Country Studies

Australia

I INTRODUCTION

This paper is part of a research project, ‘Strengthening the International Human Rights System: Rights, Regulation and Ritualism’, funded by the Australian Research Council’s Laureate Fellowship scheme. The project focuses on a problem endemic to the international human rights system: why are international human rights standards widely accepted in theory but so hard to implement in practice?

Although the international community has created a complex and sophisticated system of human rights standards, these principles are regularly sidelined or ignored by countries that have accepted them. The project draws on regulatory scholarship to analyse how states respond to human rights principles, focusing particularly on the notion of ritualism. In a classic sociological text, Robert Merton identified five modes of individual adaptation to a normative order: conformity, innovation, ritualism, retreatism and rebellion.¹ These modes appear equally at the level of organisations and among collectivities. All five modes are evident in responses to international human rights regulation, but ritualism is particularly pervasive. It has been pithily defined as ‘acceptance of institutionalised means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves’.² The concept of regulatory ritualism, then, can be understood as formal participation in a system of regulation while overlooking its substantive goals.

One aspect of the research project is to identify and analyse the ways that regulatory ritualism operates in the international human rights system through a series of case studies, of which this paper is one. The case studies document techniques of ritualism employed by countries participating in the international human rights system, with particular reference to the United Nations’ Human Rights Council Universal Periodic Review (UPR).³ The papers also look at the extent to which human rights treaties are implemented within a country’s legal framework, and the efficacy of independent oversight mechanisms such as judiciaries and National Human Rights Institutions. Collectively, they identify instances and document techniques of ritualism, as well as considering how rights are realised and ritualism avoided in particular contexts.

¹ Social Theory and Social Structure (Free Press, 1968) 194.
² John Braithwaite, Toni Makkai and Valerie Braithwaite, Regulating Aged Care (Edward Elgar, 2007) 7.
II AUSTRALIA

Australia is a parliamentary democracy, comprised of six states and three federal territories (with seven additional offshore territories). It became a federated state in 1901 through the enactment of the Australian Constitution. Section 51 of the Australian Constitution mandates the matters over which the Australian Commonwealth may legislate. The Australian states have a general power to pass laws on any other matter. Three Australian territories—the Australian Capital Territory (ACT), the Northern Territory and Norfolk Island—have been granted a limited right of self-government, while the other territories are governed only by Commonwealth laws. In the event of any inconsistency between Commonwealth and state laws, Commonwealth legislation prevails.

Australia’s Indigenous population has lived on the Australian continent for at least 40,000 years. Australia’s first peoples have suffered severe mistreatment since the arrival of Europeans on the continent, and still face discrimination in many areas. Over the past two decades, Australia has faced significant international criticism for its treatment of people seeking asylum in Australia, particularly its policies of mandatory detention and offshore processing of claims.

The two major political parties in Australia are the Australian Labor Party and the Liberal Party of Australia, who currently govern in coalition with the National Party of Australia. The Prime Minister of Australia is Tony Abbott, who is a member of the Liberal Party.

III THE DOMESTIC SPHERE

A Monist or Dualist Legal System?

The Australian legal system is dualist, in the sense that treaties that have been signed by the Australian executive do not become part of Australian domestic law until they have been implemented by an act of Parliament.\(^4\) Former High Court Justice Anthony Mason has commented that

> it is a well settled principle of the common law that a treaty […] has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia […] To achieve this result the provisions have to be enacted as part of our domestic law.\(^5\)

Section 61 of the Constitution gives the Australian executive the power to sign and ratify international treaties. Australia maintains a practice of only

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becoming a party to a treaty once it is satisfied that all of its domestic laws are in conformity with the provisions of that particular treaty.6

B Constitutionally Entrenched Rights?

The Australian Constitution is not primarily concerned with safeguarding rights, but rather with setting out the structure and relationships of government.7 It does not contain anything approaching a comprehensive Bill of rights, although it makes provision for a small number of rights:8 the right to vote;9 protection against compulsory acquisition of property on unjust terms;10 the right to trial by jury;11 freedom of religion;12 and prohibition of discrimination on the basis of state of residency.13 The High Court has also read an implied right to political communication into the Constitution.14 The Australian Constitution mandates for a clear separation of powers, an independent judiciary, and a robust degree of parliamentary oversight.

Many academics and public figures within Australian society have called for the introduction of a comprehensive Commonwealth human rights act, perhaps envisaged as a precursor to eventual inclusion within Australia’s Constitution. Successive Australian governments have rejected the idea on the basis that Australia has ‘no need’ for a charter of rights, arguing that that the parliamentary system of government, as well as the common law, provide adequate safeguarding of rights in Australia, and that this system is preferable to an ‘unelected’ judiciary articulating Australia’s rights framework via interpretation of a Commonwealth statute.15 In 2008 and 2009, the Australian government commissioned the National Human Rights Consultation. One of the central recommendations of the Consultation Report was that ‘Australia adopt a federal Human Rights Act’.16 The government did not take up the

