



Australian
Human Rights
Commission

Behme v Commonwealth of Australia

[2013] AusHRC 60

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**Behme v Commonwealth
(Department of Education,
Employment and Workplace
Relations)**

Report into the right of the
child to free primary education

[2013] AusHRC 60

Australian Human Rights Commission 2013



**Australian
Human Rights
Commission**

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**Australian
Human Rights
Commission**

March 2013

The Hon. Mark Dreyfus QC, MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr Lars Behme on behalf of his son, Johann. Mr Behme complains that his son was not able to avail himself of free primary education in a public school in New South Wales.

I have found that the Commonwealth failed to take all appropriate administrative or other measures to make free primary education available to all children in Australia, including Mr Behme's son. I have found that this act of the Commonwealth is inconsistent with:

- the right to free primary education; and
- the right of non-discrimination (article 28 & 2 of the *Convention on the Rights of the Child*)

By letter dated 29 November 2012, the Department of Education, Employment and Workplace Relations responded to my findings and recommendations. In its response, the Department maintains its position that the Commonwealth has not engaged in an act or practice that would give rise to the Commission's jurisdiction to inquire into this matter. Rather, the act or practice is that of the State of New South Wales. However, the Department states that in recognition of the importance of this matter, the Commonwealth intends to raise this issue with relevant state or territory education ministers for their consideration.

I have set out the Department's response in its entirety in part 9 of my report. I have also set out the two attachments to the Department's response in the Appendix.

Please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in black ink, reading 'Gillian Triggs'.

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint alleging a breach of human rights made against the Commonwealth of Australia by Mr Lars Behme on behalf of his son, Johann.
2. Mr Behme complains that his son was not able to avail himself of free primary education in a public school in New South Wales.
3. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

2 Summary of findings and recommendations

4. As a result of this inquiry, the Commission has found that the Commonwealth failed to take all appropriate administrative or other measures to make free primary education available to all children in Australia, including Mr Behme's son.
5. I have found that the Commonwealth has therefore acted inconsistently with Johann's right to free primary education under article 28 of the *Convention on the Rights of the Child* (CRC).
6. In the circumstances of this complaint, the Commonwealth has also acted inconsistently with Johann's right to non-discrimination in article 2 (in conjunction with article 28) of the CRC.
7. I recommend that the Commonwealth:
 - take appropriate measures to make primary education free to all children in Australia, regardless of the immigration status of their parents. These measures may include:
 1. seeking to attach appropriate conditions to the funding agreements entered into with New South Wales for educational purposes to ensure that primary education is provided free to all children in Australia.
 2. incorporating appropriate conditions to ensure that primary education is provided free to all children in Australia in any new national school funding model.
 - place information alerting migrants to the right of all children in Australia to access free primary education on appropriate Government websites, including those of the Department of Education, Employment and Workplace Relations and the Department of Immigration and Citizenship.
 - provide a formal written apology to Mr Behme for the breaches of Johann's human rights identified in this report.

3 Background

8. Mr Behme and his wife are German citizens. Mr Behme's elder son, Johann Behme, is an Irish citizen. His two other children are German citizens, although they were both born in Australia. Mr Behme and his family were residing in Australia pursuant to a Business (Long Stay) visa (subclass 457). On 20 May 2009, Mr Behme enrolled Johann, who was then four years old, in a public school in West Pymble, a suburb of New South Wales.
9. The School referred Mr Behme's application for enrolment to the NSW Department of Education and Training's Temporary Visa Holder Unit, who informed Mr Behme that he would have to pay school fees of \$4 500 per annum.
10. The requirement to pay school fees arises as a result of the operation of s 31 and s 31A of the *Education Act 1990* (NSW). Section 31(1) of the Education Act provides that instruction in government schools is to be free of charge. However, pursuant to s 31(2) of the Education Act, that provision does not apply to 'overseas students'. The term 'overseas students' is defined in s 3 of the Education Act to mean:

a student who holds a visa under the *Migration Act 1958* of the Commonwealth that enables the student to study in New South Wales, but does not include the holder of a permanent visa or special category visa within the meaning of that Act.
11. Mr Behme's son plainly falls within that definition. Section 31A of the Education Act provides, amongst other things, that the Director-General may by order fix the fees to be paid by overseas students. On 25 August 2008, the Director-General made an order pursuant to s 31A of the Education Act that set fixed fees for classes of overseas students. Relevantly, the Order fixed the fees for temporary resident visa holders at \$4 500 for 12 months tuition for Kindergarten to Year 6.
12. On 21 May 2009, Mr Behme applied to the Temporary Visa Holder Unit for a waiver of the school fees. However, on 28 May 2009, the Unit informed Mr Behme that he did not qualify for a waiver due to his family circumstances and annual gross income.

4 Complaint

13. On 3 June 2009, Mr Behme lodged a written complaint with the Commission alleging that his son, Johann, was not able to avail himself of free primary education in a public school in New South Wales. He claims that this is inconsistent with article 28(1)(a) of the CRC which provides:
 1. States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all.
14. He claims that the imposition of primary school fees on overseas students discriminates against children based on their residency status in the country in which their parents choose to live.
15. On 23 July 2009, Mr Behme further asserted that the Commonwealth is ultimately responsible for ensuring free education for all children in Australia and has failed to do so. On 29 July 2009, the Commission granted Mr Behme leave to amend his claim to name the Commonwealth as a respondent to the complaint, pursuant to s 46PF(3) of the AHRC Act.

16. The Commission has endeavoured without success to resolve Mr Behme's human rights complaint against the Commonwealth by conciliation.

5 Legislative framework

17. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly s 11(1)(f) gives the Commission the following functions:
- to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
18. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
19. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.
20. Pursuant to s 3 of the AHRC Act, the rights and freedoms recognised in the CRC are 'human rights' for the purposes of the AHRC Act.¹

6 Is there an 'act' of the Commonwealth?

6.1 Consideration of the meaning of 'failure to do an act'

21. A key issue in this complaint is whether there is an 'act' or 'practice' within the meaning of s 11(1)(f) as defined in s 3 of the AHRC Act. The Commonwealth submits that there is no 'act' or 'practice' by the Commonwealth into which the Commission has power to inquire under s 11(1)(f) of the AHRC Act.
22. Relevantly for the purposes of this inquiry, s 3(3)(a) of the AHRC Act provides that a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act. There is not a similar extended definition of the term 'practice'. I will therefore confine my inquiry to considering whether the complaint reveals a relevant 'act'. The expression 'act' is defined in section 3(1) of the AHRC Act in the following terms:
- act** means an act done:
- (a) by or on behalf of the Commonwealth or an authority of the Commonwealth;
 - (b) under a Commonwealth or Territory enactment;
 - (c) wholly within a Territory; or
 - (d) partly within a Territory, to the extent to which the act was done within a Territory.

23. An 'act' only invokes the human rights complaints jurisdiction of the Commission where the relevant act is not one required by law to be taken;² that is, where the act is within the discretion of the Commonwealth, its officers or its agents. Further, the inclusion of (a) in the above definition of 'act' as distinct from (b) supports the view that an 'act' can include exercises of the executive power under s 61 of the Constitution.³ I also consider it relevant that the Commission lacks any power to enforce its recommendations and in that way, the scope of its inquiry function is distinguishable from those matters that are justiciable before courts.
24. Here, Mr Behme points to a failure of the Commonwealth. The word 'failure', like the word 'fails' may have a number of meanings, depending upon the particular statutory context. In *Ingram v Ingram*,⁴ Jordan CJ discussed the possible meaning of the word 'fails' in different statutory contexts. He considered that in some contexts it may mean 'simply the omission to do the thing in question, irrespective of any reason which may have existed for his (or her) not doing it' and that in other contexts, the statute may require circumstances or conduct evincing default or moral blame on the part of the person to whom the statute is addressed.
25. I have not been able to locate any judicial consideration of the meaning of 'failure' in the specific context of s 3(3) of the AHRC Act. It can be observed that in s 11(1)(f) of the AHRC Act, the word 'failure' is used as an element in the definition of the limits of the Commission's statutory inquiry function. Those words of limitation require that any inquiry that the Commission entertains be restricted to an act (including a refusal or failure to do an act) which may be inconsistent with or contrary to any human right. Accordingly, whether s 11(1)(f) of the AHRC Act empowers the Commission to inquire into a 'failure to do an act' depends, critically, upon whether the particular human right in issue imposes an affirmative obligation to act.
26. In its submissions, the Commonwealth states that the Commission's inquiry function is not a general monitoring function. It states:
- Section 11(1)(f) of the AHRC Act does not confer upon the Commission a general power in any case where a person has been denied a human right by a person other than the Commonwealth, to conduct an inquiry as to whether it was possible to imagine an administrative act that the Commonwealth could have taken that might have prevented the person from denying that right.
27. I accept this submission. However, it does not answer the question of whether the particular 'human rights' in issue positively require the Commonwealth to undertake an act or acts, such that a failure to do so would be inconsistent with or contrary to those rights.

