Follow-up Report on violations by Australia of ICCPR in individual communications (1994-2017)

by

Remedy.org.au

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Executive summary

> 'Each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy …'[1]
>
> *International Covenant on Civil and Political Rights* (ICCPR)

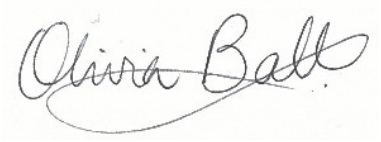
Since Australia acceded to the First Optional Protocol to the ICCPR in 1991, the Human Rights Committee has found it to be in breach of the ICCPR in 40 individual cases brought before it. This is a relatively high number, with Australia exceeded by only three other States Parties in the total number of individual communications finding breaches of the ICCPR.[2]

Of these 40 communications finding violations by Australia, only 5 (12.5%) have been fully remedied in accordance with Final Views, with partial remedies forthcoming in a further 10 cases (25%). Sixty-two per cent have not been remedied at all.

Of particular concern are a number of cases of gross violations which are ongoing, where Australia has not acted to end these violations, remedy the victims, or prevent the abuses recurring. Among these are the prolonged, arbitrary detention of recognised refugees.

Remedy Australia is a monitoring and advocacy NGO founded in response to the high rate of UN communications concerning Australia and Australia's poor response to them. We monitor treaty-body jurisprudence and follow-up to ensure implementation of remedies recommended by the Committees, including substantive remedies for authors, and effective non-repetition measures. We seek to complement and support the treaty committees in their efforts at follow-up with Australia to achieve compliance with their Views.

This Follow-Up Report provides independent information on the implementation of the Human Rights Committee's Final Views concerning violations of the ICCPR by Australia.



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1 Art 2(3)(a).

2 As at March 2016, South Korea had 122 adverse findings, followed by Jamacia (100) and Uruguay (49).

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Introduction

Forty times since 1994 individuals and groups of individuals have had complaints of human rights violations by Australia upheld by the United Nations Human Rights Committee. The first of these, *Toonen v Australia*, would prove 'a watershed with wide-ranging implications for the human rights of millions of people'.[3] It was an exceptional case, in that the Australian Government was in complete agreement with the Human Rights Committee, and sought in good faith to remedy the violation. By contrast, most authors of successful communications against Australia remain disempowered, isolated and without remedy. They have disappeared from view, along with their case. Meanwhile, pressure on the State Party to comply with its treaty obligations – notably its obligation to provide each successful author with an effective and enforceable remedy – diminishes over time.

This report is based on a systematic search to find the authors of these communications and establish what substantive remedy, if any, followed the Views of the Committee. This report represents the only comprehensive assessment of HRC communications upheld against Australia and their long-term outcomes. And it is damning. Only 5 out of the 40 Australian cases have been fully remedied, and one of those required no action on Australia's part (*Rogerson v Australia*). Ten cases have been partially remedied, but the rest have not been remedied at all. Meanwhile, some gross violations identified in individual communications, far from being remedied, continue unchecked.

Establishing contact with authors of successful complaints to determine Australia's compliance with Committee Views has involved a great deal of detective work: years spent pursuing names and contacts, lawyers, friends, sons, nuns and rumours across the Australian continent and around the world. Some of those closest to home proved the most elusive, while one man who had moved abroad happened to contact his Australian lawyer for the first time in a decade, just when the search for him had been abandoned. Remedy Australia has met with authors in living rooms, boardrooms, backyards, law offices, public housing estates, in cafes, libraries, in parliament house, maximum-security prison and on a beach. They were asked what remedies they had enjoyed and, where remedies or partial remedies had occurred, what they believed had contributed to achieving them.

One central finding of the research was the importance of civil society support for authors and their causes if they are to obtain the substantive remedies recommended by the UN Committees. Remedy Australia was founded in 2014 to provide systematic monitoring and follow-up by civil society of treaty-body jurisprudence concerning Australia.

With Australia presently undergoing periodic review by the Human Rights Committee, we submit this independent Follow-Up Report to aid your deliberations.

The 35 unremedied or partially remedied communications are summarised in this report, along with events subsequent to Final Views, where known. For ease of reference, cases are presented in alphabetical order and for brevity, the five that have been fully remedied are omitted (they are *Fardon*, *Rogerson*, *Tillman*, *Toonen* and *Young*). Full details may be found at **Remedy.org.au** We will be pleased to assist the Committee further, where possible.

[3] Navi Pillay, 'UN Human Rights Chief highlights Australian sexuality case' video address, uploaded by the Australian High Commission for Human Rights on its YouTube channel, 25 July 2011 <http://www.youtube.com/watch?v=NT5aBa-1bXs>.

A v Australia (1997)

Violations: ICCPR arts 2(3), 9(1) and 9(4)

Status: **Unremedied**

A Cambodian man known as 'A' arrived in Australia by boat in 1989 with his wife and children. The family was detained for more than four years until the success of Mrs A's refugee claim. The HRC found that Australia's system of 'indefinite and prolonged' mandatory detention constitutes arbitrary detention. The family's right to have their detention reviewed by a court, and their right to an effective remedy, were also violated. Australia rejected the Committee's interpretation of the ICCPR and refused to compensate the A family.

