



**International Convention on  
the Elimination of All Forms  
of Racial Discrimination**

Distr.: General  
14 October 2013

Original: English

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**Committee on the Elimination of Racial Discrimination**

**Communication No. 47/2010**

**Decision adopted by the Committee at its eighty-third session  
(12–30 August 2013)**

<i>Submitted by:</i>	Kenneth Moylan (represented by counsel, Alison Ewart)
<i>Alleged victim:</i>	The petitioner
<i>State party:</i>	Australia
<i>Date of the communication:</i>	19 April 2010 (initial submission)
<i>Date of the present decision</i>	27 August 2013

## Annex

### **Decision of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (eighty-third session)**

concerning

#### **Communication No. 47/2010\***

*Submitted by:* Kenneth Moylan (represented by counsel, Alison Ewart)

*Alleged victim:* The petitioner

*State party:* Australia

*Date of the communication:* 19 April 2010 (initial submission)

*The Committee on the Elimination of Racial Discrimination*, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

*Meeting on 27 August 2013,*

*Having concluded* its consideration of communication No. 47/2010, submitted to the Committee on the Elimination of Racial Discrimination by Kenneth Moylan under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

*Having taken into account* all information made available to it by the petitioner of the communication, its counsel and the State party,

*Adopts* the following:

#### **Decision on admissibility**

1. The petitioner of the communication dated 17 December 2009, completed by a letter dated 19 April 2010, is Kenneth Moylan, of Aboriginal origin, who was born on 2 August 1948 in Australia. He claims to be a victim of violations by Australia of his rights under articles 2 (para. 2), 5 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. The petitioner is represented by counsel.<sup>1</sup>

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\* The following members of the Committee participated in the examination of the present communication: Mr. Nourredine Amir, Mr. Alexei S. Aytonomov, Mr. José Francisco Cali Tzay, Ms. Anastasia Crickley, Ms. Fatimata-Binta Victoire Dah, Mr. Régis de Gouttes, Mr. Ion Diaconu, Mr. Kokou Mawuena Ika Kana (Dieudonné) Ewomsan, Mr. Yong'an Huang, Ms. Patricia Nozipho January-Bardill, Mr. Anwar Kemal, Mr. Dilip Lahiri, Mr. Jose A. Lindgren Alves, Mr. Pastor Elías Murillo Martínez, Mr. Waliakoye Saidou and Mr. Carlos Manuel Vázquez.

<sup>1</sup> Australia made a declaration under article 14 of the Convention on 28 January 1993.

## Factual background

2.1 The petitioner is an Aboriginal Australian man. He states that he has worked since he was 14 years old and wished to retire at the age of 60, in August 2008. He has no savings and only a small amount of superannuation. Accordingly, he would depend on social security provision in order to be able to retire. The qualification for the Age Pension under the Social Security Act 1991 is between 65 and 67 years of age for Australian males, depending on the year in which they were born. As the petitioner was born on 2 August 1948, he would reach pensionable age under the Social Security Act when he turns 65 years of age.

2.2 In 2007, the Australian Bureau of Statistics reported that Aboriginal men have a life expectancy of 59 years. This life expectancy is approximately 17 years lower than non-Aboriginal Australian males.<sup>2</sup> Despite this lower life expectancy, the qualifying age is the same for all Australian men. The requirements of the Social Security Act do not apply equitably to Aboriginal men and other Australians because Aboriginals do not live as long as other Australians.

2.3 According to the petitioner, the Government of Australia has made it clear that it has no intention of altering the eligibility requirements for the Age Pension for Aboriginal Australians. In April 2008, the petitioner wrote to the Minister for Families, Housing, Community Services and Indigenous Affairs, who replied that there were no plans to introduce a lower age for qualifying for the Age Pension for indigenous Australians, as it was important that the same rules for the Age Pension were applied to all Australians, which promoted equity in the social security system. The letter adds that assistance is available to people who need it before they reach pension age. Depending on an individual's circumstances, they may qualify for the Newstart Allowance if seeking work; the Disability Support Pension if unable to work due to permanent impairment; or Carer Payment if providing constant care for a person who needs care permanently or for an extended period.<sup>3</sup>