6.2 Does article 28 of the CRC positively require the Commonwealth to undertake an act?

28. Mr Behme has referred the Commission to article 28(1)(a) of the CRC, which I have set out above. Article 28 declares or recognises a 'right' to education. It also imposes upon each state party certain obligations directed to 'achieving that right progressively and on the basis of equal opportunity', including, relevantly for current purposes, the affirmative obligation to 'make primary education compulsory and available free to all'.
29. Article 2 of the CRC requires States to respect and ensure the rights in the CRC to all children without discrimination 'of any kind'. I am therefore of the view that the right recognised by article 28 of the CRC extends to all children within the Commonwealth's jurisdiction, including non-citizens.

30. The United Nations Children's Fund (UNICEF) has commented in its 2008 Implementation Handbook for the CRC that free, compulsory primary education for all is the 'core minimum' required by the right to education in article 28.⁵ Further, the nature of the requirement is unequivocal. UNICEF states:

The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization.⁶

31. I note also that UNICEF has commented that the 'right to free compulsory education is so clearly stated in the Convention [CRC] that any failure to meet this standard is a major source of concern'.⁷

32. Article 4 of the CRC specifies how the rights recognised or declared by the CRC are to be implemented and by whom. This has the effect of attenuating the content of those rights.

33. Article 4 of the CRC states:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

34. The word 'appropriate' qualifies the nature of the Commonwealth's obligations in the sense that its obligations do not extend to the taking of 'inappropriate' legislative, administrative and other measures. Further, I note that the right to education is an economic, social and cultural right.⁸ Accordingly, article 28, read with article 4 of the CRC recognises:

- a right, exercisable by each child within the Commonwealth's jurisdiction, to education;
- being a right which is to be achieved, in part, by discharge of the Commonwealth's affirmative obligation to make primary education available free to all;
- with the Commonwealth under a further or related affirmative obligation to take all appropriate, legislative, administrative, and other measures to implement that right; provided that
- such measures are not required to exceed the extent of the Commonwealth's available resources.

35. Accordingly, an alleged failure to provide free education, or at least to take all appropriate administrative and other measures to implement the right to education, including by taking measures of that nature to make available to all primary education free of charge engages s 11(1)(f) of the AHRC Act.

36. Support for this approach can be drawn from *South Africa v Grootboom*,⁹ where the South African Constitutional Court considered a similar issue dealing with rights concerning access to adequate housing conferred by s 26 of the *Constitution of the Republic of South Africa, 1996*. Articles 26(1) and (2) provide:

- (1) (e)veryone has the right to have access to adequate housing
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

37. Read together, those provisions were said to impose upon the National Government various obligations, including:
- a requirement to devise a comprehensive and workable plan or program for the provision of adequate housing being one which clearly allocated responsibilities and tasks to the different spheres of government;
 - a requirement to allocate national revenue to the other tiers of government on an equitable basis for the purposes of achieving that plan; and
 - a requirement for the reasonable implementation of that plan.
38. While such a national plan existed and was being implemented to provide housing in the medium and long term, no provision had been made (in the national plan or in the national budget) for the immediate needs of those requiring housing in the short term. The court concluded that that fell short of the requirements of article 26(2) and granted relevant declaratory relief.
39. The constitutional arrangements in South Africa differ from those in Australia. Nonetheless, the approach of the Constitutional Court provides useful guidance as to how I might approach this inquiry. Here, the short point is that free primary education has not been made available to Mr Behme's son on the basis that he is a temporary visa holder. That fact may not, in itself, disclose a contravention of article 28 (read with article 4 and 2). For example, the Commonwealth would not bear responsibility if the failure to make education available free of charge to Mr Behme's son was the result of an administrative oversight or misfeasance by NSW. However, in the current inquiry, it is necessary for me to consider the steps (if any) taken by the Commonwealth and to evaluate those steps against the positive obligation to take all appropriate administrative and other measures to implement the right to education, which is to be achieved, in part, by making primary education available free to all.

6.3 The relevance of Australia's federal structure

40. The Commonwealth submits that there can be no relevant 'act' under s 11(1)(f) of the AHRC Act, where a state, here the State of New South Wales, is ultimately responsible for the breach of human rights. I accept that it was the State of New South Wales, and not the Commonwealth, that sought to impose the school fees of \$4 500 on Mr Behme.
41. The Commonwealth submits that the Commission's inquiry in these circumstances may amount to an 'inquiry into a failure by the Commonwealth to prevent a breach of human rights by another person'. The legislature could not have intended this because it has specifically confined the Commonwealth's inquiry powers to acts of the Commonwealth. In my view, this submission misses the point. The articles of the CRC in issue are addressed to the Commonwealth. The right in article 28 of the CRC is tied to the reciprocal obligation of the Commonwealth to take certain measures. It is too broad a proposition to suggest that s 11(1)(f) cannot be engaged because the acts and omissions of another polity are also involved. Whether the Commonwealth has acted inconsistently or contrary to any human right will depend on the particular facts in each case.
42. Further, the Committee on the Rights of the Child has specifically rejected the Commonwealth's suggested proposition. In General Comment No 5, it stated that:
- where a State delegates powers to legislate to federated, regional or territorial governments, it must also require these subsidiary governments to legislate within the framework of the CRC and to ensure effective implementation.¹⁰

43. The Committee also said:

decentralization does not in any way reduce the direct responsibility of the State party's Government to fulfil its obligations to all children within its jurisdiction.¹¹

44. While the term 'delegation' is inappropriate in the Australian constitutional context to describe the relationship between the Commonwealth and the states, the above comments of the Committee emphasise that 'direct responsibility' for the discharge of the obligations imposed by the CRC remains with the Commonwealth, regardless of the fact that responsibility for the discharge of the relevant governmental function lies with another polity.

7 Has the Commonwealth taken all appropriate measures to ensure that primary education is made available free to Mr Behme's son?

7.1 Were there any avenues open to the Commonwealth?

45. The Commonwealth submits that it must have the power to prevent the breach of human rights for its failure to be inconsistent with human rights. It states:

for a failure of the Commonwealth to be inconsistent with or contrary to human rights, it must be possible to say that if the Commonwealth had done that thing the infringement of the human right would not have occurred or at least probably would not have occurred.

46. It further submits that 'no administrative action by the Commonwealth can override State legislation'. It also submits that any other avenues open to it would be purely 'political' and could not guarantee that the infringement would not have occurred.

47. Here, the specific obligation upon the Commonwealth is to take 'all' appropriate measures. In my view, article 28 (read with article 4) of the CRC obliges the Commonwealth to, at least, try to achieve the required outcome through the avenues available to it. In my view, the material issue is whether there were any administrative or other avenues available to the Commonwealth to ensure that primary education is made available free to all children in Australia – and in the context of this complaint, to Mr Behme's son.

48. From the information submitted by the parties, it is apparent that the Commonwealth provides funding to the States for the purpose of education. Prior to 1 January 2009 (during the period that the NSW Director-General made the order fixing the fees to be paid by overseas students), there existed a discretionary power under the *Schools Assistance (Learning Together-Achievement Through Choice and Opportunity) Act 2004* (Cth), which permitted the Minister to attach conditions to grants made to the States in respect of recurrent expenditure funding.

7 Has the Commonwealth taken all appropriate measures to ensure that primary education is made available free to Mr Behme's son?

49. From 1 April 2009, (which includes the period in which Mr Behme's son sought and was refused an exemption from the Order regarding fees) Commonwealth funding is being provided pursuant to the Inter-Agency Agreement on Education which is a schedule to the Intergovernmental Agreement on Financial Relations administered by Treasury. It is apparent from that Agreement that the Commonwealth saw itself as 'jointly responsible' with the States for developing and reviewing certain national objectives and outcomes in the area of education. Pursuant to the Agreement, the Commonwealth requires the States and Territories to do certain things. In this manner, the Commonwealth exercises considerable influence over the States and Territories in relation to their provision of education.
50. The national outcomes of the Agreement include:
- (a) all children are engaged in and benefit from schooling; and
 - (b) schooling promotes the social inclusion and reduces the educational disadvantages of children, especially indigenous children,
- but do not include that primary education should be available free to all.
51. It therefore appears from the above analysis that there were avenues available to the Commonwealth to, at least, attempt to achieve the outcome required by article 28 of the CRC during the relevant period of Mr Behme's complaint. The process of negotiation, formulation of objectives, outcomes and conditions, as well as the execution of the Agreement involved an exercise of the executive power conferred by s 61 of the Constitution. I accept the Commonwealth's submission that the negotiation and finalisation of any outcomes with New South Wales and other States and Territories is aptly described as 'political' – there is no guarantee that New South Wales would have accepted or complied with a condition or obligation imposed by the Commonwealth.¹² However, the fact that these avenues might be described as 'political' does not excuse the Commonwealth from its obligation under article 28 (read with article 4) of the CRC to undertake 'all' appropriate measures.