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6 For greater elaboration, see Domenique F J J De Stoop, ‘Australia’s Approach to International Treaties on Human Rights’ (1973) 5 Australian Year Book of International Law 27, 30.
7 In Kruger v Commonwealth, Justice Dawson commented that the ‘Australian Constitution, with few exceptions and in contrast with its American model, does not seek to establish personal liberty by placing restrictions upon the exercise of governmental power’: Kruger v Commonwealth (1997) 190 CLR 1 at 61 per Dawson J.
9 Australian Constitution s 41.
10 Ibid s 51(xxxi).
11 Ibid s 80.
12 Ibid s 116.
13 Ibid s 117.
15 For this perspective, see John Howard, ‘Don’t Risk What We Have’ in Julian Leeser and Ryan Haddrick (eds), Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights (Menzies Research Centre, 2009) 67. For a succinct listing of the other frequent rationales which are given against the introduction of a bill, statute or charter of rights, see Michael Kirby, ‘Human Rights Protection in Australia: A Riposte to Justice Keane’ (Speech delivered at the Second Austin Asche Lecture, Charles Darwin University, NT, 27 August 2012).
finding. It did, however, take up the recommendation to create a Parliamentary Joint Committee on Human Rights,\(^\text{17}\) which has become an important legacy of the process. The Committee’s functions include:

- examining bills and legislative instruments that come before either House of Parliament for compatibility with human rights;
- examining acts for compatibility with human rights; and
- conducting inquiries on any matter relating to human rights which is referred to it by the Attorney-General.\(^\text{18}\)

Two jurisdictions in Australia have their own state or territory-based rights legislation—the ACT has the \textit{Human Rights Act 2004} (ACT) and Victoria has the \textit{Charter of Human Rights and Responsibilities Act 2006} (Vic). These have the status of ordinary legislation and can be overridden by subsequent legislation.

In 2010, the Tasmanian government announced a consultation project to examine a model for a Human Rights Charter of Tasmania. Though over 200 organisations and individuals responded to a directions paper, in 2012, the project was put aside due to budgetary constraints.\(^\text{19}\)

The first half of 2015 witnessed growing momentum for a human rights act in the state of Queensland. There, independent Member of Parliament Peter Wellington advocated for the legislation in response to anti-association laws introduced by the government of former Queensland Premier, Campbell Newman. At the time of writing, Wellington had entered into several consultations with lawyers, legal representatives and the Queensland Attorney-General’s office, and was waiting to hear from the Attorney-General on a suitable way forward.\(^\text{20}\)

\textit{C Implementation of Human Rights Treaties}

Five UN treaty bodies and four UN special rapporteurs have referred to the inadequate incorporation of human rights treaties in Australia’s legal framework, including the absence of a legal framework for the protection of economic, social and cultural rights (ESC Rights) and a Commonwealth Bill of basic human rights.\(^\text{21}\)

\(^\text{17}\) Ibid xxxi.
Some human rights instruments are attached as schedules to the *Australian Human Rights Commission Act 1986* (Cth), including the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention concerning Discrimination in Respect of Employment and Occupation*, the *Declaration on the Rights of the Child*, the *Declaration on the Rights of Mentally Retarded Persons*, and the *Declaration on the Rights of Disabled Persons*. The Australian Human Rights Commission (AHRC) is empowered to examine enactments for their consistency with ‘any human right’, including those in the scheduled treaties. However, the actual content of the treaties as they are scheduled to the *Australian Human Rights Commission Act* do not form part of Australian domestic law.

1 **ICCPR**

The ICCPR has not been incorporated into domestic law. Australia has no comprehensive legal framework for the protection of civil and political rights at the Commonwealth level, despite recommendations adopted by the Human Rights Committee in 2009. In its Concluding Observations issued in 2009, the Committee regretted that Australian ‘judicial decisions make little reference to international human rights law, including the Covenant.’ Australia maintains reservations to the ICCPR (see Addendum, below). The Committee also expressed its concern at Australia’s restrictive interpretation of, and failure to fulfil its obligations under the First Optional Protocol, and the fact that complainants to the Human Rights Committee have not received reparation.

Some recent issues in Australia with respect to civil and political rights include:

- more than 60 counter-terrorism laws, introduced progressively since 2001, many of which infringe on civil and political rights. Measures include ASIO’s capacity to detain non-suspects for up to a week without access to a lawyer, and a reversed burden of proof. The risk of arbitrary detention is exacerbated by the vague definition of ‘terrorist act’, and journalists and whistleblowers face imprisonment for reporting classified information;

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23 Ibid s 11(1)(e).
25 Ibid [8].
26 Ibid [10]. See below under section III(H) at 22.
29 Ibid.
• that rights to equality and non-discrimination are not comprehensively protected at the Commonwealth level;\textsuperscript{30}
• that in Australian prisons, there is ‘extraordinary over-incarceration’ of Australia’s Indigenous population,\textsuperscript{31} and, more generally, chronic overcrowding;\textsuperscript{32} and
• the persistence of mandatory detention policies for asylum-seekers,\textsuperscript{33} and breach of non-refoulement obligations under customary international law.\textsuperscript{34}

More positive developments include:
• in 2010, the Australian government introduced legislation to ensure that the death penalty cannot be reintroduced anywhere in Australian territory: the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 (Cth).\textsuperscript{35} In 2009 the government announced a new policy to govern law enforcement cooperation with countries that may apply the death penalty for the Australian Federal Police;\textsuperscript{36} and
• that legislation was introduced in 2013 to prohibit discrimination on the grounds of sexual orientation and gender identity, so that complainants can apply to the AHRC.\textsuperscript{37} Same-sex marriage is not, however, recognised in Australia.

