gained the impression, in looking at voting patterns in the Commission, that Australia's voting record was more exceptional than the norm. However, it did not approach the level of exceptionalism exhibited by the United States. Australia's exceptional votes,[83] which all supported a similar vote by the United States, may reflect the extraordinarily close relationship between the Howard government and the government of George W Bush, and the tendency of both governments to turn away from multilateralism in a number of areas.[84]

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80 See Concluding Observations of CERD Committee, CERD/C/AUS/CO/14 (2005) (concerns raised included the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), and reports of prejudice against Muslims: CERD welcomed the repeal of mandatory sentencing legislation in the Northern Territory); Concluding Observations of CRC Committee, CRC/C/15/Add.268 (2005) (concerns raised included the lack of incorporation of the CRC: Australia was praised, *inter alia*, for the increased coordination of child policies between the various Australian governments); Concluding Observations of CEDAW Committee, CEDAW/C/AUL/CO/5 (2006) (concerns raised included the low proportion of women in public bodies, and the lack of a comprehensive strategy to combat trafficking and exploitation by prostitution: Australia was praised for, *inter alia*, the introduction of maternity payments, and Australia's 'high ranking in international surveys assessing gender related progress').

81 Charlesworth et al, above n 3, 88-9.

82 See, eg, Human Rights Commission Res 2004/75.

83 The votes concerned issues such as the right to development, the right to food, condemnation of Israel, and the appointment of a Special Representative on business and human rights. See the following Commission Resolutions: 2003/25, 2003/83, 2004/7, 2004/107, 2005/4, 2005/6, 2005/8, and 2005/69.

84 See, eg, ABC radio interview with Alexander Downer, 'Alexander Downer moves towards a new foreign policy' (26 June 2003) <http://www.abc.net.au/pm/content/2003/s889152.htm>, where Downer suggested that 'increasing multilateralism is a synonym for an ineffective and unfocussed policy involving internationalism of the lowest common denominator'. The clearest departure from multilateralism arose when Australia joined the US (and the UK) in invading Iraq in 2003 without UN approval.

The Human Rights Commission was replaced by the Human Rights Council from 2006. Australia did not seek election to that body before the Howard government lost power in late 2007.

(b) Special procedures and other visits

A number of UN expert human rights bodies, outside the treaty system, visited Australia throughout the term of the Howard government. Notably, four visits arose after Australia's 'falling out' with the treaty bodies in 2000.

The report of the Special Rapporteur on Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination, Professor Maurice Glèlè-Ahanhanzo, was issued in February 2002 after a 2001 visit: the recommendations focused on reconciliation with indigenous peoples.[85] In response, Australia labelled the report seriously erroneous and flawed: it added 'little to public debate' in Australia.[86]

Justice P N Bhagwati, the Regional Adviser for Asia and the Pacific of the UN High Commissioner for Human Rights, accompanied the Working Group on Arbitrary Detention on a visit to Australia in 2002, during which they visited immigration detention centres. Both Bhagwati[87] and the Working Group[88] found numerous human rights abuses entailed in the immigration detention regime. Both reports were robustly rejected by the government.[89] Regarding both reports, Australia noted factual errors or inconsistencies. Some of those criticisms were probably fair. However, such criticisms do not justify a blanket rejection of entire reports, especially when those reports reflected the virtual unanimous opinion of human rights experts on the human rights compatibility of Australia's immigration detention regime.

Again, the theme of sovereignty coloured Australia's responses: Australia's 'sovereign right under international law to determine who will enter our borders and be permitted to remain, and the conditions under which they may be removed'[90] was highlighted. States do have great latitude regarding immigration requirements for aliens, but it is overstating the case to claim that they can do whatever they wish in that respect. Human rights obligations regarding *non-refoulement*, family rights according to *Winata* and *Madafferi*, non-discrimination,[91] as well as prohibitions on ill-treatment in or out of detention, are

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85 E/CN.4/2002/24/Add.1 (26 February 2002).