7.2 Did the Commonwealth take any measures to ensure that primary education is made available free to Mr Behme's son?

52. It is apparent from the Department of Immigration and Citizenship's website 'Living in Australia: Education', that the Commonwealth is aware that some State and Territory public schools require students holding temporary visas to pay full school fees.¹³ This website states:
- Note:** Students holding temporary visas may be required to pay full school fees. Check with individual schools for details.
53. Accordingly, it does not appear that the failure to make primary education available free to Mr Behme's son, Johann was the result of an administrative oversight or misfeasance. Accordingly, on 9 November 2010, the Commission wrote to the Commonwealth seeking 'details of all legislative, administrative and other measures taken by the Commonwealth to ensure the right to free primary education for all children.'
54. The Commonwealth refused to provide these details on the basis that it disputed that the Commission had jurisdiction to inquire into the matter. The Commission wrote again to the Commonwealth on 31 August 2011, confirming its view that it had jurisdiction to inquire into the act and granting a further opportunity to provide the requested information. On 11 April 2012, the Commonwealth informed the Commission that it would not provide the further information because it remained of the view that the Commission did not have jurisdiction.

55. Further, the Commonwealth has not provided any information to the Commission regarding whether the taking of appropriate measures would exceed the extent of the Commonwealth's available resources.
56. In the absence of any information from the Commonwealth on these details and in light of the fact that free primary education has not been made available to Mr Behme's son, I conclude that the Commonwealth has failed to take all appropriate administrative or other measures to make free primary education available to all children in Australia. I conclude that the Commonwealth has failed to do an act contrary to its positive obligation under article 28 (read with article 4) of the CRC.
57. For the reasons set out above, I find that the Commonwealth has acted inconsistently with Johann's right to free primary education under article 28 of the CRC. In the circumstances of this complaint, the Commonwealth has also acted inconsistently with Johann's right to non-discrimination in article 2 (in conjunction with article 28) of the CRC, which requires the Commonwealth to respect and ensure the rights in the CRC to all children without discrimination of any kind.

8 Recommendations

8.1 Power to make recommendations

58. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹⁴ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁵
59. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.¹⁶

8.2 Compensation

60. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
61. However, in making a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.¹⁷
62. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.¹⁸
63. By email dated 31 August 2012, Mr Behme submitted:
- I would merely seek to receive the amount that DEEWR has allowed to be requested from me, nothing more, nothing less, and I do not want it for my family or I.

64. It is apparent from the information before me that Mr Behme did not pay the requested fees of \$4 500. Instead, he enrolled his son in a private Catholic school, where the fees were substantially less. Mr Behme paid school fees of \$1 876 before he decided to move to Ireland. Mr Behme has informed the Commission that his decision to leave Australia and move to Ireland was in part, because his children would be able to access free primary education in Ireland. Mr Behme has also informed the Commission that he has received from another entity compensation for the \$1 876 in school fees he paid while in Australia.
65. It is unfortunate that Mr Behme has decided to leave Australia because he could not access free primary education in New South Wales. However, in light of all of the circumstances, I am not inclined to recommend the Commonwealth pay any financial compensation to him.

8.3 Policy

66. The Commission recommends that the Commonwealth take appropriate measures to make primary education free to all children in Australia, regardless of the immigration status of their parents. These measures may include:
- seeking to attach appropriate conditions to the funding agreements entered into with New South Wales for educational purposes to ensure that primary education is provided free to all children in New South Wales.
 - incorporating appropriate conditions to ensure that primary education is provided free to all children in Australia in any new national school funding model.
67. The Commission also recommends that the Commonwealth place information alerting migrants to the right of all children in Australia to access free primary education on appropriate Government websites, including those of the Department of Education, Employment and Workplace Relations and the Department of Immigration and Citizenship.

8.4 Apology

68. I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Behme for the breaches of his son's human rights identified in this report. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.¹⁹

9 Department's response to recommendations

69. On 19 September 2012, I provided the Commonwealth with a Notice under s 29(2)(a) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by Mr Lars Behme on behalf of his son against the Commonwealth.
70. By letter dated 29 November 2012 the Commonwealth provided the following response to my findings and recommendations:

Dear Professor Triggs,

Mr Lars Behme v Commonwealth (DEEWR)

I refer to your notice of findings in relation to the above complaint and your request for the Commonwealth's response to your recommendations, dated 19 September 2012.

Please find below the Commonwealth's response.

We remain of the view that the Commonwealth has not engaged in any act or practice that would give rise to the Commission's jurisdiction to inquire into this matter, as outlined in section 11(1)(f) of the *Australian Human Rights Commission Act 1986 (Cth)*. We reiterate our comments from 21 February 2011 and 2 August 2012, which are included as attachments to this response.

With regards to the factual circumstances surrounding Mr Behme's complaint, we note Mr Behme has complained about the New South Wales Department of Education and Training's imposition of a school fee when he sought to enrol one of his children in a NSW government primary school. In this context, we would like to note that Mr Behme was a German citizen who was sponsored by his employer to work in Australia on a temporary business (long stay) 457 visa. While Mr Behme elected not to pay the school fees and instead enrolled his child in a nearby Catholic primary school, we note the school fees paid to the Catholic school (\$1 876) were later compensated to Mr Behme by another entity.

On this basis, the Commonwealth maintains that the relevant act or practice is that of the State (NSW) and not the Commonwealth. This reflects the states' and territories' absolute responsibility to ensure education is provided to all children, thus implementing Australia's obligation under the Convention on the Rights of the Child (CRC). We do not accept a finding by the Commission that, in relation to the provision of primary school education, the Commonwealth has engaged in an act or practice that is 'inconsistent with or contrary to any human right'.

Notwithstanding this, we acknowledge the Commission has raised a real issue involving a state seeking to impose school fees on a child of a temporary visa holder and Australia's human rights obligations under the CRC. The Commonwealth is not responsible for ensuring that state and territory governments comply with Australia's international human rights obligations in areas of state and territory responsibility, such as the provision of primary school education. However, in recognition of the importance of this matter, the Commonwealth intends to raise this issue with relevant state or territory education ministers for their consideration.

We note the Commission has a function, under paragraph 11(1)(k) of the AHRC Act, to report to the Attorney-General setting out the Commission's advice on any action the Commission believes NSW (or any other state in the same situation) needs to take in order to comply with Australia's international human rights obligations. We consider this approach would be the more appropriate way to raise this issue, as it identifies the appropriate level of government who is able to take action to address the matter.

Thank you for the opportunity to comment on your notice of findings and recommendations.

Yours faithfully

Martin Hehir
Deputy Secretary,
Department of Education Employment and Workplace Relations

29 November 2012

71. The Commonwealth's response includes as attachments letters to the Commission dated 21 February 2011 and 2 August 2012, which are set out in the Appendix.
72. I report accordingly to the Attorney-General.

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a long horizontal flourish extending to the left.

Gillian Triggs
President
Australian Human Rights Commission
March 2013

Appendix

the leading lawyers to government



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Our ref: 11001941

Your ref: 2023681

2 August 2012

The Hon Catherine Branson QC
President
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Dear Ms Branson

Behme case: complaint to Australian Human Rights Commission

1. Thank you for your letter of 5 July 2012 containing your preliminary view concerning the complaint made by Mr Behme under the *Australian Human Rights Commission Act 1986* (AHRC Act).
2. We wish to take the opportunity to make a brief written submission in relation to the preliminary view.
3. The Commonwealth remains of the view that, in relation to NSW's charging of school fees to Mr Behme, there is no 'act' or 'practice by the Commonwealth, into which the AHRC has power to inquire unders 11(1)(f) of the AHRC Act, or in relation to which it can reach a preliminary or final view. The Commonwealth does not consider that s 11(1)(f), combined with s 3(3)(a) of the AHRC Act, authorises the AHRC to conduct an inquiry into the measures the Commonwealth has taken to implement the CRC, or reach a preliminary or final view. The basis for this submission is set out in our letter of 21 February 2012 in some detail. We do not set it out again here.
4. We wish to raise 2 important points in response to your preliminary view which follow on from our earlier submission.
5. First, as noted, the Commission has considered this matter under s 11(1)(f) of the AHRC Act, which provides:

11 Functions of Commission

- (1) The functions of the Commission are:

...

- (f) to inquire into any act or practice that may be inconsistent with or contrary to any **human right**, and:

... [Emphasis added].

Office of General Counsel

6. 'Human right' is defined in s 3(1) of the AHRC Act to mean 'the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument'. The Convention on the Rights of the Child [1991] ATS 4 (CRC) is such a relevant international instrument.
7. We agree that art 28(1)(a) of the CRC recognises a 'human right' as defined in s 3(1) of the AHRC Act. Article 2 of the CRC also sets out a relevant human right of non-discrimination.
8. But in our view it is clear that art 4 of the CRC does not set out a human right in this sense. Article 4 provides that State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the CRC. In its terms art 4 make clear it is not setting out a human right; rather it sets out an obligation on States Parties in relation to the implementation of the human rights specified elsewhere in the CRC.
9. The preliminary view treats a failure to comply with art 4 as an act that is 'contrary to a human right' for the purposes of s 11(1)(f).
10. The preliminary view does this on page 5, where it indicates that 'a failure to provide free education, or at least to take all appropriate administrative and other measures to implement the right to education ... engages s 11(1)(f)'.
11. The discussion in the preliminary view proceeds on this basis. It concludes on page 9 that 'the Commonwealth has failed to take all appropriate administrative or other measures to make primary education available to all children in Australia'. In our view this is incorrect. We think that it is clear that a failure to take all appropriate administrative or other measures is not, in itself, an act that is 'contrary to ... a human right' for the purposes of the AHRC Act and that such a failure does not engage s 11(1)(f).
12. As we have previously submitted, we do not consider that s 11(1)(f), combined with s 3(3)(a) of the AHRC Act, authorises the AHRC to conduct an inquiry into the measures the Commonwealth has taken to implement the CRC, or reach a preliminary view on this issue. It appears from the statement of the preliminary view that the AHRC has taken an inappropriate approach in this regard. Section 11(1)(f) refers to an act contrary to a human right; art 4 of the CRC does not declare or recognise a human right; yet the preliminary view relies extensively on the Commonwealth's alleged failure to comply with art 4.
13. Secondly, we do not think that this is simply a technical legal point. Rather we think this approach by the Commission seriously distorts the purpose and operation of the AHRC Act.