2 International Covenant on Economic, Social and Cultural Rights (ICESCR)

There is no legal framework for the protection of ESC Rights at the Commonwealth level, nor is there an effective mechanism to ensure coherence and compliance of state and territory jurisdictions with Australia’s obligations under ICESCR.\textsuperscript{38} Poverty in Australia is rising, with the Australian

\textsuperscript{30} Ibid [12].
\textsuperscript{31} Saul, above n 27.
\textsuperscript{33} ICCPR Concluding Observations, UN Doc CCPR/C/AUS/CO/5, [23].
\textsuperscript{34} Ibid [19].
\textsuperscript{36} Ibid [102].
Council of Social Service finding in October 2014 that 13.9 per cent of people in Australia live below the poverty line (in the Committee on Economic, Social and Cultural Rights’ 2009 Concluding Observations, the figure was at 12 per cent).

Inequality, similarly, is worsening: while it is not extreme by international comparison, wealth is increasingly unequally distributed. The governance rhetoric of looking after ‘everyday Australians’ means that the socioeconomic rights that are catered for tend to be targeted towards ‘moderate mainstream’ concerns—a good example being a 2015 budget initiative to support parents who send their children to childcare. As pointed out by the UN Committee on the Rights of the Child, ‘the majority of early childhood care and education in [Australia] […] is provided by private, profit-driven institutions, resulting in the services being unaffordable for most families.’

Homelessness is an increasing problem in Australia, and one that disproportionately affects the Indigenous population. Australia’s Indigenous population in general suffers from disparities in access to health services, education, and employment prospects, particularly those living in remote communities. A good case study of the entrenched marginalisation of Indigenous interests to more ‘mainstream’ concerns in the Northern Territory is provided for in Australia’s UPR stakeholder document, dated November 2010. This is set out below:

According to IPA, [International Presentation Association] there was a lack of respect for the land rights of traditional owners and their management of their lands in the allocation of land for mining and nuclear waste disposal. The Federal Government draft legislation, the National Radioactive Waste Management Bill, nominated a pastoral holding in the Northern Territory as a site for radioactive waste storage and disposal. Consent had been obtained from only one of the seven clans associated with that land. IPA noted that in addition to environmental concerns, action undermined Indigenous

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44 ICESCR Concluding Observations, UN Doc E/C.12/AUS/CO/4, [26].
46 Ibid [31].
47 Ibid [18].
48 For more information on the marginalisation of indigenous Australians, see section III(C)(5) concerning the International Convention on the Elimination of All Forms of Racial Discrimination (at 13), and also section VI on rights ritualism (at 28).
49 An NGO in special consultative status with the Economic and Social Council at the UN.
owners’ sovereignty over and control of their lands. According to IPA, the Federal Government’s support for the huge increase in extractive industries in rural Australia had irreparable and irreversible effect on the sacred sites of the Indigenous peoples. It indicated that as mining towns developed, State governments were increasingly relying upon the extractive companies to provide the services they failed to deliver and that the high wages of miners caused the cost of living to escalate. As their participation in the mining industry was minimal, Indigenous people, along with other non-mining residents, experienced financial and social difficulties in these towns.50

In its most recent report, released in 2009, the Committee on Economic, Social and Cultural Rights noted with appreciation the passage of the Fair Work Act 2009,51 and the fact that Australia repealed legal provisions discriminating against same-sex couples in relation to financial aid and work related benefits.52 The rest of the report cited gaps in national implementation and violations occurring within the state. These include:

- that the AHRC has limited competency with regard to ESC Rights;53
- that Australia’s anti-discrimination legislation does not comprehensively protect against all forms of discrimination in all areas relating to ESC Rights;54
- social security that does not ensure universal coverage, and that has conditionalities for the payment of benefits with a negative impact on the disadvantaged and marginalised;55
- that rates of poverty are particularly high among disadvantaged and marginalised individuals and groups such as Indigenous peoples, asylum-seekers, migrants and persons with disabilities. Australia has not yet adopted a comprehensive strategy to combat poverty and social exclusion;56
- the gender wage gap.57 According to figures released by the Diversity Council of Australia in early 2015, the pay gap in Australia is 18.8 per cent, and is widening.58
- the inadequate health services for prisoners and those with mental health problems;59
- the high cost, complexity and strict rules of evidence applying to land claims under the Native Title Act 1993;60 and

• the critical endangerment of most Indigenous languages existing in Australia today. Indigenous cultural and intellectual property are not adequately protected.  