> **'The author is entitled to an effective remedy. . . [T]his should include adequate compensation for the length of the detention to which A was subjected.'**
>
> – Human Rights Committee, 1997

Baban v Australia (2003)

Violations: ICCPR arts 9(1) and 9(4)

Status: **Unremedied**

An Iraqi-Kurd and his infant son seeking asylum in Australia were detained and their refugee claim rejected. The HRC requested a stay of deportation; Australia complied.

The HRC found the Babans' detention was arbitrary and not subject to judicial review, and recommended compensation. They have not been compensated.

In 2001, after two years in detention, the pair escaped. After a period in hiding, they left Australia and continue to seek asylum elsewhere.

> **'The State party is under an obligation to provide the authors with an effective remedy, including compensation.'**
>
> – Human Rights Committee, 2003

Bakhtiyari & Bakhtiyari v Australia (2003)

Violations: ICCPR arts 9(1), 9(4) & 24(1) and potential violations of 17(1) & 23(1)

Status: **Unremedied**

A family of Hazaras claiming to be from Afghanistan sought aslyum in Australia and were detained on arrival. Australia determined that the Bakhtiyaris' claim to be from Afghanistan was not credible; doubt about their origins undermined their refugee claim. The HRC requested a stay of deportation.

In its Final Views, the HRC decided that the long-term detention of the family was arbitrary, beyond judicial review, and had not been 'guided by the best interests of the children'. Further potential violations were found. It proposed that Australia should pay appropriate compensation for these violations.

Ali Bakhtiyari (*Sydney Morning Herald*)

Australia deported the family to Pakistan in 2004, without compensation. Afghan authorities are reported to have confirmed they were Afghan citizens all along.[4]

> **'[W]ith respect to Mrs Bakhtiyari, the State party should … pay her appropriate compensation [&] pay appropriate compensation to the children.'**
>
> – Human Rights Committee, 2003

Blessington & Elliot v Australia (2014)

Violations: ICCPR arts 7, 10(3) and 24(1)

Status: **Unremedied**

Bronson Blessington and Matthew Elliot were children who committed violent crimes for which they were sentenced to life in prison without parole. The UN Human Rights Committee found that children should never be sentenced to life in prison without a realistic chance of release and recommended Australia reform its laws without delay to ensure the possibility of release is realistic and regularly considered. The two men ought to be given the benefit of the revised legislation and compensated for breaches of the Covenant.

> **'[P]rovide the authors with an effective remedy, including compensation. . . [T]ake steps to prevent similar violations in the future. In this connection, review legislation to ensure its conformity with the requirements of . . . the Covenant without delay, and allow the authors to benefit from the reviewed legislation.'**
>
> – Human Rights Committee, 2014

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[4] Kate Geraghty, 'Bakhtiari case to stay closed despite proof', *Sydney Morning Herald* (28 Sept 2005) <www.smh.com.au/news/national/bakhtiari-case-to-stay-closed- despite-proof/2005/09/28/1127804503772.html>.

Brough v Australia (2006)

Violations: ICCPR arts 10 and 24(1)

Status: **Unremedied**

A 16-year-old boy, convicted of burglary and assault, was transferred to an adult prison after participating in a riot at a juvenile detention centre. He was subjected to solitary confinement, forced nakedness, forced anti-psychotic medication and 24-hour lighting. In view of Mr Brough's additional vulnerability as an Indigenous Australian with a mild intellectual disability, the HRC found that he had been treated inhumanely and without the protection due to children, and should be compensated. He has not been compensated.

'The author is entitled to an effective remedy, including adequate compensation . . . [E]nsure that similar violations do not occur in the future.'

– Human Rights Committee, 2006

C v Australia (2002)

Violations: ICCPR arts 7, 9(1) and 9(4) plus a potential further breach of art 7

Status: **Partially remedied**

'C' was detained on arrival in Australia in 1992 and accepted as a refugee in 1995. He acquired serious mental illness in detention, and his threatening behaviour while in a delusional state led to his being sentenced to 3½ years' gaol. With psychiatric care, he made 'dramatic' improvement and was deemed no longer dangerous. However, as a non-citizen with a custodial sentence exceeding 12 months, he was slated for deportation.

The HRC accepted that detention had been the cause of mental illness in this man with no psychiatric history, that his mental illness was the 'direct cause' of his offending and that, with appropriate medical care, he was unlikely to re-offend. As well as being arbitrary and lacking judicial review, his detention became 'cruel, inhuman or degrading treatment' once it was evident that it was causing his deteriorating mental health. To deport Mr C would also breach article 7. The Committee recommended compensation.

Mr C's refugee visa was ultimately reinstated and he was released from detention, but he has not been compensated.

'[T]he State party should pay the author appropriate compensation [and] refrain from deporting the author to Iran. The State party is under an obligation to avoid similar violations in the future.'

– Human Rights Committee, 2002

Cabal & Pasini v Australia (2003)

Violation: ICCPR art 10(1)

Status: **Partially remedied**

Mexican brothers-in-law living in Australia were subject to arrest warrants in Mexico. They were remanded in custody while contesting extradition. The HRC found that locking the two men in a wire cage with floor area only big enough for a chair constituted a breach of prisoners' right to humane and dignified treatment. The men were extradited before the HRC reached its Final Views.