14. Article 28(1)(a) of the CRC is an important human right. On the basis of the preliminary view, the Commission has found that NSW has undertaken acts in breach of this right. The preliminary view appears to draw a distinction between these acts, and acts by NSW which are an administrative oversight or misfeasance; it seems to suggest that the Commonwealth may be responsible for the former but not the latter. We do not understand the reason for this distinction. And at any rate we think that it surely adds to any culpability of NSW that these are purposeful acts, and not matters of administrative oversight or misfeasance.
15. Notwithstanding this no criticism of or finding against New South Wales is made. Rather the finding is against the Commonwealth which has undertaken no acts in breach of art 28.
18. We recognise that this is because an 'act' or 'practice' into which the AHRC has power to inquire under s 11(1)(f) is defined in s3(1) as an act or practice done, or engaged in:
 - by or on behalf of the Commonwealth or an authority of the Commonwealth;
 - under an enactment (ie Commonwealth or Territory legislation); or
 - wholly or partly within a Territory.

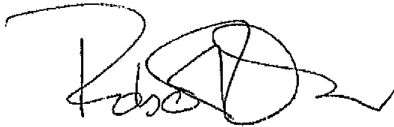
Therefore a finding against NSW cannot be made. But in our view it is inappropriate to use this limitation on Jurisdiction in effect to expand the responsibility of the Commonwealth.

17. We previously noted that in our view s 11(1)(f) of the AHRC Act does not confer on the AHRC a general power, in any case where a person has been denied a human right by a person other than the Commonwealth, including a State, to conduct an inquiry as to whether it was possible to imagine an administrative act that the Commonwealth could have taken that might have prevented the person from denying that right, and if so to make a finding against the Commonwealth.
18. Whilst agreeing with this proposition on page 4, the preliminary view none-the-less takes this very approach. It appears to do so on the basis that art 4 of the CRC imposes a positive obligation on Australia to take measures for the realisation of the right in art 28, and that this situation can be distinguished from other circumstances in which a person other than the Commonwealth has breached a human right. However; this is not a real distinction, since international human rights instruments generally include some provision like art 4 requiring States to take measures for the realisation of the rights to which they relate. The approach in the preliminary view is therefore, in effect, to treat s 11(1)(f) as a general power to conduct an inquiry, and make a finding against the Commonwealth, whenever a person other than the Commonwealth has breached a right under a relevant international human rights instrument, even though the AH RC confers no power to inquire into the acts of the person concerned.

Australian Government Solicitor

19. In this case, any breach of art 26(1)(a) is clearly the responsibility of NSW. And yet the finding is against the Commonwealth.
20. If this approach is taken more generally it may mean that all human rights breaches in Australia will be the responsibility of the Commonwealth, notwithstanding that, as is the case here, the breach of human rights has been brought about by the purposeful act of another person with no involvement of the Commonwealth. In our view such an approach seriously distorts the purpose and operation of the AHRC Act by ignoring the culpability of such other persons, and making the Commonwealth responsible for their acts, even though it plays no part in them.

Yours sincerely



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21 February 2011

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Dear Ms Lindley

Behme case: complaint to Australian Human Rights Commission

1. Thank you for your letter to Mr Tony Giugni of 9 November 2010, concerning the complaint made by Mr Behme under the *Australian Human Rights Commission Act 1986* (AHRC Act)¹.
2. In your letter, you requested that 'in order for the President to form a final view as to whether the Commonwealth has met its obligations under' arts 3, 4 and 28 of the *Convention on the Rights of the Child*² (CRC), the Commonwealth provide:
 - 'details of all legislative, administrative and other measures taken by the Commonwealth to ensure the right to free primary education for all children', and
 - 'all information evidencing the meeting by the Commonwealth of its obligation to ensure that the best interests of the child is a primary consideration in all of its actions concerning the provision of education to children in Australia'.
3. Your letter also invited the Commonwealth's submission as to whether such measures fulfil the obligations under arts 3, 4 and 28 of the CRC.
4. For the reasons set out in this letter, the Commonwealth remains of the view that, in relation to NSW's charging of school fees to Mr Behme, there is no 'act' or 'practice' by the Commonwealth, into which the AHRC has power to inquire under s 11(1)(f) of the AHRC Act. The Commonwealth does not consider that s 11(1)(f), combined with s 3(3)(a) of the AHRC Act, authorises the AHRC to conduct an inquiry into the measures the Commonwealth has taken to implement the CRC. Accordingly the Commonwealth does not consider it appropriate to provide the AHRC with the

¹ Previously entitled the *Human Rights and Equal Opportunity Commission Act 1986*.

² New York, 20 November 1989, [1991] ATS 4.

material requested in the AHRC's letter of 9 November 2010, nor to make submissions on whether the measures taken by the Commonwealth fulfil Australia's obligations under the CRC.

Background

5. The complaint by Mr Behme, under the AHRC Act, arises out of the charging of fees by the State of New South Wales, for the schooling of the children of temporary visa holders. Section 31A of the *Education Act 1990* (NSW) provides, in part:
 - (1) The Director-General may, by order published in the Gazette, fix the fees to be paid by overseas students, or classes of overseas students, at government schools.
 - ...
 - (3) The Director-General may exempt an overseas student, or class of overseas students, from the requirement to pay a fee in accordance with this section, or refund all or any part of such a fee, in such circumstances as the Director-General considers appropriate.
 - (4) An overseas student is not entitled to receive instruction, or to participate in school activities, at a government school, unless any fee payable by the student under this section has been paid.
 - (5) The Director-General may terminate the enrolment of an overseas student at a government school if a fee that is required to be paid under this section in relation to the overseas student has not been paid.
 - (6) Any fee that is due but not paid under this section may be recovered by the Director-General as a debt in a court of competent Jurisdiction.
6. Section 3(1) of the Education Act includes the following definition:

overseas student means a student who holds a visa under the *Migration Act 1958* of the Commonwealth that enables the student to study in New South Wales, but does not include the holder of a permanent visa or special category visa within the meaning of that Act.
7. The Director-General has fixed fees for, among others, overseas students in primary school, pursuant to s 31A.
8. It is claimed that the charging of fees to primary school students is contrary to the CRC, of which art 28 provides that:
 1. States parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) make primary education compulsory and available free to all[.]
9. Article 2(1) of the CRC stipulates that rights under the CRC are to be respected and ensured by States 'without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political

or other opinion, national, ethnic or social origin, property, disability, birth or other status’.

10. Since the CRC has been declared a ‘relevant international instrument’ under s 47 of the AHRC Act, a right or freedom that is recognised or declared under the CRC is a ‘human right’ for the purposes of the AHRC Act.³ Section 11(1)(f) of the AHRC Act provides:

11 Functions of Commission

- (1) The functions of the Commission are:

...

- (f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
- (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry; ...[.]

11. Section 20(1) of the AHRC Act provides:

- (1) Subject to subsection (2), the Commission shall perform the functions referred to in paragraph 11(1)(f) when:
- (a) the Commission is requested to do so by the Minister; or
 - (b) a complaint is made in writing to the Commission, by or on behalf of one or more persons aggrieved by an act or practice, alleging that the act or practice is inconsistent with or contrary to any human right; or
 - (c) it appears to the Commission to be desirable to do so.

12. Section 3(1) of the AHRC Act includes the following definitions:

act means an act done:

- (a) by or on behalf of the Commonwealth or an authority of the Commonwealth;
- (b) under an enactment;

³ See definitions of ‘human rights’ and ‘relevant international instrument’ in s 3(1) of the AHRC Act.

- (c) wholly within a Territory; or
- (d) partly within a Territory, to the extent to which the act was done within a Territory.

practice means a practice engaged in;

- (a) by or on behalf of the Commonwealth or an authority of the Commonwealth;
- (b) under an enactment;
- (c) wholly within a Territory; or
- (d) partly within a Territory, to the extent to which the act was done within a Territory.

13. In response to Mr Behme's complaint, the AHRC is inquiring as to whether the Commonwealth has engaged in an act or practice that may be inconsistent with or contrary to any human right, in relation to NSW charging Mr Behme fees for his son's primary education.
14. Section 3(3)(a) of the AHRC Act provides:
 - (3) In this Act:
 - (a) a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act[.]