The report also criticises the low percentage of Australia’s gross national income (GNI) that the country devotes to foreign aid. According to the figures in the report (calculated in 2008–2009), Australia devoted 0.32 per cent of its GNI to foreign aid, with the OECD’s target at 0.7 per cent for developed countries. That figure is set to slide to 0.22 per cent in 2016–2017.

3 Convention on the Rights of the Child (CRC)

There is no comprehensive legislation at the national level that gives full and direct effect to the CRC in Australian law. The Committee on the Rights of the Child was particularly concerned in its Concluding Observations (2012) that the absence of national legislation on child rights:

has resulted in fragmentation and inconsistencies in the implementation of child rights across its territory, with children in similar situations being subjected to variations in the fulfilment of their rights depending on the state or territory in which they reside.

According to the Committee, the principle of ‘best interests of the child’ is not appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programmes and projects relevant to and which have an impact on children.

Domestic issues related to children’s rights include:

• the large numbers of Aboriginal and Torres Strait Islander children being separated from their homes and placed into new communities which do not adequately provide for the preservation of their cultural and linguistic identities;
• the high levels of violence against women and children, and the risk that the coexistence of domestic violence, lawful corporal punishment, bullying, and other forms of violence in Australian society are interlinked, leading to escalation and exacerbation of the situation;
• that the current disability support system is ‘under-funded, unfair, fragmented and inefficient’.

61 Ibid [33].
62 Ibid [12].
63 Lowy Institute for International Policy, Australia’s Foreign Aid <http://www.lowyinstitute.org/issues/australian-foreign-aid>.
65 Ibid.
66 Ibid [31].
67 Ibid [37].
68 Ibid [46].
69 Productivity Commission, quoted in ibid [57]. The excerpt from the Productivity Commission continues: ‘the current system gives people with a disability little choice and no certainty of access of appropriate supports, with children with disabilities frequently failing to receive
that funding for mental health continues to be substantially below that of other developed countries. There are high rates of suicide (particularly in Aboriginal communities). The Committee expressed concern at the potentially erroneous prescription of psycho-stimulants to children diagnosed with ADHD and ADD;\textsuperscript{70} and the extent of child and youth homelessness.\textsuperscript{71} Indigenous children and children in asylum-seeking, refugee and/or immigration detention situations are particularly vulnerable.\textsuperscript{72}

The Committee also expressed its concern at the allegations of complicity of Australian mining companies in rights violations in countries such as the Democratic Republic of Congo, the Philippines, Indonesia and Fiji. In these countries, children have been victims of child labour, evictions, land disposessions and killings (see section IV(B) on NGO assessments, below).\textsuperscript{73}

(a) OP-CRC on the Sale of Children, Child Prostitution and Child Pornography

Australian domestic legislation is not harmonised with the Optional Protocol,\textsuperscript{74} and there is little coordination between the existing implementation initiatives.\textsuperscript{75} The Committee noted that Australia has not defined and prohibited all the offences as provided for in arts 1, 2, and 3 of the Optional Protocol, and that the existing legislation varies greatly between different states and territories.\textsuperscript{76} The Committee expressed its concern that the 'underlying root causes of the offences under the Optional Protocol, such as poverty, are not sufficiently addressed.'\textsuperscript{77}

(b) OP-CRC on the Involvement of Children in Armed Conflict

The following areas of concern were highlighted by the Committee:

\begin{itemize}
  \item crucial and timely early intervention services, support for life transitions, and adequate support for the prevention of family or carer crisis or breakdown'.
  \item CRC Concluding Observations, UN Doc CRC/C/AUS/CO/4, [64].
  \item Ibid [70].
  \item CRC Concluding Observations, UN Doc CRC/C/AUS/CO/4, [27].
  \item See ibid [10]–[12].
  \item Ibid [24].
  \item Ibid [20].
\end{itemize}
that the Defence Instructions 2008 only prevent children under the age of 18 from involvement in hostilities to the extent that it does not adversely impact on the conduct of operations; that under the cadet scheme, children are exposed to military-like training activities. ‘Work-experience programs’ run by the Australian Defence Force may unduly put pressure on young persons, especially from marginalised populations, to volunteer without full informed consent; that national legislation only criminalises the recruitment of children under 15, and only applies in the time of an armed conflict; and that Australia actively exports arms, including small arms and light weapons to countries where children are known to be, or may potentially be, recruited or used in armed conflict.

4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The Committee against Torture, in Concluding Observations issued in December 2014, welcomed the passage in Australia of the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010. This legislation enacted a new offence of torture and ensured that the death penalty cannot be re-introduced in any state or territory in Australia.

The Committee cited the following areas of concern:

- that the AHRC does not have the statutory powers to monitor Australia’s implementation of CAT;
- the persistence of violence against women, disproportionately affecting Indigenous women and women with disabilities;
- prison conditions, including overcrowding, inadequacy of health services, and the high number of deaths in custody.

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78 Defence Instructions have the same force of law as subordinate legislation, like regulations. According to Australia, the purpose of the Defence Instruction 2008 was to ‘give effect to article 3 of the Optional Protocol regarding ADF’s minimum voluntary recruitment age and the conditions that are to apply to members of the ADF who are under 18 years of age’. see Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict—Initial Reports of States Parties due in 2008—Australia, UN Doc CRC/C/OPAC/AUS/1 (15 September 2010) [17].