Australia has said it would ensure 'a similar situation does not arise again', but does not accept that Cabal (pictured) and Pasini are entitled to compensation.

> **'[Both] authors are entitled to an effective remedy of compensation . . . The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.'**
>
> – Human Rights Committee, 2003

Campbell v Australia (2017)

Violation: ICCPR art 26

Status: **Unremedied**

Dr Campbell and her partner of 10 years, Ms A, had a daughter together and are both recognised as the child's legal parents. Without access to marriage equality in Australia, the couple travelled to Canada to marry. They separated and Campbell assumed sole care of their daughter. They obtained a formal separation and division of property, but no formal proceedings concerning the custody and care of their daughter. Ms A stopped contributing to their mortgage and to child support.

Australia forbids child marriage, polygamous marriage and same-sex marriage, although these kinds of marriages are lawful in certain other countries. Australian law provides divorce proceedings for the former two types of marriage, but forbids same-sex couples who have married abroad from obtaining a divorce in Australia. Campbell alleged that this distinction constitutes discrimination on the basis of sexual orientation, with difficulties and harms arising both from discrimination and denial of divorce.

The Committee found Australia in breach of article 26 of the Covenant (equality before the law).

> **'[Australia] is under an obligation to … provide the author with full reparation for the discrimination suffered through the lack of access to divorce proceedings [and] take steps to prevent similar violations in the future and to review its laws in accordance with the present Views.'**
>
> – Human Rights Committee, 2017

Coleman v Australia (2006)

Violation: ICCPR art 19(2)

Status: **Unremedied**

This 26-year-old made a speech (pictured) in Townsville's pedestrian mall without a permit, in breach of a local government by-law. Mr Coleman was fined and subsequently detained by police for 5 days for non-payment of the fine.

The HRC found that Mr Coleman's speech was on subjects of public interest (human rights, Indigenous land rights and mining) and his conduct was neither threatening nor unduly disruptive. His arrest, conviction and imprisonment were 'disproportionate' and 'undoubtedly' a violation of his freedom of expression. Australia was asked to quash his conviction, refund his fines or court costs (nearly AU$3,000) and compensate him for his imprisonment. It has done none of these.

> **'The State party is under an obligation to provide the author with an effective remedy, including quashing of his conviction, restitution of any fine paid by the author pursuant to his conviction, as well as restitution of court expenses paid by him, and compensation for the detention suffered as a result of the violation of his Covenant right.'**
>
> – Human Rights Committee, 2006

D and E v Australia (2006)

Violation: ICCPR art 9(1)

Status: **Unremedied**

A make-up artist known as D, having participated in the production of pornography in Iran, suffered a beating and short imprisonment. Her husband, E, was also 'repeatedly arrested and questioned regarding his wife'. They fled Iran with their children, and were detained on arrival in Australia. While Australia accepted that D faced the death penalty in Iran because of her activities, it did not accept that her claim fell under the Refugee Convention. The HRC requested a halt to the family's deportation; Australia complied.

The Committee found the family's detention of more than 3 years was arbitrary and that Australia should provide an effective remedy, including compensation. The family was eventually granted humanitarian visas to remain in Australia, but has not been paid compensation.

> **'The State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation. The State party is also under an obligation to take measures to prevent similar violations in the future.'**
>
> – Human Rights Committee, 2006

Dudko v Australia (2007)

Violation: ICCPR art 14(1)

Status: **Unremedied**

This Russian-Australian librarian denies she was the woman who assisted a convicted bank robber to escape prison by hijacking a helicopter. She was tried and sentenced to ten years' gaol. Ms Dudko was denied the right to attend a High Court appeal, at which she was representing herself due to an inability to obtain Legal Aid.

Ms Dudko as she is released from prison (*Herald Sun*)

The HRC found a breach of her right to a fair trial and equality before the law, which includes the right to be present in person during a criminal appeal. The HRC said Australia should provide Ms Dudko with an unspecified remedy. No remedy has been forthcoming.

> **'The State party is under an obligation to provide the author with an effective remedy. The State party is also under an obligation to ensure that similar violations do not occur in the future.'**
>
> – Human Rights Committee, 2007

Faure v Australia (2005)

Violation: ICCPR art 2(3)

Status: **Unremedied**

A woman claimed that the 'Work for the Dole' scheme, whereby social security payments were made conditional on participation in labour programmes, constituted compulsory labour. The HRC did not agree on that point, but did find that, in failing to provide a general domestic mechanism by which to 'test an arguable claim under … the Covenant', Australia had violated Ms Faure's right to an effective remedy. The Committee held that 'its Views on the merits of the claim constitute[d] sufficient remedy' in this instance, but that Australia ought to ensure that, in future, 'an effective and enforceable remedy' is available to all within its jurisdiction for any violation of the Covenant. Australia has not introduced such a remedy.

> **'The Committee is of the view that in the present case its Views on the merits of the claim constitutes sufficient remedy for the violation found.**
> **The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.'**
>
> – Human Rights Committee, 2005

FJ et al v Australia (2016)

Violations: ICCPR art 7, ICCPR art 9(4), ICCPR art 9(1)

Status: **Unremedied**

Five refugees were detained on arrival by boat in Australian territorial waters. They were assessed by Australian authorities as refugees, but also deemed a security threat. The basis of their security assessment was kept secret, meaning the authors were unable to challenge the merits of the assessment nor the justification of their detention.