Summary of Commonwealth's argument that there is no relevant 'act' or 'practice' enlivening the power of inquiry under s 11(1)(f)

15. The Commonwealth considers that the AHRC does not have power to conduct an inquiry under s 11(1)(f), in relation to this matter, since the Commonwealth has not engaged in any relevant 'act or practice' that may be inconsistent with or contrary to any human right, within the meaning of the AHRC Act.
16. For the power under s 11(1)(f) to exist on the basis of a 'failure' by the Commonwealth 'to do an act', within the meaning of s 3(3)(a):
 - there must be non-performance by the Commonwealth of an identifiable administrative act that was due, required or promised; and
 - the failure must itself be inconsistent with, or contrary to, a human right, and therefore either the Commonwealth's failure itself must breach a human right or there must be a relationship between the Commonwealth's failure to do the act and the breach of human rights by another person such that the failure caused the breach.
17. Alleged failure by the Commonwealth to implement the terms of a human rights instrument is not, in itself, sufficient to found a right of inquiry under s 11(1)(f).

Letters from AHRC

18. On 23 September 2009, the Commonwealth wrote to the AHRC, arguing that the complaint against the Commonwealth should be discontinued as lacking in substance, since the Commonwealth had not engaged in any relevant act or practice. The President of the AHRC decided not to discontinue the inquiry, on the basis that the expression 'lacking in substance' in s 20(2)(c)(ii) of the AHRC Act refers to a claim which presents no more than a remote possibility of merit or which does no more than hint at a just claim.⁴ The AHRC letter notifying AGS of this decision⁵ includes the following:

Section 3(3) of the AHRC Act defines an act to include a failure or refusal to act, it is therefore arguable that, if the Commonwealth could be taking steps to implement the Convention on the Rights of the Child (CRC), the failure to do so amounts to an act or acts for the purposes of the Commission's human rights inquiry function under the AHRC Act.

Under Article 28 of the CRC, States Parties are obliged to undertake all appropriate, administrative, and other measures to ensure that primary education is compulsory and available free to all children within its jurisdiction.

There are arguably several measures the Commonwealth could take to implement the CRC despite the States having primary control of the education in Australia. For example, it is arguable that the Federal Government could:

- make free primary education a condition of States receiving funding under the Inter-Agency Agreement on Education;
- bring the requirements of the CRC to the attention of relevant State Governments and ask them to report on its full implementation; or
- commence discussions with the States to implement Article 28 of the CRC through COAG, JSCOT or other existing inter-government structures.

Clearly I would require further evidence before reaching a view on those matters however, for present purposes I am not satisfied that the complaint is lacking in substance on the basis that there is no relevant act into which I can inquire. ...

In my view, it is arguable that if the Commonwealth is demonstrated to be failing to take action of the type described above, this may be inconsistent with or contrary to Article 28 of the CRC.

19. In a subsequent letter of 9 November 2010,⁶ the AHRC stated that:

the President is of the view that it is arguable that the Commonwealth has committed an act that may be inconsistent with or contrary to the human right to free primary education by failing to take all appropriate legislative, administrative and other measures to implement the right to free primary education for all.

⁴ *Assai v Department Of Health and Community Services* [1990] HREOCA 8 (26 September 1990).

⁵ Letter to Andrew Dillon, AGS, of 3 March 2010.

⁶ Letter to Tony Giugni, AGS, ref 2023581.

... On the information currently available to the Commission, it appears open to the President to find that the Commonwealth has failed to take all appropriate administrative and other measures to ensure all children in Australia receive free primary education and has failed to have regard to the best interests of the child as a primary consideration in all of its actions in relation to education in Australia.

... In order for the President to form a final view as to whether the Commonwealth has met its obligations under the CROC identified above, I would be obliged if you would provide the following information:

1. details of all legislative, administrative and other measures taken by the Commonwealth to ensure the right to free primary education for all children
2. All information evidencing the meeting by the Commonwealth of its obligation to ensure that the best interests of the child is a primary consideration in all of its actions concerning the provision, of education to children in Australia.

I also invite your submission as to whether the measures taken by the Commonwealth, as detailed in your reply, fulfil the obligations under CROC in articles 3, 4 and 28.

Whether there was an ‘act or practice’ by the Commonwealth

20. An ‘act’ or ‘practice’ into which the AHRC has power to inquire under s 11(1)(f) is defined as an act or practice done, or engaged in:
 - by or on behalf of the Commonwealth or an authority of the Commonwealth;
 - under an enactment (ie Commonwealth or Territory legislation); or
 - wholly or partly within a Territory.
21. NSW was not acting on behalf of the Commonwealth when it charged Mr Behme the fees for his son’s education. (In this regard, the Commonwealth agrees with the preliminary view expressed by the President in a letter sent by the AHRC to NSW declining to discontinue the Inquiry⁷). Neither was NSW acting under an enactment, nor wholly or partly within a Territory. Therefore, the AHRC has power under s 11(1)(f) to inquire in this case only if there was a relevant act done, or practice engaged in, by the Commonwealth or an authority of the Commonwealth.
22. The Commonwealth has done no positive act, and has engaged in no positive practice, with regard to Mr Behme being charged fees for his son’s primary education, and has had no involvement in the charging of such fees to Mr Behme or anyone else. The Commonwealth does not require the fees to be charged, either by legislation or as a condition of funding. The Commonwealth provides funding to the States for educational purposes generally, but does not give separate funding for the children of temporary visa holders, nor specify that the education of such children is not to be paid for out of the funds it provides. The amount of funding provided by the Commonwealth to the States constitutes a significant percentage of

⁷ Letter to Ms Kate Burns, Crown Solicitors Office, 3 March 2010.

the States' educational funds, but not a majority of those funds. Education is not a matter that falls within the powers of the Commonwealth under the Constitution.

23. The letter from the AHRC of 3 March 2010 suggests that s 3(3) of the AHRC Act may have the effect that the absence of any action by the Commonwealth in relation to the charging of fees to Mr Behme, may constitute a relevant 'refusal or failure to do an act', into which the AHRC can inquire.

Meaning of 'failure' in s3 (3)

24. It has not been alleged that the Commonwealth 'refused' to do anything in the present case. Rather, the question has been raised whether there was any 'failure' by the Commonwealth to do an act, being a failure that may be inconsistent with or contrary to any human right.
25. Mere absence of action is not, in itself, a 'failure to do an act', in the ordinary meaning of that expression. So far as potentially relevant, the Macquarie Dictionary definitions of 'failure' and 'fail' are:

failure

2. non-performance of something due or required: a failure to do what one has promised; a failure to appear.

fail

1. to come short or be wanting in action, detail, or result; disappoint or prove lacking in what is attempted, expected, desired, or approved.

6. neglect to perform or observe: he failed to come.

26. This suggests that, according to the ordinary meaning of the word, a failure to do something is not merely an absence of any action, but non-performance of something due, required, or promised.
27. There does not appear to have been any judicial consideration of the meaning of 'failure' in the specific context of s 3(3) of the AHRC Act, nor of similar provisions in s 3(3) of the *Racial Discrimination Act 1975* (RDA), s 3(2) of the *Sex Discrimination Act 1984* (SDA), s 4(2) of the *Disability Discrimination Act 1992*, and s 7⁸ of the *Age Discrimination Act 2004*. However, the meaning of 'fail' and 'failure' to do something, in other contexts, has been considered by the courts.
28. A passage frequently referred to occurs in *Ingram v Ingram*,⁹ in which Jordan CJ said:

... where it is provided by statute that certain consequences shall follow if a person fails to do something which is directed to be done, the meaning of the word 'fail' depends upon the context in which it is found. In some contexts it may

⁸ Section 7 of the Age Discrimination Act uses the term 'omission' rather than 'failure'.

⁹ (1938) 38 SR (NSW) 407 at 410.

mean simply the omission to: do the thing in question, irrespectively of any reason which may have existed for his not doing it *Miedbrodt v. Fitzsimon* (1876) LR 6 PC 06, at pp 315-316: *R. v. Southwark Borough Council; Ex parte Southwark Borough Market Trustees* (1921) 124 LT 623, at p 624. In other cases it may mean an omission to do the thing by reason of some carelessness or delinquency on his part, but not omission caused by impossibility for which the person in question is not responsible: cf. *Loates v. Maple* (1903) 88 LT 288, at p 290. In other cases it may mean omission to do the thing, but so that omission caused by impossibility arising from some causes is included and from others is excluded: cf. *Re Neilson* (1890) 18 Rettie 338.¹⁰

29. In relation to this passage, Kirby P in *CBS Productions Pty Ltd v O'Neill* said:¹¹

... Jordan CJ pointed out that the word 'fail' may have at least three possible meanings. There are doubtless several other combinations of circumstances which do or do not attract the verb to fail ...