80 Ibid [19].

81 Ibid [21].

82 Ibid [27].


84 Ibid [9].

that Indigenous people are disproportionately affected by incarceration, and that legal assistance services for Indigenous people are inadequately funded;\textsuperscript{86}

- with respect to irregular arrivals, breach of the non-refoulement obligations contained art 3 of the Convention against Torture;\textsuperscript{87}
- mandatory immigration detention,\textsuperscript{88} and the conditions in offshore processing centres;\textsuperscript{89} and
- the insufficient information provided on the screening practices that are carried out on people seeking asylum. Without this information, the Committee was unable to assess if thorough investigations of whether or not asylum-seekers are victims of torture are being carried out.\textsuperscript{90}

A joint submission by a coalition of Australian NGOs\textsuperscript{91} to Australia’s UPR commented on the lack of regulation of police use of force in many Australian jurisdictions, inadequate mechanisms for independent investigation and oversight of police, and a lack of access to effective remedies for police misconduct.\textsuperscript{92} According to this group, ‘[t]here is evidence of police targeting and harassment of Aboriginal peoples and newly arrived migrants, particularly Africans.’\textsuperscript{93} The additional problem of TASER use by police is regularly cited in UN documents,\textsuperscript{94} and is a recurring issue in the Australian context.\textsuperscript{95}

In early 2015, the Special Rapporteur on Torture found that aspects of Australia’s asylum-seeker policies violated CAT, including indefinite detention on an Australian-funded detention centre on Manus Island, harsh conditions, frequent unrest and violence and the failure to protect certain vulnerable individuals.\textsuperscript{96}

In late 2013, Prime Minister Abbott was widely criticised for defending state-sponsored torture in Sri Lanka by saying that while the Australian government ‘deplores the use of torture we accept that sometimes in difficult

\textsuperscript{86} Ibid [12].
\textsuperscript{87} Ibid [15].
\textsuperscript{88} Ibid [16].
\textsuperscript{89} Ibid [17].
\textsuperscript{90} Ibid [18].
\textsuperscript{91} Designated ‘JS1’ (Joint Stakeholder group one) in the UPR process. The principle authors of the submission are the Human Rights Law Resource Centre, Kingsford Legal Centre and the National Association of Community Legal Centres Inc, although the document was endorsed by 68 organisations.
\textsuperscript{93} Ibid.
circumstances difficult things happen. In early 2015, he responded to allegations of sexual assault in offshore immigration detention centres by similarly saying ‘things happen.’

5 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Australia has legislation against racial discrimination in the form of the Racial Discrimination Act 1975 (Cth). Within Australian politics, the impetus for anti-discrimination legislation has regularly come up against a proclaimed right to ‘freedom of speech’—it was on this basis that members of Australia’s conservative Liberal National Coalition successfully argued for the exclusion of provisions prohibiting the expression of racial hatred when the legislation was first enacted in 1975. The Racial Discrimination Act was amended to encompass a prohibition on the expression of racial hatred in 1995. Racial discrimination and hate speech is not however a criminal offence in Australia. In 2013 and 2014, the Commonwealth Attorney-General George Brandis attempted to wind back legislation that makes it unlawful to offend and insult people on the basis of race, but abandoned the proposed changes in the face of community opposition.

A large proportion of the Concluding Observations issued by the Committee on the Elimination of Racial Discrimination (2010) concerns the plight of Australia’s Indigenous population, and the inadequacy of the current measures that are being pursued by the government. Many initiatives cited by the Committee demonstrate some element of rights ritualism. These include:

- the announcement of a new national approach to preserve Indigenous languages in the absence of any additional resources;
- recent initiatives to increase access to legal aid coupled with inadequate funding increases; and
- the establishment of a National Congress of Australia’s First Peoples, whose power is limited to providing advice, and which many not in

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101 Ibid [19].
fact be fully representative of Australia’s First Peoples (this body had its funding cut in the 2014 budget).

With respect to other issues of racial discrimination existing in Australia, the Committee noted:

- the absence of any constitutional protection against racial discrimination, and that sections 25 and 51(xxxi) of the Constitution raise issues of discrimination;
- that the activities of Australian corporations operating at home and overseas have had a negative impact on Indigenous peoples’ rights to land, health, living environment and livelihoods;
- that the expression of racial hatred is not prohibited in Northern Territory legislation;
- the high standards of proof required for recognition of the relationship between Indigenous peoples and their land under the Native Title Act 1993;
- the continued discrimination experienced by Indigenous Australians in the enjoyment of their ESC Rights; and
- the racially motivated assaults occurring against international students, and the failure of the government to address the racial motivation of these acts.