2.4 After consulting a lawyer on the matter in October 2009, the petitioner received confirmation that no domestic remedy existed to challenge this situation.<sup>4</sup> Indeed, in its memorandum of advice, counsel mentioned that there were potentially two avenues for the petitioner: a claim under the Racial Discrimination Act 1975 and a claim under the Australian Human Rights Commission Act 1986. With regard to the first avenue, section 10 of the Racial Discrimination Act enables a person to claim his/her right before a court if, because of the operation and effect of a law, he/she does not enjoy a right to the same extent as others on the basis of race.<sup>5</sup> Counsel mentioned that if a person wishes to claim

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<sup>2</sup> Australia, Australian Bureau of Statistics, *Older Aboriginal and Torres Strait Islander People: A Snapshot, 2004-05* (2007).

<sup>3</sup> Letter from the Office of Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 25 June 2008.

<sup>4</sup> The petitioner was provided with written advice from a barrister at law (letter dated 9 October 2009 annexed to the petitioner's initial submission).

<sup>5</sup> Racial Discrimination Act 1975, section 10: Rights to equality before the law:

“(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

that a law of the Commonwealth (namely the Social Security Act) denies Aboriginal men the same rights as non-Aboriginal men, then proceedings must be commenced in the Federal Court. However, there are substantial filing fees for commencing such a proceeding. There is also a risk of substantial costs if an applicant fails in his case. Even in the event that proceedings were initiated, the Court could argue that there is no denial of right to social security and that section 10 of the Racial Discrimination Act does not operate with respect to provisions of Commonwealth law which may have an indirect effect on a person's right. Counsel expressed doubts as to whether section 10 of the Act extended to the concept of indirect race discrimination. Any success would be a success on paper as the Court would not have the competence to order that the Social Security Act be amended.

2.5 As for the second avenue, the same counsel advised that, under the Australian Human Rights Commission Act, a person may lodge a complaint to the Australian Human Rights Commission if he/she believes that there has been a breach of human rights. However, under such legislation, a complaint can only be made on this basis in relation to an act or practice (it is not specifically mentioned that this extends to complaints in relation to legislation). Furthermore, the Government would be free to disregard the findings of the Human Rights Commission even if it was to find a breach of human rights. Counsel recalled that the Human Rights Committee had determined that, owing to their lack of binding power, bodies such as the Australian Human Rights Commission did not offer an effective remedy.<sup>6</sup>

### **The complaint**

3.1 The petitioner claims that Australia has violated his rights under articles 5 and 6 of the Convention by applying legislation that has discriminatory effects on Australians of Aboriginal origin and not giving him the opportunity to challenge such legislation before national authorities.

3.2 The petitioner refers to general comment No. 19 (2007) of the Committee on Economic, Social and Cultural Rights on the right to social security, where it is stated that differences in the average life expectancy of men and women can also lead directly or indirectly to discrimination in provision of benefits (particularly in the case of pensions) and thus need to be taken into account in the design of the scheme.<sup>7</sup>

3.3 Despite the general prohibition of discrimination in relation to the provision of social security, a State can and should take into account special circumstances relating to disadvantaged groups when determining eligibility criteria. In certain conditions, States

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(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander; not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.”

<sup>6</sup> Human Rights Committee, communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para. 7.3.

<sup>7</sup> *Official Records of the Economic and Social Council, 2008, Supplement No. 2 (E/2008/22)*, annex VII, para. 32.

parties are in fact obliged to take such special measures under article 2, paragraph 2, of the Convention. If they do not, indirect discrimination will result, as has been the case here.

3.4 The petitioner contends that domestic remedies to contest the mere existence of domestic legislation are not available in Australia. The High Court of Australia (constitutional court) does not have jurisdiction to hear complaints alleging that Australian legislation breaches international law. Moreover, it does not have jurisdiction to hear complaints about breaches of human rights owing to the lack of a bill/charter of rights. Neither the Racial Discrimination Act nor any other act would enable the Court to amend the Social Security Act. As for the Australian Human Rights Commission, it offers no remedy owing to its power to make recommendations only, which are thus non-binding.