Scrutiny of judicial observations on the word 'fails' (or relevant variants of the verb 'to fail') discloses, as one would expect, differing meanings attributed to the word in differing contexts. **In some contexts, the courts have been at pains to confine the word to circumstances evincing default or moral blame on the part of the person alleged to have failed.** This the Court of Criminal Appeal did in Deputy Commissioner of *Taxation v Ganke* [1975] 1 NSWLR 252. That was a case where a taxpayer was alleged to have 'failed' to furnish information. The court held that mere omission was not sufficient to come within the statutory phrase. In *Goodwin v Bousfield* [1977] 2 NSWLR 733 Nagle J adopted a similar approach because of the penal provisions of the statute there under consideration. A like approach was taken by the Full Court of the Supreme Court of Queensland in *Lambert v McIntyre; Ex parte Lambert* [1975]. Qd R349: see also *R v Skurray* (1967) 86 WN (P11) (NSW) 1 and cf *Loates v Maple* (1903) 88 LT 288; *R v Wagner* [1970] RTR 422.

On the other hand, an equally lengthy catalogue of cases can be assembled to illustrate the applicability of the words to circumstance where there is absolutely no suggestion of delinquency on the part of the person alleged to have failed, but simply **an omission on that person's part to do something required or expected.** For example, see *Re an Arbitration between Wilson and Son and Eastern Counties Navigation & Transport Co (Ltd)* (1892) 8TLR 264 at 266; *Miedbrodt v Fitzsimon*; *The Energie* (1875) LR 6 PC 306 and *McAdam v Federated Clerks Union WA Branch* (1976) 56 WA Indus Gaz 792.

[our emphasis]

¹⁰ (1938) 38 SR (NSW) 407 at 410. Quoted with approval by Taylor J in *Collector of Customs (NSW) v Southern Shipping Co Ltd* [1962] HCA 20; (1962) 107 CLR 279 at 295.

¹¹ (1985) 1 NSWLR 601 at 609. Kirby P dissented on the point of construction before the Court, but these remarks have been referred to often in subsequent cases.

30. The meaning of 'fails to' has been considered by the High Court in the context of constitutional provisions relating to disputes between Houses of Parliament. In *Clayton v Heffron*¹², the Court considered the expression 'rejects or fails to pass' in s 5B of the Constitution Act 1902 (NSW). Dixon CJ, McTiernan, Taylor and Windeyer JJ said in a joint judgment:¹³

The provision is concerned with a **refusal or neglect** to give effect to the Assembly's will in law making. It is because the assent of the Council to a Bill may be withheld otherwise than by rejection that the alternative 'fails to pass' is added ... Pursuing the same purpose, sub-s. (4) provides a period of inaction as conclusive of failure to pass a bill. These are considerations which point to an intention to cover entirely the withholding by the Legislative Council of its consent to a measure sent up to it by the Legislative Assembly. [our emphasis]

31. This passage was referred to in *Victoria, New South Wales, Western Australia & Queensland v Commonwealth (Petroleum & Minerals Authority (PMA) case)*¹⁴, in which the High Court considered s 57 of the Constitution, which deals with the situation where the House of Representatives passes a proposed law and the Senate rejects or 'fails to pass it'. Barwick CJ said:

It seems to me that the word 'fails' in s. 57 involves the notion that a time has arrived when, even allowing for the deliberative processes of the Senate, the Senate ought to answer whether or not it will pass the Bill or make amendments to it for the consideration of the House: that the time has arrived for the Senate to take a stand with respect to the Bill. If that time has arrived and the Senate rather than take a stand merely prevaricates, it can properly be said at that time to have failed to pass the Bill.¹⁵

... The concept of failure to pass must. It seems to me, mean more than 'not pass'. Failure in this sense imports, as I have said, the notion of the presence of an obligation as a House to take a definitive stand.¹⁶

[our emphasis]

32. Stephen J¹⁷ noted that if 'fails to pass' means 'did not pass', and no more, then the reference to rejection is redundant and the reference to passing with amendments no less so. An analogous argument could apply to s 3(3) of the AHRC Act; if 'failure' to do an act meant simply 'not acting', there would be no need to refer to 'refusal' to do an act.
33. Other, more recent, consideration of the meaning of 'fails' and the element of fault is to be found in *Hill v Holmes*¹⁸, *R v Mokbel & Mokbel*¹⁹, and *McGee v Chitty*²⁰.

¹² [1960] MCA 92; (1960) 105 CLR 214.

¹³ (1960) 105 CLR at 242.

¹⁴ [1975] HCA 39; (1975) 134 CLR 81.

¹⁵ at 122.

¹⁶ at 123.

¹⁷ at 186.

¹⁸ [1999] FCA 760; (1999) 92 FOR 120, Goldberg J at [34] - [35].

¹⁹ [2006] VSC 158, Gillard J at [32] to [40].

²⁰ [2010] WASC 67, Simmonds J at [26] to [42].

34. The provisions considered by the courts in the cases referred to above differ from s 3(3) of the AHRC Act, in that those other provisions specify both whose failure is in question and what specific thing they have failed to do, eg failure by the Senate to pass a Bill, failure to comply with a direction by the person to whom the direction is given. Many of the cases therefore focus on whether the 'failure' in question requires some element of fault, or whether it is sufficient that the person has not done the thing explicitly required, whatever the reason.
35. A difficult feature of s 3(3) of the AHRC Act, combined with the definition of 'act', is that the 'failure' does not refer to a specific act (but we discuss below the type of act that must be concerned), and so far as concerns acts done under an enactment, or wholly or partly in a territory does not refer to a specific person. The absence of a particular duty imposed on a particular person or body may make it difficult to determine whether there has been a relevant 'failure'.
36. Another context in which this type of problem occurs is that of the offence of cruelty to animals by neglect, which may be committed not just by the owner but by any person. In *Daniele v Welssenberger*²¹, Pullin J said:²²

[15] The word 'fail' in its ordinary meaning means 'a neglect to perform or observe' some obligation duty or requirement; a 'failure' to do something is. In its ordinary meaning, the 'non-performance of something due or required'. *Macquarie Dictionary*. S4(1)(b) is unusual because an Act will ordinarily expressly state the precise nature of the duty before stating that it is an offence to fail to observe the duty. Here there is no express statement of any duty. S4(1)(b) refers to a failure to feed and water animals, and **because of the ordinary meaning of 'fail', there must be a 'duty' to feed or water the animals before an offence is committed. 'Duty' in its ordinary meaning is that which one is 'bound to do by moral or legal obligation' (Macquarie Dictionary) or 'an obligation assumed ... or imposed by law to conduct oneself in conformance with a certain standard or to act in a particular way' (Merriam - *'Webster's Dictionary of Law'*, 1996).**

[our emphasis]

37. It is clear that the meaning of the term 'failure' in a particular legislative provision depends on the intention of Parliament to be judged in the particular context. However, the cases support the view that mere absence of action is not in itself a 'failure', in the ordinary meaning of the word, and that there must at least be a non-performance of something due, required, or promised.

Failure to 'do an act'

38. It is significant that s 3(3) does not use the expression 'failure to act', but rather 'failure to do an act'. In our view, this must refer to a particular act which the person concerned (in this case the Commonwealth) has failed to do. In light of the meaning of 'failure' as discussed above, this means that for the power in s 11(1)(f) to apply to

²¹ [2002] WASCA 346; (2002) 136 A Crim R 390.

²² at [14] - [21]. See also *Backhouse v Judd* [1925] SASR 16 at 19-20.

an absence of action by the Commonwealth, it is necessary to identify an act that the Commonwealth had a duty to perform, or was reasonably expected to perform, but did not perform. (It is not suggested that there must be a legal obligation to perform the act in question.)

AFIRC argument: non-implementation of CRC

39. The letter of 3 March 2010 from the AHRC states that:

It is therefore arguable that, if the Commonwealth could be taking steps to implement the Convention on the Rights of the Child (CRC), the failure to do so amounts to an act or acts for the purposes of the Commission's human rights inquiry function under the AHRC Act.

Under Article 28 of the CRC, States Parties are obliged to undertake all appropriate, administrative, and other measures to ensure that primary education is compulsory and available free to all children within its jurisdiction.²³

40. This argument appears to be that, because of the CRC, the Commonwealth is under a duty to take all appropriate administrative measures to ensure that free primary education is provided, and that therefore if a State refuses free primary education, the fact that the Commonwealth has not taken steps to require the State to provide it constitutes a 'failure to do an act' on the part of the Commonwealth, into which the AHRC may inquire under s 11(1)(f). In order to inquire whether the Commonwealth had failed to prevent an act by another person that was contrary to a human right, the AHRC would need to inquire into the act by another person. Therefore, the effect of the suggested argument would be that, notwithstanding the limitations in the definitions of 'act' and 'practice', the AHRC could, under s 11(1)(f), inquire into any act by any person in any circumstances, if the Commonwealth could have done something to prevent that act.
41. It is true that, as a matter of international law, Australia must ensure that the obligation under art 28 is met by taking appropriate legislative, administrative and other measures. It is also true that it is the Commonwealth that represents Australia in the international sphere. However, the Commonwealth Parliament did not, in s 11(1)(f) of the AHRC Act, confer on the AHRC a general power to monitor the Commonwealth's implementation of human rights treaties. Section 11(1)(e) of the AHRC Act authorises the AHRC to examine Commonwealth and territory legislation, and on the request of the Minister to examine proposed legislation, to ascertain whether it may be inconsistent with any human right. In addition, s 11(1)(j) and (k) provide for the AHRC, on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made, or action that should be taken by the Commonwealth, on matters relating to human rights, and as to any action that, in the opinion of the Commission, needs to be taken in order to comply with the provisions of any relevant international instrument. However, the power of

²³ Article 4 of the CRC provides, in part: States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.

inquiry under s 11(1)(f) (to which various compulsory powers under Division 3 of Part II apply) is not expressed in similarly broad terms.