In 2007, the Australian government introduced a package of legislation to govern remote Indigenous communities in the Northern Territory of Australia. It was termed the Northern Territory ‘Emergency Response’, or the Northern Territory ‘Intervention.’ The Intervention measures involved, among other things:

- prohibitions on the sale, consumption or purchase of alcohol;
- filtering of public computers to prohibit access to pornography;
- compulsory acquisition of leases over 65 Aboriginal communities;
- a mandate that the Minister for Indigenous Affairs is empowered to control the activities, funding, assets and business structures of Indigenous community service entities, which included local

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102 Ibid [15].
104 CERD Concluding Observations, UN Doc CERD/C/AUS/CO/15-17, [10].
105 Ibid [13].
106 Ibid [17].
107 Ibid [18].
108 Ibid [22].
109 Ibid [23].
government councils, incorporated associations or Aboriginal corporations;
- a mandate that customary law or cultural practices are not mitigating factors in determining sentencing or bail applications;
- the deployment of the Australian Federal Police as ‘special constables’ to the Northern Territory Police Force; and
- the establishment of an income management regime that suspends between 50 and 100 per cent of welfare payments, quarantining the suspended funds to only be spent on food and other essential items.

The government also suspended the application of the *Racial Discrimination Act* to the Intervention legislation. In 2010, this suspension was repealed. The Committee on the Elimination of Racial Discrimination nonetheless expressed its concern that the Intervention legislation ‘continues to discriminate on the basis of race’. It stated:

> [t]he Committee regrets the discriminatory impact this intervention has had on affected communities, including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work and remedies.

The AHRC has cited the presence of cyber-racism as an ‘increasing issue’ for Arab and Muslim Australians, newly arrived immigrants—especially from Africa—and international students. In Australia’s UPR, one joint stakeholder group recommended that Australia mandate anti-racism training for police.

6 *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*

Australia passed sex discrimination legislation in 1984 in the form of the *Sex Discrimination Act 1984* (Cth). The Committee on the Elimination of Discrimination Against Women has however criticised the lack in Australia of harmonization or consistency in the way that the Convention was incorporated and implemented across the country, particularly when the primary competence to address a particular issue lay with the individual States and Territories.

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112 *CEDAW Concluding Observations* of the Committee on the Elimination of Discrimination against Women—Australia, 46th sess, UN Doc CEDAW/C/AUL/CO/7 (30 July 2010) [16] (‘CEDAW Concluding Observations’).
Australia has also retained two reservations to CEDAW, despite the fact that it has enacted domestic legislative changes with respect to the areas covered by the reservations.\textsuperscript{117}

The Committee also highlighted the problem of violence against women as it occurs in multiple contexts. It noted:

- there are unacceptably high levels of violence against women in Australia;\textsuperscript{118}
- Indigenous women are particularly disadvantaged, being 35 times as likely to be hospitalized as a result of family-violence related assaults as non-Indigenous females;\textsuperscript{119}
- the high levels of violence occurring against disabled women living in institutions or supported accommodation;\textsuperscript{120} and
- the prevailing high levels of violence experienced by migrant women, who also have low levels of participation in the labour market and concentration in low-paid jobs.\textsuperscript{121}

In Australia, the fact of widespread violence against women occurring in the country\textsuperscript{122} has received more traction due to the award in 2015 of Australian of the Year to anti-domestic violence advocate Rosie Batty. Despite the Council of Australian Governments' commitment to a number of anti-domestic violence initiatives to be enacted by the end of 2015,\textsuperscript{123} and the Australian government's commitment of $16.7 million over three years towards awareness campaigns in the 2015 federal budget, Ms Batty has commented that insecure and short-term funding cycles continued to seriously hamper crisis support and violence prevention work, and commented on ways that federal funding can be used more effectively to combat violence.\textsuperscript{124}

Although there have been increased women's representation in senior ranks of public office,\textsuperscript{125} and a number of well-resourced initiatives have been undertaken to eliminate discrimination against women and girls in the education system,\textsuperscript{126} the Committee remained concerned that the measures taken to promote the participation of Aboriginal and Torres Strait Islander women and women with disabilities in public life remain inadequate, and that inadequate attention is given to the ways in which discrimination affects

\textsuperscript{117} Ibid [18].
\textsuperscript{118} Ibid [28].
\textsuperscript{119} Ibid [40].
\textsuperscript{120} Ibid [42].
\textsuperscript{121} Ibid [44].
\textsuperscript{122} For comprehensive account of this issue, see UN UPR Compilation—Australia, UN Doc UN Doc A/HRC/WG.6/10/AUS/2, [24].
\textsuperscript{123} Jane Wangmann, 'Australia’s “Urgent” Action on Family Violence Has Fallen Years Behind', The Conversation (online), 22 April 2015 <http://theconversation.com/australias-urgent-action-on-family-violence-has-fallen-years-behind-40303>.
\textsuperscript{125} CEDAW Concluding Observations, UN Doc CEDAW/C/AUL/CO/7, [34].
\textsuperscript{126} Ibid [36].
educational outcomes for Indigenous women and girls. The persistence of a
gender pay gap was highlighted, as well as the serious problem of sexual
harassment in the workplace. Australian women face criminal penalties if
they attempt to terminate a pregnancy outside the strict conditions placed on
accessing termination services, and these conditions are inconsistent
between Australian states and territories. The Committee commended
Australia for the measures it had adopted in order to combat trafficking.