#### **State party's observations on admissibility and merits**

4.1 On 16 December 2011, the State party submitted its observations on admissibility and merits where it noted that it was working to close the gap between indigenous and non-indigenous Australians in key health, education and employment outcomes, including life expectancy. The State party had adopted the Council of Australian Governments National Indigenous Reform Agreement and Closing the Gap targets to address the disadvantage experienced by indigenous Australians. The State party added that it took seriously the implementation of these initiatives, including by requiring that the Government of Australia report annually to the Parliament thereon and establishing the new National Congress of Australia's First Peoples. It acknowledges the historical injustices experienced by indigenous Australians. In February 2008, the Parliament formally apologized to the indigenous peoples of Australia for past mistreatment and injustices.

4.2 The State party notes that, in addition to allegations under article 5 (equality before the law in the enjoyment of the right to social security) and article 6 (effective protection and remedies), the petitioner alleges that the State party breached article 2, paragraph 2, of the Convention by failing to take the special measures necessary to achieve the goal of substantial equality in the provision of social security to indigenous Australians.

4.3 Whilst acknowledging the significant difference in life expectancy between indigenous and non-indigenous Australians, the State party notes a number of inaccuracies in the petitioner's communication which relate to both the statistics provided and the way in which those statistics have been interpreted. In particular, the petitioner states that Aboriginal men have a life expectancy 17 years lower than non-Aboriginal Australian men, relying on data from 2004–2005. However, in 2009, the Australian Bureau of Statistics published revised life expectancy estimates using 2005–2007 as reference period, indicating that the difference was 11.5 years between indigenous and non-indigenous Australians.

4.4 The communication is inadmissible for failing to exhaust domestic remedies and for non-substantiation. With regard to the first ground, the petitioner had a number of domestic remedies available to him. First, he could have made a court claim under section 10 of the Racial Discrimination Act 1975 (which implements the Convention in Australian domestic law) with respect to the effect of the Social Security Act 1991, which governs the Age Pension. Section 10 of the Racial Discrimination Act is concerned with the operation and effect of laws. It can also be extended to a law which indirectly affects the enjoyment of a human right by people of a particular race.<sup>8</sup> To make successful a complaint under section 10, the petitioner would have been required to demonstrate that because of the Social Security Act, Aboriginal people do not enjoy a right or enjoy a right to a more limited

<sup>8</sup> The State party refers to the judgement in *Bropho v. Western Australia* (2008), Full Federal Court of Australia, 100, paras. 287–290.

extent than people of other races.<sup>9</sup> If the claim was successful, the Federal Court would have had a wide discretion under section 23 of the Federal Court of Australia Act 1976 to make any order it considered appropriate. For instance, the Court could have read down the relevant provisions in a way which allowed both section 10 of the Racial Discrimination Act and the Social Security Act to have effect.

4.5 The State party adds that the petitioner also failed to take the remedy of applying for alternative types of social security, such as the Disability Support Pension and Special Benefit, for which he may be eligible. Had he made an application in this regard, the petitioner would have been in a position to challenge decisions made in relation to his claim through a number of avenues. For instance, certain decisions by government officials on social security matters can be subjected to internal review within the relevant government agency, merits review by the Security Appeals Tribunal and the Administrative Appeals Tribunal, and judicial review by the Federal Court and High Court of Australia.

4.6 With regard to the avenues explored by the petitioner which led to the conclusion that no domestic remedies existed (see para. 2.4 above), the State party replies that writing letters to ministers and seeking legal advice are not sufficient to consider that the petitioner exhausted domestic remedies. The Committee has expressed the view that it is incumbent upon the petitioner to pursue the available remedies and that mere doubts about the effectiveness of such remedies do not absolve a petitioner from pursuing them.<sup>10</sup> It is for a domestic court not for a legal counsel to decide on the avenues available under domestic legislation. The communication contains no evidence that such avenues were explored.