42. If s 11(1)(f), combined with the definitions in s 3, were intended to give the AHRC a general power to inquire into the Commonwealth's implementation of the relevant human rights instruments, including the prevention of breaches by States and other persons, it would be strange to limit this to Commonwealth implementation by means of administrative actions. Yet the 'acts or practices' to which s 11(1)(f) of the AHRC Act applies are acts and practices of an administrative nature. That provision does not authorise inquiry into the operation of legislation (though the exercise of a discretion under legislation may be a relevant 'act or practice').²⁴ Therefore, the 'failure' to do an act, referred to in s 3(3)(a) of the AHRC Act, must be a failure to do an administrative act. It would therefore not be open to the AHRC, in reliance on s 11(1)(f), to inquire into the failure or refusal by the Commonwealth Parliament to enact legislation to prevent a breach of a human right by a State or private person, eg by overriding State legislation.
43. It would also be strange, if the Parliament had intended, by s 11(1)(f), to authorise the AHRC to inquire into any act by any person, that could have been prevented by an administrative act of the Commonwealth, that this should have been done essentially by way of definition provisions, and in particular the definition of 'act' in s 3(1) and s 3(3). Those provisions, and therefore 11(1)(f), are not applicable only to the Commonwealth and Commonwealth authorities, they apply also to the acts (including failure to act) of any private person that take place wholly or partly in a territory. If the Parliament had intended to provide that the Commission could inquire into a failure by the Commonwealth (or a person acting under an enactment, or a private person in a territory) to prevent a breach of human rights by another person, this could have been provided explicitly.
44. There is nothing in the extrinsic material for the AHRC Act that suggests an intention to authorise the AHRC to use its inquiry powers to exercise such broad oversight over, not only the administrative actions, but also the general policy and scope of action of the Commonwealth.
45. The Explanatory Memorandum for the Human Rights and Equal Opportunity Commission Bill 1986 describes definitions of 'significant words and phrases' in s 3, but does not mention s 3(3), and in relation to the definition of 'act' notes only that it is the same as in the Human Rights Commission Act 1981. The 1981 Act did not include an equivalent of s 3(3) of the AHRC Act. Neither was an equivalent of s 3(3) of the AHRC Act included in the Human Rights and Equal Opportunity Commission Bill 1984 (the 1984 Bill). The 1984 Bill lapsed when Parliament was dissolved. The second reading speech for the Human Rights and Equal Opportunity Commission Bill 1986 (the 1986 Bill) states that the 1985 Bill is 'substantially the same as' the 1984 Bill, but the 1985 Bill included s 3(3). The second reading speech for the 1985

²⁴ See, for example, *Secretary, Department of Defence v Human Rights & Equal Opportunity Commission* [1997] FCA 960.

Bill does not mention s 3(3); neither is it mentioned in the Parliamentary debates, Section 3(3) of the AHRC Act appears to have been added to the 1985 Bill as a routine 'machinery' drafting matter at some point between the lapsing of the 1984 Bill and its re-introduction as the 1985 Bill. It is the equivalent of s 3(2) of the SDA and of s 3(3) of the RDA. There is no discussion of those provisions in the Explanatory Memorandum for the SDA (there is no Explanatory Memorandum for the RDA), nor in the relevant second reading speeches or Parliamentary debates.

46. The provision in s 11(1)(f)(i) for the AHRC to endeavour, by conciliation, to 'effect a settlement of the matters that gave rise to the inquiry', also seems ill adapted to a situation in which the Commonwealth (or private person in a territory) has played no role in the 'matters that gave rise to the inquiry'. That would particularly be so in cases where, as here, there is no 'act or practice' by the persons directly involved (eg the State) in relation to which the AHRC has power to inquire. It is true that in such a case the AHRC could decide that it was not appropriate to endeavour to effect a settlement, and could instead report to the Minister under s 11(1)(f)(ii). Nonetheless, we think that the fact that the Act contemplates that an inquiry under s 11(1)(f) will normally lead to conciliation reinforces the view that the inquiry is not intended to relate to an absence of action by the Commonwealth in relation to matters in which it has no real involvement.
47. For the reasons given above, we suggest that s 11(1)(f) of the AHRC Act does not confer on the AHRC a general power, in any case where a person has been denied a human right by a person other than the Commonwealth, to conduct an inquiry as to whether it was possible to imagine an administrative act that the Commonwealth could have taken that might have prevented the person from denying that right.

Failure must be contrary to or inconsistent with a human right

48. In any case, to be the subject of an inquiry under s 11(1)(f) the relevant failure must itself constitute an act that may be inconsistent with or contrary to any human right. For the Commonwealth's failure to do something to be inconsistent with or contrary to a human right, it must be possible to say that if the Commonwealth had done that thing the infringement of the human right would not have occurred or at least probably would not have occurred. Therefore either the Commonwealth's failure itself must breach a human right or there must be a relationship between the Commonwealth's failure to do the act and the breach of human rights by another person such that the failure caused the breach.
49. To the extent that the charging of the fees in this case is determined by State legislation, no administrative action by the Commonwealth could prevent it from occurring. The Commonwealth cannot, by any administrative action, override State legislation. (As noted above, s 11(1)(f) does not authorise the AHRC to inquire into the absence of Commonwealth legislation that would override the relevant provisions of the State legislation by virtue of s 109 of the Constitution.)

50. The Director-General has discretion under the State legislation as to whether to determine fees for particular overseas students, and as to whether to grant an exemption from such fees. The Commonwealth clearly has no power to direct the Director-General as to how to exercise that discretion. The Commonwealth's ability to influence the Director-General in the exercise of his or her discretion would be limited to making representations before the decision on determining fees or granting an exemption is made. The extent to which Commonwealth representations could affect the Director-General's decision would depend on the matters that the Director-General is entitled to take into account as relevant considerations, including for example budgetary matters. It seems very unlikely that any administrative action by the Commonwealth (eg by making representations) could be decisive in this regard.

AHRC suggestions as to acts the Commonwealth failed to do

51. The measures that the AHRC suggests could arguably be taken by the Commonwealth seem more directed to persuading the State to amend its legislation. The particular measures referred to by the AHRC are:
- make free primary education a condition of States receiving funding under the Inter-Agency Agreement on Education;
 - bring the requirements of the CRC to the attention of relevant State Governments and ask them to report on its full implementation; or
 - commence discussions with the States to implement Article 28 of the CRC through COAG, JSCOT or other existing inter-government structures.
52. We have considered each of these.

Funding conditions

53. Attaching conditions to funding might persuade the NSW Government to introduce into Parliament amendments of its legislation, or adopt a policy that prevents fees from being charged, but this is purely speculative. In any case, there is room for significant doubt that the States in general, and NSW in particular, would have accepted the funding on this basis. The Commonwealth's administrative capacity to use funding to influence the States in relation to school fees diminished significantly on 1 January 2009.²⁵
54. Until 1 January 2009, the Commonwealth could have associated National Specific Purpose Payments with intergovernmental agreements to attempt to compel the States to amend legislation relating to school fees. (As already noted, there is doubt whether NSW would have accepted such an arrangement.) However, since the coming into effect of the Intergovernmental Agreement on Federal Financial Relations (IGAFFR) and the National Education Agreement (NEA) (in Schedule F to

²⁵ The imposition of fees for the primary education of Mr Behme's son appears to have occurred in May 2009.

the IGAFFR) on 1 January 2009, this has not been Commonwealth policy or practice. Instead, funding is provided to States through the NEA, without ‘financial or other input controls imposed on service delivery by the States’.²⁶

55. The NEA includes the following provision.

Role of the Commonwealth

18. The Commonwealth undertakes responsibility for:

- (a) allocating funding to States and Territories to support improved service delivery and reform to meet nationally agreed outcomes and to achieve the national objective, including for students with particular needs;
- (b) ensuring that the funding arrangements for non-government school systems and schools are consistent with, and support the responsibilities of the States and Territories in respect of regulation, educational quality, performance and reporting on educational outcomes;
- (c) higher education policy, including its impact on pre-service and post-graduate teacher education and teacher supply through setting higher education national priorities, and its funding of universities;
- (d) investing in actions to secure nationally agreed policy priorities, in consultation with States and Territories; and
- (e) ensuring that funding agreements between the Commonwealth and non-government authorities will include a provision that the non-government school sector will work with Governments within each state or territory to ensure their participation in relevant aspects of this agreement.