7 Convention on the Rights of Persons with Disabilities (CRPD)

Australia enacted the Disability Discrimination Act in 1992. However, the
Committee on the Rights of Persons with Disabilities noted in 2013 that

the scope of protected rights and grounds of discrimination in the Disability
Discrimination Act 1992 is narrower than that provided for under the Convention and
does not provide the same level of protection to all persons with disabilities.

Australia still retains three interpretive declarations on articles in the CPRD. In
2010, the Australian government (in concert with the state and territory
governments) published a National Disability Strategy that guides disability
policy in Australia from 2010 to 2020. Despite this, the AHRC has commented
that 'people with disability and their families do not enjoy all human rights in
Australia.'

The Concluding Observations of the Committee (2013) mention some of the
ways that those living with disabilities are marginalised in areas of domestic
regulation. These include:

- that students with disabilities enrolled in regular schools receive a
  substandard education because they are not reasonably
  accommodated for;
- that persons with disabilities are ‘subjected to unregulated behaviour
  modification or restrictive practices such as chemical, mechanical
  and physical restraints and seclusion, in various environments’;
- the lack of training for judicial officers, legal practitioners and court
  staff on ensuring persons with disabilities have appropriate access to
  justice, and indefinite detention in prisons or psychiatric facilities
  for persons with disabilities who are deemed unfit to stand trial;

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127 Ibid [38].
128 Amnesty International, ‘Australia: Amnesty International Submission to the UN Universal
129 CEDAW Concluding Observations, UN Doc CEDAW/C/AUL/CO/7, [30].
130 Committee on the Rights of Persons with Disabilities, Concluding Observations on the
Initial Report of Australia, 10th sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [14]
(‘CRPD Concluding Observations’).
131 Australian Human Rights Commission, above n 114, [13].
132 CRPD Concluding Observations, UN Doc CRPD/C/AUS/CO/1, [45].
133 Ibid [35].
134 Ibid [27].
135 Ibid [31].
• the failure to provide all information in accessible formats;\textsuperscript{136} and
• the concern at the level of compliance with accessibility standards in Australia.\textsuperscript{137}

The fact of inadequate support is also evinced by the over-representation of children and adults with disability in the criminal justice system.\textsuperscript{138}

The Concluding Observations cite reports of the ‘high incidence of violence against, and sexual abuse of, women with disabilities’,\textsuperscript{139} and the practice of involuntary or coerced sterilisation of persons with disabilities.\textsuperscript{140} In Australia, a person can be subjected to medical intervention against her or his will if the person is deemed to be incapable of making or communicating a decision about treatment.\textsuperscript{141}

Some of Australia’s laws are explicitly discriminatory against those with disabilities: Australia’s migration laws permit discrimination on the basis of disability by providing for strict health criteria in order to meet the visa requirements for entry.\textsuperscript{142}

\textbf{D Independent Bodies to Monitor and Scrutinise Rights Enforcement}

The primary body that monitors and promotes human rights protection in Australia is the AHRC. The Commission was established by the \textit{Australian Human Rights Commission Act 1986} (Cth), which also governs its powers and functions. The AHRC has functions in relation to the following human rights treaties: ICCPR, CRPD, and CRC.\textsuperscript{143} The AHRC does not have statutorily designated powers to monitor the implementation of Australia’s obligations under the other major human rights treaties. The Committee on Economic, Social and Cultural Rights\textsuperscript{144} and the Committee against Torture\textsuperscript{145} have both criticised Australia on this basis.

The functions of the AHRC include:

• resolving complaints of discrimination or breaches of human rights under Commonwealth laws.\textsuperscript{146} The AHRC has designated responsibilities for monitoring rights protection under the \textit{Racial Discrimination Act 1975}, the \textit{Sex Discrimination Act 1984}, the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{136} Ibid [43].
\item \textsuperscript{137} Ibid [20].
\item \textsuperscript{138} ‘Joint NGO Submission to the Universal Periodic Review of Australia’, above n 92, [28].
\item \textsuperscript{139} \textit{CRPD Concluding Observations}, UN Doc CRPD/C/AUS/CO/1, [16]
\item \textsuperscript{140} Ibid [39].
\item \textsuperscript{141} Ibid [33].
\item \textsuperscript{142} Amnesty International, above n 128, [2.1].
\item \textsuperscript{144} \textit{ICESCR Concluding Observations}, UN Doc E/C.12/AUS/CO/4, [13].
\item \textsuperscript{145} \textit{CAT Concluding Observations}, UN Doc CAT/C/AUS/CO/4-5, [8].
\item \textsuperscript{146} Australian Human Rights Commission, \textit{About the Commission} <https://www.humanrights.gov.au/about-commission-0>.
\end{itemize}
\end{footnotesize}

- holding public inquiries into human rights issues;
- developing education programs and resources;
- providing independent legal advice to assist courts in cases involving human rights principles;
- providing advice and submissions to parliaments and governments to develop laws, policies and programs; and
- undertaking and coordinating research.¹⁴⁸

Each state of Australia, as well as the Northern Territory and the ACT, also each have their own designated human rights monitoring institution.