86 See E/CN.4/2002/SR.10, 28 March 2002) [52].

87 See 'Report of Justice P N Bhagwati on Mission to Australia 24 May-2 June 2002', <http://www.unhchr.ch/huricane/huricane.nsf/0/bc4c8230f96684c8c1256c070032f5f1/$FILE/Report.doc>.

88 UN Doc E/CN.4/2003/8/Add.2 (24 October 2002).

89 Alexander Downer and Daryl Williams, 'Government rejects report of the UN Human Rights Commissioner's Envoy into Human Rights and Immigration Detention' (Joint Press Release, 31 July 2002) <http://www.foreignminister.gov.au/releases/2002/fa109_02_un_hr_report.html>.

90 Alexander Downer and Phillip Ruddock, 'Government rejects UN report on Arbitrary Detention' (Joint Media Release, 13 December 2002) <http://www.foreignminister.gov.au/releases/2002/fa184a_02.html>.

91 See, eg, *Aumeeruddy-Cziffra v Mauritius* CCPR/C/12/D/35/1978, *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471.

all international legal constraints on the rights of states to deal with unlawful arrivals.

In August 2006, the Special Rapporteur on Adequate Housing, Miloon Kothari, conducted a two-week mission to Australia. His mission report noted numerous problems with Australia's fulfilment of the right to adequate housing, such as Australia's lack of 'a clear, consistent, long-term and holistic housing strategy'.[92] Significant concerns were expressed regarding housing conditions for indigenous people, homelessness, and housing affordability.

In responding to Kothari's report in the Human Rights Council in July 2007, the Australian Observer stated:

> [t]he report made exaggerated claims regarding deficiencies in Australia's housing sector and failed to acknowledge that the vast majority of Australian households had access to high quality housing.[93]

This statement seems to betray a lack of understanding of the nature of the right to adequate housing. This right is subject to progressive implementation and available resources, which means that the obligations for wealthy countries are greater than for poorer countries. It is true that many Australians live in excellent housing conditions. It is also true that too many Australians live under housing stress in substandard conditions, which is not acceptable in such a prosperous country.[94]

As with the treaty bodies, the Australian government routinely dismissed the recommendations and views of other UN human rights experts as biased, ill-informed, and wrong. While this author does not believe that UN human rights experts are infallible, the blanket refusal of the government to countenance the possibility that it might be perpetrating human rights abuses, in the face of consistent types and levels of criticism, amounted to a failure to engage seriously in UN human rights processes contrary to its international law obligations.[95] It also exacerbated the substantive human rights abuses identified within those processes.

V. Domestic Institutions

The human rights criticisms aimed at Australia by the UN human rights bodies were largely reinforced by the major federal human rights institution, HREOC. For example, the mandatory detention of asylum seekers was comprehensively condemned in a 1998 report,[96] and again in 2004 in a report on children in detention.[97] Concerns regarding the right to housing, particularly homelessness,

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92 A/HRC/4/18/Add.2, 2.

93 See Summary Record of 2nd meeting of the Human Rights Council, Fifth Session, 11 June 2007, 3pm, UN Doc A/HRC/5/SR.2 [71]-[72].

94 See also K Hilton, 'Righting Australia's National Housing Crisis', *Human Rights Law Resource Centre Bulletin* (No 15, July 2007) 1-2.

95 Kinley and Martin, above n 13, 473-76.

96 Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998).

97 Human Rights and Equal Opportunity Commission, *A Last Resort? The National Enquiry into Children in Immigration Detention* (2004).

were expressed in a February 2008 report.[98] Numerous concerns regarding indigenous peoples, including the rollback of native title laws, have been expressed in annual reports of the Aboriginal and Torres Strait Islander Social Justice (ATSISJ) Commissioner.[99] Unsurprisingly, HREOC reports have traversed a wider spectrum of human rights concerns in Australia than the UN bodies, including reports that highlight systemic discrimination on the basis of sexuality[100] and age.[101]