All the authors were released while their communication was under consideration by the Committee. The length of their detention ranged from more than 3 years to more than 5 years each.

The Committee accepted that their detention was arbitrary (art 9(1)), lacking periodic re-evaluation and judicial review (art 9(4)) and that the arbitrary and indefinite nature of their detention, as well as the conditions of their detention, inflicted "serious, irreversible psychological harm" (art 7). It recommended rehabilitation and compensation for the authors and non-repetition measures.

> **'[M]ake full reparation . . . inter alia, provide the authors with rehabilitation and adequate compensation. . . [and] take steps to prevent similar violations in the future . . . revise migration legislation to ensure conformity with the requirements of articles 7 and 9(1) and (4) of the Covenant.'**
>
> – Human Rights Committee 2013

FKAG et al v Australia (2013)

Violations: ICCPR arts 7, 9(1), 9(2) and 9(4)

Status: **Partially remedied**

Thirty-six Tamils, including 3 children, plus a Rohingya man from Burma, applied for asylum in Australia and were detained. They were later accepted by Australia as refugees, but were not released from detention because ASIO determined that they represented an undisclosed security risk.

The HRC issued repeated requests concerning the authors' mental health, which led to no discernible improvement in their conditions.

In its Final Views, the HRC found the authors had suffered inhuman and degrading treatment, arbitrary detention, denial of habeas corpus and, for 5 of the authors, a denial of the right to be informed of the reasons for one's arrest. It recommended the authors be released, given rehabilitation and compensation.

The child authors and their parents were released in 2013. In December 2015, Australia reported that a total of 12 of the authors of the 2 joint communications *FKAG* and *MMM* had been released.[5] In May 2017, Australia reported that **2 of the FKAG authors remain in detention: Mr K.S. and Mr K.T.[6] They have been held in arbitrary, indefinite detention since 2009 or 2010. Both men have attempted suicide.**[7] In 2011, at the time they petitioned the HRC, Mr K.S. was detained in Sydney and Mr K.T. in Melbourne.

As a current and continuing gross violation of human rights, Remedy Australia considers the *FKAG et al* case warrants the most urgent and concerted follow-up. We urge the Committee to insist Australia release these two remaining authors – Mr K.S. and Mr K.T. – under individually appropriate conditions, and guarantee all the authors rehabilitation and compensation, as well as taking effective non-repetition measures.

> **'[P]rovide the authors with an effective remedy, including release under individually appropriate conditions, rehabilitation and appropriate compensation. . . [T]ake steps to prevent similar violations in the future. In this connection, the State party should review its Migration legislation to ensure its conformity with the requirements of articles 7 and 9, paragraphs 1, 2, and 4 of the Covenant.'**
>
> – Human Rights Committee, 2013

5 UN Human Rights Committee, 'Follow-up progress report on individual communications adopted by the Committee at its 115th session (19 October-6 November 2015), UN Doc. CCPR/C/115/3, p4.

6 UN Human Rights Committee, 'Follow-up progress report on individual communications adopted by the Committee (30 May 2017), UN Doc. CCPR/C/119/3 pp9-10.

7 UN Human Rights Committee, *F.K.A.G. et al v Australia* (2013), UN Doc. CCPR/C/108/D/2094/2011, para. 2.7.

G v Australia (2017)

Violations: ICCPR arts 17 & 26

Status: **Unremedied**

Ms G is a transgender woman. She changed her name on her birth certificate and had her driver's license, Medicare card and credit cards reissued in her new name and successfully applied for a passport in her new name and gender. She married a woman, and subsequently underwent gender affirmation surgery.

Because Australia does not permit same-sex marriage, it will not change the gender on the birth certificate of someone who is married. The same restriction does not apply to other identity documents, such as passports.

Ms G's birth certificate states that she was born male, but presents and identifies female. It thereby reveals private information about the fact that she is transgender and is a violation of her right to privacy (art 17).

Requiring Ms G to divorce in order to obtain a birth certificate that correctly identifies her gender is arbitrary interference with her right to family (art 17).

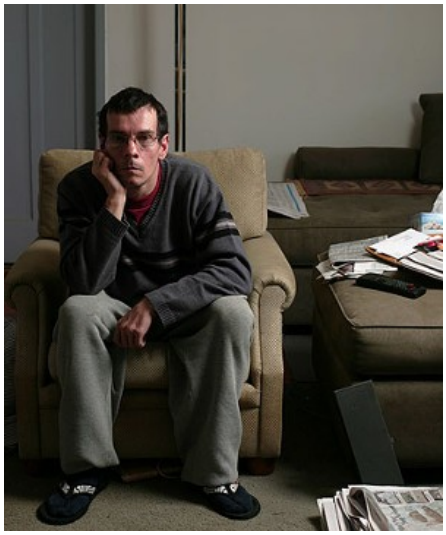
Further, "by denying transgender persons who are married a birth certificate that correctly identifies their sex, in contrast to unmarried transgender and non-transgender persons, the government is failing to afford the author and similarly situated individuals equal protection under the law". The HRC found Ms G experienced discrimination on the basis of her marital status and her transgender identity (art 26).