4.7 The State party further considers that the petitioner has not substantiated his claims based on statistical evidence and his personal circumstances. The petitioner was 61 years old at the time of submission of his communication to the Committee. According to figures from the Australian Bureau of Statistics, 60-year-old indigenous males have an average life expectancy of another 17 years approximately (compared to 22 years for non-indigenous males). The petitioner is not the victim of any violation relating to the Age Pension because, based on the statistical information of the State party, it is likely that he will reach a sufficient age to qualify for and enjoy the Age Pension in the coming years.

4.8 In addition, there is no evidence to substantiate the petitioner's claims regarding his state of health and his assumption that he would not be eligible for other types of social security. The State party also considers that the petitioner has failed to articulate how specific special measures could be required under article 2, paragraph 2, of the Convention. While he asserts that indirect discrimination can result from a failure to take special measures, he does not provide any evidence or reasoning to support his allegation.

4.9 On the merits, the State party refers to the Committee's general recommendation No. 32 (2009) on the meaning and scope of special measures in the Convention,<sup>11</sup> where it has stated that special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need and grounded in a realistic appraisal of the current situation of the individuals and communities concerned. The State is currently taking a wide range of measures to address differences in life expectancy between indigenous and non-indigenous Australians. For the past two decades, there have been improvements in important aspects

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<sup>9</sup> *Sahak v. Minister for Immigration and Multicultural Affairs* (2002), Full Federal Court of Australia, 215, para. 35.

<sup>10</sup> Communication No. 9/1997, *D.S. v. Sweden*, decision of inadmissibility adopted on 17 August 1998, para. 6.4.

<sup>11</sup> *Official Records of the General Assembly, Supplement No. 18 (A/64/18)*, annex VIII.

of health, for example, in circulatory disease mortality rates, child and infant mortality rates and smoking rates. Indigenous all-cause mortality rates declined and the gap between indigenous and non-indigenous Australians has narrowed. It is for the State party to determine the form that any special measures under the Convention should take and no specific form of special measures can be required by the Convention. In this regard, differentiated social security is not the appropriate mechanism to accelerate the move towards substantive equality in health and mortality outcomes between indigenous and non-indigenous Australians. Rather, improving health outcomes, such as mortality, in the context of long-standing indigenous disadvantage, will require long-term sustainable improvements across a range of aspects of peoples' lives.

4.10 With regard to article 5 (e) (iv), the enjoyment of Age Pension, as distinct from social security more generally, is not required to fulfil the obligations under the Convention. The State party considers that, in any event, Australian social security law, including with respect to the Age Pension, is not discriminatory under international law as the measures are general and therefore do not differentiate directly or indirectly on the basis of race. In the alternative, to the extent that there could be said to be any indirect differential treatment between indigenous and non-indigenous Australians, it is legitimate differential treatment and not discriminatory under international law.

4.11 The right to the non-discriminatory enjoyment of social security does not require States to accord everyone social security, or to accord everyone every type of social security. Given that article 5 (e) (iv) requires the equal and not the universal enjoyment of social security, the State party is entitled to set criteria to determine when social security should be available, in order to target those most in need. The percentage of indigenous Australians who receive social security is representative of the proportion of indigenous people in Australia. The petitioner may be eligible for a number of types of social security, including the Disability Support Pension, Newstart Allowance and the Special Benefit, a social security income support payment for people who are in financial hardship through circumstances beyond their control and who have no other means of support.

4.12 Eligibility criteria under the Social Security Act are based on a range of objective criteria other than race, including age and, for those persons born before 1957 only, sex. The Age Pension provisions apply equally to all Australians and any limitations on the petitioner's ability to access that scheme do not arise by reason of his race. Rather, they arise from the fact that he has not yet reached the eligibility age for the Age Pension. Therefore, the petitioner is treated in the same way as all Australians, without distinction as to his race.

4.13 According to the Australian Bureau of Statistics, indigenous Australians represent 2.5 per cent of the total population. According to the Productivity Commission's 2010 *Indigenous Expenditure Report*,<sup>12</sup> around 2.8 per cent of the population receiving social security payments in 2008 and 2009 self-identified as indigenous, which shows that social security laws do not have the effect of nullifying the enjoyment of the right to social security by indigenous Australians, or the author, on an equal footing with other Australians. Moreover, the Bureau estimates that indigenous Australians represent 0.6 per cent of the population aged 65 and above and, according to the Productivity Commission, they represent 0.9 per cent of Age Pension and Wife Pension (Age) recipients in 2008 and 2009.