The Howard government's relationship with HREOC was strained. Whilst it responded to some of the HREOC reports, for example with the passage of the Age Discrimination Act 2004 (Cth), most of HREOC's recommendations were rejected. For example, in 1997, HREOC published the 'Bringing them Home' report, the outcome of its national inquiry into the 'stolen generation', that is aboriginal children who had been subjected to forced separation from their families in the early to mid-twentieth century.[102] The government famously rejected the recommendation to 'apologise' formally to the stolen generations. Indeed, as of 2007, 34 of the 54 recommendations from the report had not been fulfilled.[103]

The government attempted to curtail HREOC's powers with its introduction of the Australian Human Rights Commission Legislation Bill 2003. If enacted, this Bill would have replaced the structure of one President and five specialist commissioners with a President and three generalist commissioners. The power to recommend the award of damages or compensation, pursuant to its power to conciliate discrimination claims, would have been removed.

Most controversially, the Bill would have required HREOC to gain the approval of the Attorney-General before it could intervene in a court case. HREOC intervenes in court cases to give the court an expert independent view of the human rights ramifications of a particular case. The government explained that the amendment was designed to ensure that intervention power was only used 'after the broader interests of the community [were] taken into account'.[104] The amendments were also designed to 'prevent duplication and waste of resources'.[105]

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98 Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008). This report was finalised after Howard left power.

99 See annual reports of the Commissioner on Social Justice and Native Title, <http://www.hreoc.gov.au/social_justice/publications.html>.

100 Human Rights and Equal Opportunity Commission, *Stories of Discrimination Experienced by the Gay, Lesbian, Bisexual, Transgender and Intersex Community* (2007).

101 Human Rights and Equal Opportunity Commission, *Age Matters: A Report on Age Discrimination* (2000).

102 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

103 S Peatling, 'Blacks, be patient: Abbott' *Sydney Morning Herald* (25 May 2007) <http://www.smh.com.au/news/national/be-patient-health-minister/2007/05/24/1179601579542.html>.

104 Explanatory Memorandum, Human Rights Legislation Amendment Bill (No 2) 1998, 9.

105 Senate Legal and Constitutional Legislation Committee, Parliament of Australia,

The Legal and Constitutional Legislation Committee of the federal Parliament conducted an inquiry into the Bill in 2003. Virtually all non-government submissions opposed the amendment.[106] It was noted that the amendment would undercut the independence of HREOC, especially as the federal government was likely to be a party in many of the cases in which intervention would be sought.[107] Furthermore, HREOC can only intervene with the leave of the court, which guards against overzealous use of the power. By 2003, no court had ever rejected its motion to intervene.[108] Regarding waste, the Committee heard evidence that from 2000 to 2003, HREOC spent only 0.5 per cent of its budget on court interventions.[109] Regarding duplication, the government was presumably indicating that HREOC might duplicate its own arguments in certain cases. In fact, by 2003, HREOC had disagreed with the government in 16 out of the 18 cases in which the government was a party and HREOC had intervened.[110]

The Committee ultimately recommended in May 2003 that the amendment 'not be agreed to'.[111] Nevertheless, the Bill passed the lower house on 27 June 2003, with the amendment intact.[112] The Senate, where the government lacked a majority, did not pass the Bill.[113] It must be noted that the Bill was not reintroduced in the period between 2005 and 2007, when the government had a Senate majority.

The Howard government nevertheless succeeded in significantly weakening HREOC throughout its terms. In its first budget, the government cut HREOC's budget by 40 per cent over three years.[114] Belatedly, the trend was reversed in 2006 when HREOC's budget was increased by $2 million, due to an expected 'additional workload' caused by industrial relations legislative amendments.[115] The government also failed promptly to replace Commissioners. The positions of the Race Discrimination Commissioner and the Disability Discrimination Commissioner, respectively, were not filled after 1998:[116] other Commissioners have fulfilled those roles in an 'acting' capacity.[117] This situation diminished the capacity of those acting Commissioners to fulfil functions within their real area of

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Report on the Provisions of the Australian Human Rights Commission Legislation Bill (2003) [3.41].