> **'[P]rovide the author with an effective remedy. . . *inter alia*, provide the author with a birth certificate consistent with her sex. [Also] prevent similar violations in the future [by revising] legislation to ensure compliance with the Covenant.'**
>
> – Human Rights Committee, 2017

Griffiths v Australia (2014)

Violations: ICCPR arts 9(1) and 9(4)

Status: **Unremedied**



Hew Griffiths (photo: Natalie Grono)

Hew Griffiths, an Australian permanent resident, was indicted in the US for breach of copyright for making proprietary software and computer games freely available online, without financial gain.

Mr Griffiths was arrested and held on remand for periods totalling more than 3 years before he was extradited to face the charge of conspiracy to commit copyright infringement. He pleaded guilty and was sentenced to 51 months in prison, taking account of the time already served.

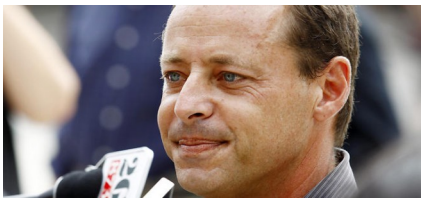
The Human Rights Committee found that Mr Griffiths' disproportionately long and unjustified detention constituted arbitrary detention, and that he was denied the opportunity to challenge his detention.

> **'[Mr Griffiths is entitled to] an effective remedy, including adequate compensation, including compensation of [his] legal costs. [Australia ought to] review its legislation and practice, in particular the *Extradition Act No. 4* of 1988, with a view to ensuring that the rights under articles 9 and 2 of the Covenant can be fully enjoyed in [Australia]'.**
>
> – Human Rights Committee, 2014

Hicks v Australia (2015)

Violations: ICCPR art 9(1)

Status: **Unremedied**



Australian man David Hicks (pictured) was captured in Afghanistan in 2001 and detained by the US at Guantánamo Bay. In 2007, he was tried by Military Commission and sentenced to 7 years' jail. Under a prisoner transfer agreement, Hicks was moved to Australia, where he served 7 months of his sentence, the remainder being suspended. Hicks claims his military trial was unfair, his conviction unlawfully retrospective and his detention arbitrary.

The HRC found that Australia imprisoning Mr Hicks for 7 months following his return to Australia amounted to arbitrary detention, but that no individual remedy was owed to Mr Hicks because Australia's "actions were intended to benefit" him. Australia is nonetheless obliged to "prevent similar violations in the future."

Australia has rejected the Committee's findings.

> **'The finding of a violation constitutes appropriate reparation in the form of satisfaction. [Australia] is under an obligation to take steps to prevent similar violations in the future.'**
>
> – Human Rights Committee, 2015

Horvath v Australia (2014)

Violations: ICCPR art 2(3)

Status: **Partially remedied**

In 1996, 21-year-old Corinna Horvath (pictured) was assaulted by police during an unlawful raid on her home. Her nose was broken and she was hospitalised for 5 days. Despite her case reaching the High Court of Australia, Ms Horvath has still not received the compensation awarded to her by the County Court when it first heard the case in 2001. Further, none of the police involved were disciplined or prosecuted for what the Court found to be trespass, assault, unlawful arrest and false imprisonment.

> **'[Australia] is under an obligation to provide the author with an effective remedy, including adequate compensation. [Australia] is also under an obligation to take steps to prevent similar violations occurring in future. In this connection, [Australia] should review its legislation to ensure its conformity with the requirements of the Covenant.'**
>
> – Human Rights Committee, 2014

In September 2014, Ms Horvath obtained an individual remedy, receiving a written apology from the Victorian Police Commissioner and an ex gratia payment as compensation.

Further, in November 2016, Leading Senior Constable David Jenkin was charged with recklessly causing injury, recklessly causing serious injury, intentionally causing injury and intentionally causing serious injury. Jenkin, still a police officer, was removed from operational duties. His committal hearing is listed for January 2018.

Despite this progress, the *Horvath* case has not been fully remedied, with non-repetition obligations remaining. Remedy Australia recommends the following reforms to give full effect to the Human Rights Committee's Views in *Horvath*:

1. Implement an independent investigatory system that aligns with international human rights standards and ensures all victims of human rights abuses arising from police misconduct receive an effective remedy.
2. Implement an independent system for police oversight that aligns with international human rights standards and ensures police officers in breach of human rights are disciplined.
3. Introduce compulsory, evidence-based human rights training for commencing and in-service police officers in Victoria.
4. Amend the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to expressly include the right to an effective and enforceable remedy of any person whose rights are violated, notwithstanding that the violation has been committed by persons acting in an official capacity.
5. Amend the *Victoria Police Act 2013* (Vic) to ensure the State is liable for all police misconduct.

Kwok v Australia (2009)

Violations: ICCPR art 9(1) and potential violations of arts 6 and 7

Status: **Partially remedied**

Ms Kwok fled China when her husband was arrested for corruption offences. He was later sentenced to death. She was wanted for alleged involvement in the 'same set of circumstances'. China sought her forced repatriation and Australia was willing to comply. Ms Kwok claimed she would not receive a fair trial in China and could also be sentenced to death. The HRC requested a stay of deportation; Australia complied.