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<sup>12</sup> Australia, Indigenous Expenditure Report Steering Committee, *2010 Indigenous Expenditure Report* (Canberra, 2010, Productivity Commission).

4.14 Diseases which most frequently cause the lower life expectancy of indigenous Australians (in 2004–2008, circulatory disease, cancer, injury and poisoning, endocrine, metabolic and nutritional disorders, and respiratory disease) are of such a nature that the people who suffer from them are likely to benefit from other types of social security than the Age Pension, such as the Disability Support Pension, provided that the relevant income and other requirements are met.

4.15 To the extent that there is differential treatment (based on age), the aim of such differentiation is legitimate, reasonable, objective and proportionate. In particular, its purpose is to support older Australians who have made, through their work, a valuable contribution to Australian society. Moreover, it enables the State party to ensure that older persons have an adequate level of financial support while also requiring individuals to draw on their own financial resources, where they exist, and to productively manage resources to ensure that the pension system remains affordable and sustainable for all Australians.

4.16 As for article 6 of the Convention, without prejudice to the State party's submission that the petitioner's claim in this regard is inadmissible, it is also without merits. Article 6 is accessory in nature and applies consequently to a violation of a specific article of the Convention. Where no substantive right is violated, there can be no claim under article 6. In the light of the above assertion, the State party considers the petitioner's claim under that provision to be without merit. In the alternative, it considers that effective remedies are available in Australia as a range of review and appeal mechanisms were available to the petitioner which he declined to use (see paras. 4.4–4.6 above).

#### **Petitioner's comments on the State party's observations on admissibility and merits**

5.1 On 6 November 2012, the petitioner replied that the statistics produced by the Australian Bureau of Statistics indicating a drastically lower life expectancy of indigenous Australians demonstrate that, in effect, indigenous Australians, the petitioner included, do not enjoy the right to social security in their old age as the rest of the population does.

5.2 The petitioner contests the State party's argument that statistics from 2009 prevail over statistics from 2007. The methodology used for the 2009 Bureau statistics, as relied upon by the State party, has been challenged by a number of key organizations, including the Close the Gap Campaign Steering Committee, which counts among its members the Australian Human Rights Commission, Oxfam Australia, the Australian Medical Association, the Australian Indigenous Doctor's Association and Australians for Native Title and Reconciliation.<sup>13</sup> Furthermore, the Bureau has itself warned against comparing earlier statistics relating to life expectancy with later statistics, explaining that differences should not be interpreted as measuring changes in indigenous life expectancy over time.<sup>14</sup> Even accepting the 2009 Bureau statistics, an important gap in life expectancy amounting to 11 and a half years is still evident. The petitioner therefore considers that his arguments with regard to unequal treatment between indigenous and non-indigenous Australians remain valid.

5.3 The petitioner stresses that both sets of statistics relate to life expectancy at birth, meaning that the number of years indicated is the expected length of time that a male boy born in either 2004–2005 (2007 Bureau statistics) or 2005–2007 (2009 Bureau statistics)

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<sup>13</sup> The petitioner refers to the report of Close the Gap Campaign Steering Committee, *Shadow Report 2012* (2012). Available from <http://resources.oxfam.org.au/pages/view.php?ref=687> (accessed on 1 October 2013).

<sup>14</sup> Australia, Australian Bureau of Statistics, "The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples", cat. No. 4704.0 (2010).



can be expected to live. Therefore, either reference period is not entirely accurate for the petitioner, who was born in 1948.