106 Ibid [3.13].
107 Ibid [3.16].
108 Ibid [3.21].
109 Ibid [3.42].
110 Ibid [3.43].
111 Ibid Recomm 2(a), viii.
112 House of Representatives, *Debates* (26 June 2003) 17848.
113 The Bill was introduced into the Senate on 11 August 2003 but was never passed. See Senate, *Hansard Reports* (11 August 2003) 13014.
114 Zifcak, above n 69, 65.
115 See Nicola Roxon, 'Labor to revive the fair-go country', *Labor E-Herald* (7 September 2006) <http://eherald.alp.org.au/articles/0906/natp07-01.php>.
116 See also Dissenting Report of the Committee, above n 105, by members from non-government parties [[1.6].
117 Eg, at the time of writing, Tom Calma is the ATSISJ Commissioner and the Acting Race Discrimination Commissioner.

responsibility, and diminished HREOC's capacity to fulfil its functions regarding race and disability discrimination.[118]

Finally, one may note that the Howard government criticised the courts when it perceived that they were engaging in judicial activism, and unduly undermining its role as the democratically-elected government. Some of the salient decisions that prompted such criticism were human rights decisions. For example, in *B and B v Minister for Immigration and Multicultural Affairs*,[119] the Family Court found that it had jurisdiction to order the release of children from immigration detention. In subsequent proceedings, it ordered the release of two children, B and B. The relevant Minister, Philip Ruddock, stated that the court had overstepped its power, and improperly disturbed the elected government's policies.[120] Therefore, the unelected courts were attacked for an alleged failure to respect the democratic credentials of the government. However, the same 'sovereignty' argument could not be used against local courts as had been used against the UN human rights bodies, given that the courts are part of the broader Australian system of government. As noted by Charlesworth et al, the concern perhaps never was really about sovereignty, but about the maintenance of government policy regardless of human rights ramifications.[121]

VI. Foreign Policy and Human Rights

Finally, it is instructive to comment on the Howard government's attitude to human rights in foreign policy. Like many governments, it was particularly scathing regarding human rights abuses of states with unfriendly governments, such as Iraq (under Saddam Hussein) and Zimbabwe.[122] However, it significantly softened its stance in its engagements with allies, such as the United States, and states of great strategic interest, such as China.

Early in its first term, the Howard government failed to sign the Australia-European Union Framework Agreement on trade because it contained a human rights clause. Australia felt that such clauses were inappropriate for industrialised countries, and inappropriately linked trade and human rights.[123] The European Commission refused to drop its routine clause, so a less formal Joint Declaration on trade and cooperation was adopted instead of a treaty.[124] Therefore, the idea that human rights law should not apply to countries such as Australia was

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118 Dissenting Report, above n 105 [1.7] and [1.15].

119 [2003] Fam CA 451. This decision was overturned by the High Court in *Minister for Immigration and Multicultural Affairs and Indigenous Affairs v B* (2004) 219 CLR 365.

120 Charlesworth et al, above n 3, 91.

121 Ibid.

122 See, eg, Alexander Downer, 'Zimbabwe: Australian Financial Sanctions', (Press Release, 21 June 2007) <http://www.foreignminister.gov.au/releases/2007/fa073_07.htm>.

123 See V Miller, 'The Human Rights Clause in the EU's External Agreements', House of Commons Library Research Paper 04/33 (16 April 2004) <http://www.parliament.uk/commons/lib/research/rp2004/rp04-033.pdf> 59.

124 Ibid 58.

evident early on in the Howard years. It must be noted that Australia was not alone in its attitude to the EU human rights clause: similar concerns led to the conclusion of a similar declaration between New Zealand and the EU in 1999.