The HRC found that Australia should not deport Ms Kwok, as the risk to her life 'would only be definitively established when it is too late'. It also found that Ms Kwok's 6½ years in immigration detention was arbitrary detention. Australia should not send Ms Kwok to China 'without adequate assurances' from the People's Republic, and should compensate her for 'the length of detention to which [she] was subjected'.

Ms Kwok was not refouled, but neither has she been compensated. The HRC has deemed Australia's response satisfactory, despite its failure to pay compensation to one of its longest-serving immigration detainees. Remedy Australia respectfully disagrees with this conclusion and submits that this case is only partially remedied. Consistent with the Committee's Views, Ms Kwok ought to be compensated for her exceptionally prolonged, arbitrary detention in 'harsh and inhospitable' conditions.

> **'The author is entitled to . . . adequate compensation for the length of the detention to which she was subjected.'**
>
> – Human Rights Committee, 2009

Leghaei et al v Australia (2015)

Violations: ICCPR art 17 & 23(1)

Status: **Unremedied**

An Iranian family migrated to Australia on temporary visas. They applied for permanent residency, which was refused owing to an undisclosed assessment by Australia's domestic security agency concerning the father, Dr Leghaei (pictured).

Despite 16 years lawful residence in Australia, without ever being charged or warned for any reason, the security assessment against Dr Leghaei was upheld on appeal. Dr Leghaei's wife and children all had permanent residency or citizenship, but his wife and 14-year-old daughter chose to accompany him when he was obliged to leave Australia.

The HRC found that Australia did not provide Dr Leghaei with "adequate and objective justification" for his expulsion and denied him "due process of law". "Disrupting long-settled family life" by expelling the father of a minor child and forcing family to choose whether to accompany him constitutes arbitrary interference with the family.

> **'[P]rovide a meaningful opportunity to challenge the refusal to grant him a permanent visa; and compensation. . . [P]revent similar violations in the future.'**
>
> – Human Rights Committee, 2015

Madafferi & Madafferi v Australia (2004)

Violations: ICCPR art 10(1) and potential breaches of 17(1), 23(1) and 24(1)

Status: **Partially remedied**

Mr Madafferi (pictured), an Italian in Australia, overstayed his tourist visa. He came to the attention of Australian authorities when he was sentenced by an Italian court in absentia. In the meantime, he had married an Australian and fathered Australian children, but his application for a spouse visa was refused on character grounds and he was detained, pending deportation. Mr Madafferi developed a 'stress disorder' in detention and was admitted to a psychiatric hospital for 6 months. The HRC requested a stay of deportation, which was initially refused.

The Committee found that conditions in immigration detention were inhuman, and that there would be arbitrary interference with the family, in conjunction with treaty provisions protecting the family and children, if Mr Madafferi were deported.

In 2005, Mr Madafferi's deportation order was overturned 'on humanitarian grounds'. The HRC has deemed Australia's response satisfactory, but the non-repetition obligations remain unaddressed.

> **'[Australia] is under an obligation to avoid similar violations in the future.'**
>
> – Human Rights Committee, 2004

MGC v Australia (2015)

Violations: ICCPR art 9(1)

Status: **Unremedied**

MGC is a US national who lived in Australia as an adult for 15 years. He committed a series of offences involving fraud, pleaded guilty and was convicted. Because his prison sentence exceeded 12 months, his visa was cancelled and he was detained for 3½ years prior to deportation.

MGC, having an Australian son, alleged his prolonged detention and permanent deportation interfered with his family. He also alleged his detention was arbitrary. The HRC agreed his detention was arbitrary, but not that the interference with his family was arbitrary.

> **'[Australia is obliged to provide] an effective and appropriate remedy, including compensation. . . also to prevent similar violations in future. In this connection, [Australia] should review its migration legislation to ensure its conformity with the requirements of article 9 of the Covenant.**'
>
> – Human Rights Committee, 2015

MMM et al v Australia (2013)

Violations: ICCPR arts 7, 9(1) and 9(4)

Status: **Partially remedied**

These 9 authors arrived in Australia and were detained. All were accepted by Australia as refugees. However, they were not released from detention because Australia's domestic spy agency determined they posed an undisclosed security risk.

The HRC found the authors suffered inhuman and degrading treatment, arbitrary detention and denial of habeas corpus.

In May 2017, Australia reported that all 9 authors had been released from detention.[8] However none has been compensated nor provided with rehabilitation services. Nor has the Migration Act been amended.

> **'[P]rovide all authors with an effective remedy, including release, rehabilitation & appropriate compensation . . . [Also] prevent similar violations in future. In this connection, review migration legislation to ensure conformity with the Covenant.'**
>
> – Human Rights Committee, 2013

Nystrom v Australia (2011)

Violations: ICCPR arts 12(4), 17 and 23(1)

Status: **Partially remedied**

Mr Nystrom was born in Sweden and entered Australia when only 27 days old. His family assumed he was a naturalised Australian. Mr Nystrom began hearing voices in childhood and has suffered psychiatric symptoms throughout his life. From the age of ten, he began offending, usually under the influence of alcohol. At the age of 30, seven years after his last offence, during which time he had been law-abiding, steadily employed and recovering from his alcoholism, Mr Nystrom's permanent visa was cancelled on character grounds. The Federal Court found him to be 'an absorbed member of the Australian community with no relevant ties elsewhere'.