5.4 In its observations, the State party states that, according to Bureau figures, 60-year-old indigenous males have an average life expectancy of another 17 years approximately (compared to 22 years for non-indigenous males). The State party does not provide any reference for this assertion nor could any be found, and as such the accuracy or otherwise of this statement is difficult to challenge. However, the 2009 Bureau statistics relied upon by the State party indicate that a 50-year-old indigenous man can expect to live a further 23.8 years compared to 31 years for a non-indigenous male and a 65-year-old indigenous man can expect to live a further 13.4 years compared to 17.9 years for a non-indigenous male. During the period covered by those statistics (2005–2007), the petitioner was between 57 and 59 years old, i.e., covered by the figures referred to above. The gap is therefore sufficient to indicate a significant difference in the potential enjoyment of the Age Pension between indigenous and non-indigenous Australians.

5.5 Although the petitioner acknowledges that some positive steps have been taken by the State party to reduce the gap, there is considerable debate about whether these measures have contributed to any significant improvements.<sup>15</sup> Furthermore, efforts made today cannot address a legacy of decades of ill-treatment that older indigenous Australians have experienced.

5.6 With regard to the admissibility, the petitioner refers to paragraph 5 of the Human Rights Committee's general comment No. 33 (2008) on obligations of States parties under the Optional Protocol to the International Covenant on Civil And Political Rights, where it has considered that it is incumbent to the State party to specify the available and effective remedies that the author of a communication has failed to exhaust. In the present case, the State party has mentioned that the Court could have interpreted the relevant provisions in a way which allowed both section 10 of the Racial Discrimination Act 1975 and the Social Security Act to have effect. The petitioner considers, however, that this would have been impossible due to the obligatory requirements of the Social Security Act, because that law mandates that a person be 65 years (or up to 67 years, depending on the year of birth) in order to be eligible for the Age Pension, and there is no discretion for a Court to interpret such provision, even in the unlikely event that a court would adopt a broad view of section 10 of the Racial Discrimination Act so as to make a finding on discrimination. As already stated in his original complaint, the Court has no legislative role and no power to rewrite Commonwealth laws. The Court could not make an order that would change the qualifications for entitlement to an age pension. Unless and until the legislature amended the Social Security Act, the petitioner would not receive an effective remedy.

5.7 In relation to why alternative types of social security were not available to the petitioner, the latter submits that social security provided during the older years of a person's life is different to that provided to, for example, those who are unemployed but actively looking for work (Newstart Allowance) or those experiencing extreme financial hardship (Special Benefit). To be supported in his old age, the petitioner should not have to satisfy the tests for these other forms of social security, but should rather be entitled to equal enjoyment of the Age Pension. In addition, contrary to the State party's assertions, the petitioner could not have sought a remedy before the Social Security Appeals Tribunal, then a review by the Administrative Appeals Tribunal and then judicial review. The Tribunal cannot take action in relation to changing the law or rewriting it as long as the law has been correctly applied. If one wants to change the law, he/she has to direct his/her

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<sup>15</sup> The petitioner refers to the report of Close the Gap Campaign Steering Committee, *Close the Gap Shadow Report 2012*.

request to the relevant Member of Parliament.<sup>16</sup> Furthermore, individuals can only apply to the Tribunal in the event that an incorrect decision was made; or where facts leading to a decision were incorrectly misinterpreted; or if all the information was not taken into account to make the decision; or if a discretionary decision was taken against an individual against his/her own interests. None of the above relate to the petitioner's case. Rather, any decision to refuse to grant the Age Pension to the petitioner would not have been discretionary but mandated by the prescriptive provisions of the Social Security Act.

5.8 With regard to State party's arguments on non-substantiation, the petitioner replies that they relate to the merits. In this regard, he refers to the Committee's general recommendation No. 32, where it has stated that to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.<sup>17</sup> In contrast to the Committee's reasoning, the State party has adopted a strict interpretation of the concept of discrimination, thereby ignoring the recognition given by the Committee and others (including the European Court of Human Rights) of the concept of indirect discrimination. The drastically lower life expectancy of indigenous Australians means that they are in a situation which is objectively different from the rest of the population.

5.9 With regard to special measures, in line with the Committee's position in general recommendation No. 32 (para. 18), the European Court of Human Rights has found that in certain circumstances, a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>18</sup> The petitioner adds that article 2, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination aims at the achievement of equal enjoyment of human rights and fundamental freedoms and not merely de jure equality. Taking steps to address this indirect discrimination would not constitute universal enjoyment as mentioned by the State party, but merely provide for equal enjoyment as required under the Convention.