As noted above, the Howard government developed a very close relationship with the government of George W Bush in the United States. Perhaps this relationship prompted Australia's five-year failure to seek the return to Australia of Australian citizen David Hicks, who was incarcerated in the United States military camp on in Guantánamo Bay from late 2001 until March 2007. The system and condition of detention and military trials for prisoners in Guantánamo Bay have been globally condemned as serious breaches of human rights.[125] United States courts have forced significant amendments to the regime, due to United States constitutional requirements.[126] Many other states, throughout that period of time, secured the return of their own nationals from Guantánamo. However, Australia refrained from overt criticism of Guantánamo Bay, and, did not seek Hicks' return prior to his hastily convened hearing in 2007, at which he pleaded guilty and received a nine-month sentence. Similarly, Australia made little attempt to secure the release of another citizen from Guantánamo Bay, Mamdouh Habib, who was detained there for two years prior to his release without charge in 2005. Australia failed to stand up for the rights of affected citizens, presumably due to the perceived exigencies in the war on terror, as well as an extreme closeness in its relationship with the United States. This attitude was not however shared by other major allies of the United States, such as the United Kingdom.[127] However, it may be noted that a Canadian citizen, Omar Khadr, remains in Guantanamo Bay at the time of writing; the Canadian government has not apparently sought his extradition or repatriation.[128]

Australia under the Keating government had been a supporter of annual draft resolutions censuring China's human rights record in the UN Commission on Human Rights. In 1997, in apparent response to Chinese pressure, the Howard government dropped its sponsorship of that Resolution, and instead began to conduct bilateral human rights dialogues with China.[129] Such dialogues have been conducted annually since that time.[130] The same model was eventually taken up with Iran, Vietnam and Laos.[131] Since 1997, the China dialogues have grown to incorporate dialogues between NGOs and the Chinese delegation, as well as inclusion of HREOC staff in the Australian delegation.

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125 See, eg, Concluding Observations on USA by the HRC (CCPR/C/USA/CO.3/Rev.1 (2006)) and by the CAT Committee (CAT/C/USA/CO/2 (2006)).

126 See, eg, *Hamdan v Rumsfeld* (2006) 548 US 557 (US Supreme Court).

127 Charlesworth et al, above n 3, 95-6.

128 See, eg, M Shephard, 'Dallaire vows to agitate for Omar Khadr' *Toronto Star* (1 May 2008).

129 Kent, above n 76, 616.

130 The Keating government actually conducted the first bilateral human rights dialogues with China in 1991 and 1992, though it continued to sponsor the Commission resolution. See Kent, above n 76, 611, 615.

131 Five such dialogues have taken place with Vietnam, while one dialogue each has been held with Iran and Laos.

As noted, the bilateral dialogues under the Howard government have coincided with a retreat by Australia from censuring China in multilateral forums. Australia is not unusual in this respect. The United States and the EU have both stopped sponsoring anti-China resolutions, concentrating instead on similar bilateral dialogue approaches.[132] This circumstance has led to a perception that considerable pressure has been taken off China. In 1999, Alexander Downer justified the government's approach:

> I feel strongly that our dialogue has made a difference, and that it is more beneficial to have China engaged, and moving forward, than to have them put up the shutters and make no progress at all. Is it better to have all the energy of China's bureaucracy directed at defeating an annual draft resolution in the Commission on Human Rights, or have them working – as they now are – on the ratification and implementation of human rights instruments?[133]

The bilateral dialogue process was investigated by the Joint Standing Committee on Foreign Affairs, Defence and Trade in September 2005. The Committee generally approved of the process, though it made discreet recommendations to improve transparency.[134] The Committee made no specific recommendations regarding Australia's position in multilateral human rights forums: it had severe doubts over the usefulness of the Commission as a forum for raising human rights issues in China.[135] The report was delivered at a time when the reputation of the Commission was queried globally. Indeed, it was abolished and replaced by the Council only a few months later.

It is probably true that Australia maximised its influence with China in refraining from overt criticism, and conducting bilateral dialogues. The abandonment of multilateral strategies by more powerful states, such as the United States, indicates that a revival of that strategy by Australia would be unlikely to receive majority support in the Commission's successor, the Human Rights Council.[136] Therefore, the bilateral track was at least a pragmatic route that ensured that China would hear Australia's human rights voice.

However, Ann Kent has argued that her own research demonstrated that bilateral pressures were 'low on the scale of effectiveness compared to multilateral pressures'.[137] She found that the dialogues imposed little accountability on China, as there were no benchmarks for compliance.[138] Therefore, the approach ran the

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[132] See Free Tibet Campaign, 'Behind Closed Doors: Bilateral Dialogues on Human Rights' *China Rights Reform* No 2, 2003, <http://hrichina.org/public/PDFs/CRF.2.2003/bilateral.pdf>.