Mr Nystrom was nonetheless deported to Sweden in 2009 and has since been homeless, in homeless shelters, in prison and in psychiatric care. The HRC found his deportation constituted arbitrary interference with his right to family and his 'right to enter his own country', which is Australia. Further, his expulsion was arbitrary – occurring so long after his offending. He should be permitted and materially assisted to return to Australia.

Australia has refused to allow Mr Nystrom back into Australia, but says it has made policy reforms to guard against repetition. Remedy Australia urges the Committee to press for Mr Nystrom's return as a matter of priority.

> **'[A]llow the author to return and materially facilitate his return to Australia. . . [A]void exposing others to similar risks of a violation in the future.'**
>
> – Human Rights Committee (2011)

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[8] UN Human Rights Committee, 'Follow-up progress report on individual communications adopted by the Committee (30 May 2017), UN Doc. CCPR/C/119/3 pp9-10.

Shafiq v Australia (2006)

Violations: ICCPR arts 9(1) and 9(4)

Status: **Partially remedied**

A young Bangladeshi man fled his homeland fearing reprisals from a banned political party. Having been left at an orphanage as a child, Mr Shafiq has no identity papers; Bangladesh has no record of him and denies he is a citizen, rendering him stateless. Australia detained him on his arrival in 1999 and, disbelieving his refugee claim, tried unsuccessfully to deport him. Mr Shafiq, one of Australia's longest-held immigration detainees, became mentally ill in detention and acquired diabetes from a psychiatric medication he was given, rendering him insulin-dependent.

The HRC found his detention was arbitrary and that he had been denied habeas corpus. It recommended he be released and compensated.

After 7½ years in detention, Mr Shafiq was released in 2007 on a 'removal pending' visa, but he remains on a temporary visa – after 18 years in Australia – and under continual threat of deportation. Mr Shafiq believes he would soon die if deported, due to the difficulty he would have obtaining insulin in Bangladesh. He has not been compensated.

> **'[Australia] is under an obligation to provide the author with an effective remedy, including release and appropriate compensation.'**
>
> – Human Rights Committee, 2006

Shams et al v Australia (2007)

Violations: ICCPR arts 2(3), 9(1) and 9(4)

Status: **Unremedied**

Eight unrelated young men from Iran, fearing persecution for a range of reasons, arrived in Australia and were detained. Each submitted a communication to the HRC, containing similar allegations concerning their treatment in detention and their fear of refoulement. Australia responded to all 8 cases together, and the HRC did the same, hence 8 independent communications became *Shams et al*.

The Committee found that all had suffered arbitrary detention in excess of four years, had been denied habeas corpus and the right to remedy and that each should be compensated. Seven of the authors were ultimately found by Australia to be refugees, while the eighth was given a humanitarian visa. They have not been compensated.

Payam Saadat, one of the *Shams et al* authors

> **'[A]n effective remedy . . . should include adequate compensation for the length of the detention to which each author was subjected.'**
>
> – Human Rights Committee, 2007

Winata & Li v Australia (2001)

Violations: Potential breaches of ICCPR arts 17(1), 23 and 24(1)

Status: **Partially remedied**

Indonesians Hendrick Winata and So Lan Li arrived in Australia in the 1980s and overstayed their visas, undetected. They had a son, who obtained Australian citizenship on his 10th birthday. The next day, his parents applied for refugee status. Their application was rejected and the Immigration Department ordered their deportation.

The HRC found that to deport Mr Winata and Ms Li would arbitrarily interfere with their family and breach Australia's obligation to protect families and children.

Australia rejected the Committee's Views, but did not deport Mr Winata and Ms Li, who eventually obtained permanent residency in Australia.

> **'[E]nsure that similar violations of the Covenant do not occur in the future.'**
>
> – Human Rights Committee, 2001

Zoltowski v Australia (2015)

Violations: ICCPR arts 14(1), 17(1), 23(1) & 24(1)

Status: **Unremedied**

Mr Zoltowski is a Polish-Australian who moved to Australia with his wife and their 2-year-old son. After nearly 3 years, the family returned to Poland. However, Mrs Zoltowski changed her mind, and took the boy to Australia without his father's consent. The couple divorced, with Polish courts granting sole custody of the child to his father, and an Australian Family Court granting sole custody to his mother.

Mr Zoltowski applied under the *Hague Convention on Civil Aspects of International Child Abduction* for the return of his son to Poland. Eighteen months later, when this application was unsuccessful, he applied under the Hague Convention for access and custody. The Family Court of Western Australia granted Mr Zoltowski supervised access to his son in Australia, two-and-a-half years after he had first applied.

The HRC found that Australia's failure to guarantee personal relations and regular contact between Mr Zoltowski and his son constituted arbitrary interference with family life and violation of the right of families and children to protection. Also, Australia's failure to deal expeditiously with Mr Zoltowski's custody and access applications amount to a violation of his rights concerning fair hearings. An effective remedy would include ensuring regular contact between father and son and compensation for the violations of their rights. Australia must also act to prevent similar violations recurring.