5.10 Contrary to its assertion, the State party's choice to set the age requirement at 65 years old seems to be arbitrary and not suitable for all, given the substantial differences between indigenous and non-indigenous Australians. The State party does not provide any information on the criteria it has used to set the retirement age at 65. In the light of the State party's express recognition of the difference in life expectancies, the petitioner does not see why the State party has set the age requirement at 65 for all Australians, when it is recognized that indigenous Australians are in a different situation.

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<sup>16</sup> The petitioner refers to the guidelines on line of the Social Security Appeals Tribunal at <http://www.ssat.gov.au/centrelink-reviews/decisions.aspx#cannotdo>.

<sup>17</sup> General recommendation No. 32, para. 8.

<sup>18</sup> European Court of Human Rights, *D.H. and Others v. Czech Republic*, Grand Chamber, application No. 57325/00, 13 November 2007, para. 127.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the Convention, whether or not the communication is admissible.

6.2 Firstly, the Committee wishes to recall that, contrary to the State party's general statement that article 6 would be accessory in nature (see para. 4.16 above), the rights in the Convention are not confined to article 5. In this regard, the Committee refers to its jurisprudence, where it has found a separate violation of article 6 in various instances.<sup>19</sup>

6.3 The Committee notes that the State party has challenged the admissibility of the complaint for failing to exhaust domestic remedies. The State party argues that the petitioner had a number of domestic remedies available to him, including the possibility to lodge a court claim under section 10 of the Racial Discrimination Act 1975 with respect to the effect of the Social Security Act 1991, and that, if the claim was successful, the Federal Court would have had a wide discretion under section 23 of the Federal Court of Australia Act 1976 to make any order it considered appropriate, such as reading down the relevant provisions in a way which allowed both section 10 of the Racial Discrimination Act and the Social Security Act to have effect. The Committee notes that the State party bases its argument on the jurisprudence of the Federal Court itself (see para. 4.4 above).

6.4 The Committee notes that the petitioner does not deny that proceedings could be commenced before the Federal Court pursuant to section 10 of the Racial Discrimination Act. He claims, however, that such proceedings would involve substantial filing fees and costs if the petitioner failed and that, even in the event of a successful outcome, this would remain a success on paper as the Federal Court has no legislative power and only the legislature can change the law.

6.5 The Committee recalls that mere doubts about the effectiveness of domestic remedies, or the belief that the resort to them may incur costs, do not absolve a petitioner from pursuing them.<sup>20</sup> In the light of the information before it, the Committee considers that the petitioner has not advanced sufficient arguments that no avenues exist in Australia to claim that a given piece of legislation has discriminatory effects on a person based on race. Notwithstanding the reservations that the petitioner may have on the effectiveness of the mechanism under section 10 of the Racial Discrimination Act in his particular case, it was incumbent upon him to pursue the remedies available, including a complaint before the High Court. Only after attempting to do so could the petitioner conclude that such a remedy was indeed ineffective or unavailable.

6.6 In the light of the above and without prejudice to the question of the merits regarding the alleged structural discrimination related to pension entitlements, the Committee considers that the petitioner has failed to meet the requirements of article 14, paragraph 7 (a), of the Convention.

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<sup>19</sup> Communication No. 10/1997, *Habassi v. Denmark*, opinion adopted on 17 March 1999, para. 10; communication No. 16/1999, *Ahmad v. Denmark*, opinion adopted on 13 March 2000, para. 8; and communication No. 29/2003, *Durmic v. Serbia and Montenegro*, opinion adopted on 6 March 2006, para. 10.

<sup>20</sup> Communication No. 9/1997, *D.S v. Sweden*, Inadmissibility Decision of 17 August 1998, para. 6.4.

7. The Committee on the Elimination of Racial Discrimination therefore decides:
- (a) That the communication is inadmissible;
  - (b) That this decision shall be communicated to the State party and the petitioner.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

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