[133] Alexander Downer, 'Australia – Effective Action on Human Rights', Speech to the NSW Branch of the Australian Institute of International Affairs, 5 August 1999, <www.foreignminister.gov.au/speeches/1999/990805_aiia.html>.

[134] See generally, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Australia's Human Rights Dialogue Process*, September 2005 (2005).

[135] Ibid [4.32]-[4.38].

[136] The Resolution against China never actually passed in the Commission on Human Rights.

[137] Kent, above n 76, 583.

[138] Ibid 621.

risk of simply alleviating pressure on China, and perhaps even legitimising its human rights approach.[139] She concluded:

> At most, bilateral monitoring achieves temporary, superficial, and instrumental change and, at worse, as has been the case with China, erodes the power, influence, and efficacy of the most effective monitoring agencies – multilateral human rights institutions.[140]

The Howard government did not always act to placate powerful states of strategic interest to Australia in the human rights arena. In early 1998, John Howard signalled a reversal of 23 years of Australian government policy by writing to President Habibie of Indonesia, suggesting that the East Timorese be permitted to vote on self-determination after a period of autonomous government.[141] Australia's position helped to spur Indonesia to negotiate a process for the exercise of East Timorese self-determination. A referendum on 30 August 1999 yielded a massive vote in East Timor in favour of independence, but prompted widespread atrocities by Indonesian-backed militia groups in East Timor. In September 1999, Indonesia consented to the deployment of international forces in East Timor to control the violence. Australia led that force, the UN-sanctioned International Force in East Timor (INTERFET), which helped to restore peace to East Timor and paved the way to independence.[142] Despite Indonesia's consent to the intervention, Australia's leadership of INTERFET, as well as its reversal of policy towards East Timor in late 1998, severely strained relations between Indonesia and Australia.[143] Nevertheless, Australia played a crucial role in securing the belated exercise of self-determination by the East Timorese, for which it has been praised by the UN,[144] including its human rights bodies.[145]

VII. Conclusion

The Howard government continually asserted its sovereignty as the Australian government in the face of criticism from international bodies. A similar attitude was evident in its dealings with the EU over the human rights clause in the proposed EU-Australia trade agreement. The government also argued that Australia's comparatively good human rights record should somehow exempt it from international scrutiny. Conversely, it asserted its 'sovereignty' as the democratically elected government of Australia in response to criticism by other governmental bodies, such as HREOC and the courts.

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139 Ibid 619.

140 Ibid 624.

141 Senate Foreign Affairs, Defence and Trade Committee Report, *Final Report on Inquiry into East Timor* (7 December 2000) [7.88]-[7.89]. Up to that point, Australia had been the only Western government to recognise Indonesia's sovereignty over East Timor after its invasion of the colony in 1975.

142 See T Voon, 'Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo' (2002) 7 *UCLA Journal of International Law and Foreign Affairs* 31, 55-8.

143 Committee report, above n 141 [7.142]; Voon, above n 142, 74-5.

144 Voon, ibid 75.

145 CESCR Concluding Observations on Australia, E/2001/22 [372].

Therefore, the Howard government persistently fended off human rights criticism from all quarters, rather than to engage seriously with the substance of those criticisms. Nor were human rights concerns a conspicuous component of its policies regarding foreign relations. The result was that human rights considerations played little role in shaping government policies, while more pragmatic considerations, such as the maintenance of strategic foreign alliances or the maintenance of populist policies regardless of their human rights ramifications, drove government decision-making.

There were some important silver linings. Australia helped to promote useful reforms of the human rights treaty bodies. Australia played a major role in establishing the ICC as well as, belatedly (considering the long-term pro-Indonesia policy of successive Australian governments), an independent East Timor. However, the general downgrading of human rights as an influence on government policy throughout 1996 to 2007 means that the record of the Howard government in engaging with the international human rights system cannot, overall, be rated highly.