56. These agreed Commonwealth responsibilities do not include providing funds for educating children of temporary visa holders, nor direct funding of government schools. Commonwealth funding is provided to the States and Territories to ‘support improved service delivery and reform’ to meet agreed outcomes and objectives.
57. The IGAFFR, like most agreements between the Commonwealth, State and Territory governments is not intended to create legally enforceable obligations. Therefore, legally, the Commonwealth has the power to seek to include in a funding agreement with a State government conditions concerning the charging of primary school fees. However, it would be contrary to the IGAFFR for the Commonwealth to do so. It seems unlikely that NSW would agree to change legislation or policy in order to accept funding to which the Commonwealth attached conditions contrary to the terms of the IGAFFR.
58. The other possible measures suggested in the AHRC letter of 3 March 2010 are:
- bring the requirements of the CRC to the attention of relevant State Governments and ask them to report on its full implementation; or

²⁶ cl 21 IGAFFR; E5, Schedule E, IGAFFR.

- commence discussions with the States to implement Article 28 of the CRC through COAG, JSCOT or other existing inter-government structures.
59. COAG members often conclude intergovernmental agreements. The agreements may include provision for monitoring, including for example, reporting timetables. Reports to COAG from members on implementation matters are routine COAG business. However, whether to enter into such an agreement in the first place is entirely a matter for each member.
 60. On 14 June 1996, COAG agreed Principles and Procedures for Commonwealth-State Consultation on Treaties to achieve 'the best possible outcome for Australia in the negotiation and implementation of international treaties'. The Treaties Council of COAG was established in 1997, 'to improve the provision of information about, and consultation procedures concerning, treaties and other international instruments of sensitivity or importance to the States and Territories'. The Council has met only once. In 1997 in practice, the Council's work is handled by the Standing Council on Treaties (SCoT) which exists 'to identify treaties and other international instruments of sensitivity and importance to the States and Territories' and, among other things, to 'monitor and report on the implementation of particular treaties where the implementation of the treaty has strategic implications, including significant cross-portfolio interests, for States and Territories; [and] ensure that appropriate information is provided to the States and Territories.' SCoT is guided by the Principles and Procedures for Commonwealth-State Consultation on Treaties which direct that treaties and other international instruments of 'particular sensitivity and importance' include those with 'potential to affect the finances or current or future policy decisions of the States and Territories or the need for State and Territory participation in implementation, including legislation'.
 61. In practice, SCoT examines treaties under negotiation to identify issues for implementation and does not systematically examine treaties to which Australia has previously acceded. Australia ratified the CRC before SCoT was established.
 62. JSCOT is a Committee of the Commonwealth Parliament. It can inquire into, and report to the Parliament on, treaty actions. It has no function of communicating with, or negotiating with, the States.
 63. Essentially, therefore, the measures suggested by the AHRC amount to engagement by the Commonwealth in political discussions with the States, with a view to persuading the States to alter their legislation and/or administrative practices. We do not consider that not doing so is a failure of the sort to which s 3(3)(a) refers. Any person, not just the Commonwealth, could make representations to NSW in an effort to persuade it not to charge primary school fees. It cannot have been intended that s 11(1)(f) of the AHRC Act would authorise an inquiry on the basis that a private person in a territory, for example, has not attempted to persuade a person in a State to refrain from acting in a way that is contrary to a human right.

64. While the Commonwealth could engage in political discussions with NSW, there is no reason to believe that NSW would necessarily be persuaded to alter its position on the charging of fees. The Commonwealth may be in a position of some financial advantage and may exert some political influence over the States, but the Commonwealth is not in a position of superiority over the States, so as to be capable of directing a State government to act in a particular way.
65. The Commonwealth suggests, therefore, that there is no evidence that failure by the Commonwealth to do any particular administrative act was inconsistent with or contrary to a human right in the Behme case.

Situations where there is a 'failure' constituting an 'act' to which ss 3(3)(a) and 11(1)(f) apply

66. In our view, s 11(1)(f) applies to a failure by the Commonwealth to do an act that it has a duty to do (including a moral duty), in a particular situation in which there is Commonwealth involvement. This would include the type of situation that is analogous to that in which the AHRC may inquire into a failure by a private person in a territory to do an act, where it is alleged that the failure is contrary to a human right. For example, in *Gutchen v Delacey*,²⁷ the AHRC found that the co-owners of a hotel had engaged in racial discrimination because, knowing that acts of discrimination were occurring on the part of hotel staff, they failed to intervene. The Commission said that:

There was a failure in the management which had it not occurred would have (I expect) led to the racist bar no longer being in place at the Graham Hotel by early June.

Section 3(3) of the Racial Discrimination Act provides that refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to such a refusal or failure. The co-owners failed to take action and by their omission to intervene directly, or at least through Mr Langston, I consider they have acted unlawfully within the terms of the Racial Discrimination Act.

67. Applying the same principles, if a section manager in a Commonwealth Department were aware that an employee in that section was discriminating against persons of a particular race, and the manager did nothing about it, there would be a relevant 'act' in the form of a failure to do an act.
68. Although the Commonwealth gives funds to the States to be used for education, there is no relationship between that funding and the charging of fees to Mr Behme. This may be contrasted with the situation in *Baird v Queensland*.²⁸ In that case, funding was provided by the Queensland Government to the Lutheran Church which ran Aboriginal reserves, specifically to pay the wages of workers who were almost inevitably Aboriginal, and who, as the Government was aware, were not paid at award rates as required by State law. The Queensland Government calculated the

²⁷ [1990] HREOCA 13.

²⁸ [2006] FCAFC 162; (2006) 236 ALR 272.

funds to be provided for this purpose on the basis of a rate of pay that was below any relevant award rate. The Queensland Government was found to have engaged in racial discrimination by determining the amount of the funds on a racially discriminatory basis. In the principal judgment in the Full Federal Court, Allsop J stated that the 'case involved both the acts taken and the omission or failure to do something different'²⁹. In *Baird*, the State had done a positive act, ie provided funding, but had done so on a racially discriminatory basis, and in doing so had also failed to provide funding on a non-discriminatory basis.

Response to request in letter of 9 November 2010

69. Accordingly, the Commonwealth considers that, in relation to NSW's charging of school fees to Mr Behme, there is no 'act' or 'practice' by the Commonwealth, into which the AHRC has power to inquire under s 11(1)(f) of the AHRC Act. The Commonwealth does not consider that s 11(1)(f) combined with s 3(3)(a) authorises the AHRC to conduct an inquiry into the measures the Commonwealth has taken to implement the CRC. Accordingly the Commonwealth does not consider it appropriate to provide the AHRC with the material requested in the AHRC's letter of 9 November 2010, nor to make submissions on whether the measures taken by the Commonwealth fulfil Australia's obligations under the CRC.

Yours sincerely

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²⁹ At [50], (2006) 236 ALR 272 at 287.

- 1 On 22 October 1992, the Attorney-General made a declaration under s 47 of the AHRC Act that the CRC is an international instrument relating to human rights and freedoms for the purposes of the AHRC Act: *Human Rights and Equal Opportunity Commission Act 1986 – Declaration of the United Nations Convention on the Rights of the Child*.
- 2 *Secretary, Department of Defence v HREOC* (1997) 78 FCR 208 (Burgess), 212-2.
- 3 It is also significant that the Attorney-General has power to remove from the reach of the Commission's compulsory powers documents and information relating to 'security, defence or international relations of Australia' (traditionally associated with the exercise of the prerogative); inter-ministerial communications between Commonwealth and State Ministers, to the extent the disclosure would prejudice relations between these polities and material which would disclose the deliberations of the Executive Council: see s 24(1) of the AHRC Act.
- 4 (1938) 38 SR (NSW) 407, 410 (Jordan CJ).
- 5 UNICEF Implementation Handbook for the Convention on the Rights of the Child, (2008), 421.
- 6 As above.
- 7 UNICEF Implementation Handbook for the Convention on the Rights of the Child, (2008), 422.
- 8 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), article 13.
- 9 (2001) 1 SALE 46 (CC).
- 10 CRC General Comment No 5 on 'General measures of implementation of the Convention on the Rights of the Child' (2003), CRC/GC/2003/5, [20].
- 11 CRC General Comment No 5 on 'General measures of implementation of the Convention on the Rights of the Child' (2003), CRC/GC/2003/5, [40]-[41].
- 12 I note however that the jurisprudence concerning s 96 of the *Constitution* contains many examples of conditions that might equally be regarded as unpalatable to the States, where the financial assistance has nevertheless been accepted. Further, the Commonwealth appears to have had no difficulty seeking to use these measures to pursue other policy outcomes in the field of education which might be said to relate to human rights, such as the reduction of educational disadvantage of indigenous children consistent with article 2 of the CRC.
- 13 Department of Immigration and Citizenship, 'Australia: Education', see: <http://www.immi.gov.au/living-in-australia/settle-in-australia/everyday-life/education/>, (viewed 7 September 2009 and 24 May 2012).
- 14 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(a).
- 15 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(b).
- 16 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(c).
- 17 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 18 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 19 D Shelton, *Remedies in International Human Rights Law* (2000), 151.

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