The Australian Law Reform Commission this month commenced a review of Australia's family law system, at the request of the Attorney-General, who acknowledges it is 'long overdue'. The Commission is to "consult widely with the community, practitioners and experts in family law and family dispute resolution, the legal, services and health sectors, as well as interested members of the public" and will report by 31 March 2019.[9]

We encourage the HRC to continue follow-up with the State Party to ensure the Covenant violations revealed in the *Zoltowski* matter are addressed by the review and matched by effective remedial action by federal, state and territory governments.

> **'[E]nsure regular contact between author and son and provide adequate compensation to the author . . . also prevent similar violations in the future.'**
>
> – Human Rights Committee, 2015

[9] Attorney-General George Brandis, 'First comprehensive review of the family law act', media release (27 September 2017) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/ThirdQuarter/First-comprehensive-review-of-the-family-law-act-27-September-2017.aspx>.

Conclusion

Elizabeth Evatt, a former member of the Human Rights Committee, characterises Australia's compliance with Committee Views on individual communications as 'abysmal'.[10] Remedy Australia deems only 5 out of Australia's 40 individual communications concluded with adverse findings (12.5%) to have been fully remedied. Not detailed in this report, they are *Fardon*, *Rogerson*, *Tillman*, *Toonen* and *Young*.

To be considered fully remedied, the author must have obtained the substantive remedies recommended by the Committee (if any), plus the State Party must have taken genuine steps to prevent the violation recurring, where requested by the Committee.

In Remedy Australia's estimation, based on our research outlined in this report, **87.5% of individual communications finding Australia in breach of the ICCPR have been only partially remedied or, more often, not remedied at all.**

Justice demands that effective remedies be forthcoming for all authors. We highlight three areas of particular concern:

Failure to cease violations

The first obligation of the right to an effective remedy is to cease violations.

In at least 7 instances, Australia has not acted to end the violations identified in individual communications, let alone make amends; rather, the abuses are ongoing at the time of writing. Remedy Australia considers these unremedied or only partially remedied current abuses to be in the most urgent need of the Human Rights Committee's attention. Among them are:

- The indefinite and prolonged arbitrary detention of two of the *FKAG et al* authors – **Mr K.S. and Mr K.T.** – in conditions that breach article 7.
- **Stefan Nystrom** has not been allowed and materially assisted to return to his own country. Given Mr Nystrom's mental illness and destitution, this requires urgent remedy.
- **Arkadiusz Zoltowski** has not been guaranteed personal relations and regular contact with his minor son, nor have compensation or effective non-repetition measures been forthcoming.

Two cases in this category are very recent and we await with anticipation Australia's response to *Campbell v Australia* and *G v Australia*.

Failure to compensate arbitrary detention

By far the most frequent and grievous finding of violation in individual communications concerning Australia is that of arbitrary detention. A growing number of former immigration detainees has successfully sued the government for compensation, but to our knowledge no author of individual communication to the HRC has been compensated.

[10] Interview with Ms Evatt, now a member of Remedy Australia's Advisory Council (Sydney, 26 March 2013).

Follow-up on *Kwok* has been concluded by the HRC on the basis of poor advice and at the expense of justice. Remedy Australia considers her case only partially remedied.

Australia's own Federal Court has said, "there can be no question that the right to personal liberty is among the most fundamental of all common law rights. It is also among the most fundamental of the universally recognised human rights."[11]

At the same time, Special Rapporteur on the Right to Reparation Theo Van Boven, in a draft of his *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*, defined 'gross violations' as including torture and cruel, inhuman or degrading treatment or punishment and "arbitrary and prolonged detention".[12] By this measure, Australia has committed and failed to remedy gross violations of human rights with respect to:

Mr **A** and his family
Mr **Baban** and his son
The **Bakhtiyari** family
Mr **C**
Ms **D** and Mr **E** and their two children
The 5 authors of ***FJ et al***
The 37 authors of ***FKAG et al***
Ms **Kwok**
The 9 authors of ***MMM et al***
Mr **Shafiq**
The 8 authors of ***Shams et al***.

Failure to prevent repetition

Ten communications have resulted in partial remedy, often after considerable delay. Typically, the abuse complained of has ended, or threat of potential violation is averted, but there has been no effort at restitution or reparation, or implementing non-repetition measures. Thus, significant remedies remain outstanding in most unremedied or partially remedied cases in the form of effective non-repetition measures. (The exception among the partially remedied communications is *Nystrom*, which is unusual in that Australia claims to have acted to prevent the violation recurring, but has refused to provide a substantive individual remedy to the author.)

Of the 40 Australian cases resulting in findings of the ICCPR, only 5 have been fully remedied. For the sake of brevity, they are not detailed in this report. But full details of all Australian communications resulting in findings of treaty violations may be found at our website: **remedy.org.au**

We commend the Committee for its work on individual communications and welcome dialogue to enable us to support and cooperate with you as best we can.

Melbourne, October 2017

[11] *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70 at 87.

[12] Theo Van Boven, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms', UN Doc E/CN4/Sub2/1993/8 (1993), principle 1.