

United Nations Human Rights Committee
c/o Petitions and Inquiries Section
Office of the High Commissioner for Human Rights
By email: petitions@ohchr.org

15 February 2017

Dear Committee

Author's Comments on Australia's Response to the Committee's Views in Communication No. 2005/2010 (*Hicks v Australia*)

The author has considered Australia's response of 18 October 2016 (transmitted to counsel three months later on 31 January 2016) to the Committee's Views. Australia rejects (at para. 32) the Committee's finding that Australia breached Article 9(1) of the ICCPR and that Australia must take steps to prevent similar violations in future.

This is accordingly one of the objectionable cases identified by the Committee in paragraph 18 of General Comment No. 33 (2008) on the Obligations of States Parties under the Optional Protocol, where the state fails to accept the Committee's Views.

It is also an instance of what the Committee there identified as an attempt by the state to reopen legal argument, despite the state participating fully in the conduct of the proceedings prior to Views, and despite Views being final and not subject to appeal. As such, the author does not propose to respond to Australia's further legal submissions by re-arguing issues already contested during the procedure and settled in the Views. The issues Australia raises in its response – admissibility, the scope of Article 9(1), and the significance of prisoner transfers – were fully argued during the proceedings.

Australia's response is unacceptable. The author draws the Committee's attention to paragraphs 11–15 of General Comment No. 33 (2008), by which Australia is required to respect the Committee's Views as authoritative, quasi-judicial determinations of its treaty obligations, which Australia is further bound to implement in good faith:

11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

12. The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views". These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.

13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

14. Under article 2, paragraph 3 of the Covenant, each State party undertakes “to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity.” This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found: “In accordance with article 2, paragraph 3(a) of the Covenant, the State party is required to provide the author with an effective remedy. By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s views.”

15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.

The author urges the Committee to condemn Australia’s refusal to respect its obligations under the ICCPR and Protocol, including its obligation to take steps to prevent similar violations in future; and to encourage Australia to respect the authority of the Committee’s Views.

Australia’s refusal to respond favourably to the Committee’s Views is part of a long-running, consistent pattern of non-compliance, with Australia failing to provide effective remedies in the overwhelming majority of the more than 30 Views in which adverse findings have been made against it.

Yours sincerely

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