E How Effective are the Monitoring Bodies?

With respect to the domestic setting, the activities of the AHRC are divided into discrete areas of rights: Aboriginal and Torres Strait Islander Social Justice; Age Discrimination; Asylum Seekers and Refugees; Children’s Rights; Disability Rights; Race Discrimination; Rights and Freedoms; Sex Discrimination; and Sexuality, Sex and Gender Identity.¹⁴⁹

The operation of the AHRC in the areas it is mandated to monitor is robust and independent from governmental interference. It releases news reports and media statements on a very frequent basis, publishes regular reports (including annual reports) in several rights areas, maintains a conciliation register of past discrimination claims which it has dealt with, and acts as a repository of education materials on human rights. It also reports and makes submissions to various UN human rights bodies, including the UPR, and publishes a yearly progress report on Australia’s implementation of recommendations from the UPR.¹⁵⁰ Gillian Triggs, the current President of the AHRC, has expressed her intent to ‘focus her Presidency on the implementation in Australian law of the human rights treaties to which Australia is a party’.¹⁵¹

In February 2015, the AHRC released a report on the effects of immigration detention on children, titled The Forgotten Children: National Inquiry into Children in Immigration Detention. The focus of the report was not to revisit the AHRC’s view that Australia’s mandatory immigration detention policies breach international law, but to ‘assess the evidence of the impact of prolonged detention on children.’¹⁵² The tone of the report is non-partisan: the

¹⁴⁸ Australian Human Rights Commission, above n 146.
¹⁵² Australian Human Rights Commission, above n 72, 10.
foreword states that ‘it has become increasingly difficult to understand the policy of both Labor and Coalition Governments’ in relation to mandatory detention. The overarching finding of the inquiry was that the ‘prolonged, mandatory detention of asylum-seeker children causes them significant mental and physical illness and developmental delays, in breach of Australia’s international obligations.’

From before the report was released, Triggs faced sustained criticism from members of the Australian government, who attacked the report on the basis that it was partisan. Prime Minister Abbott referred to the report as a ‘transparent stitch-up’, and a ‘blatantly partisan exercise’. Triggs was the object of attacks from many members of the Coalition government, including Queensland Member of Parliament, George Christensen. Christensen stated:

[Triggs] has effectively sidelined herself and the HRC from having any credibility with the Abbott Government. If she wants to do the right thing by the commission and have their views listened to by the government again, she needs to tender her resignation.

Another Coalition Senator, Barry O’Sullivan, stated that ‘it’s no doubt a question that she is asking herself at the moment as to whether she has the confidence of the government, the confidence of the nation’. After the report was released, media reports surfaced that Triggs had been asked to resign in the lead up to the publication of the report by the Australian Attorney-General, George Brandis, and had been offered another position ‘related to her experience as an international lawyer’. These reports, while highlighting the independence of the AHRC and the robustness and independence of some actors in the Australian press, point to the Australian government’s attempts to tamper with the independence of the AHRC and its Presidency, a role which Triggs notes is ‘protected by legislation from political interference’.

In other comments, Prime Minister Abbott has indicated his government’s stance on the progressive realisation of human rights in Australia, and his position towards the UN’s human rights monitoring function. In speaking about his government’s immigration policy, he stated that ‘only this government can keep them [boats containing people seeking asylum] stopped because any other government […] would quickly succumb to the cries of the human rights

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153 Ibid.
156 Ibid
157 Ibid.
159 Ibid.
lawyers.¹⁶⁰ In response to a report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment released in March 2015 which found that aspects of Australia’s immigration policies are in breach of CAT, Prime Minister Abbott responded that ‘I really think Australians are sick of being lectured to by the United Nations, particularly given that we have stopped the boats’.¹⁶¹ These responses indicate some degree of resistance to the monitoring function of United Nations human rights bodies, and a repudiation of UN interference in domestic policies.

F Cause of Action in Domestic Legislation?

Given the limited extent to which human rights protections are implemented within Australia’s Constitution and domestic legislation, Australians can make complaints about a breach of human rights only in narrowly defined circumstances. A person who has suffered discrimination that falls under the purview of the Sex Discrimination Act, the Age Discrimination Act, the Disability Discrimination Act and the Racial Discrimination Act can make a complaint to the AHRC, which then undertakes an investigation. The process for resolving complaints arising under this legislation is, firstly, via conciliation.¹⁶² If the conciliation is not successful, the complainant can apply to the Federal Court or the Federal Circuit Court.

G How Effective is the Cause of Action?

In Australia, violations falling outside the legislative anti-discrimination framework are not open to redress in federal courts. In cases of discrimination that do fall within the scope of the legislation, a person cannot appeal directly to a court, but must first complain to the AHRC and undergo the mandatory conciliation process. As a first port of call, the webpages of the AHRC contain the suggestion that the complainant of discrimination try to resolve the discrimination issue by ‘raising it directly with the person or people involved’.¹⁶³ This notion that it is easy or straightforward to raise a discrimination complaint with the person who has caused it has been criticised.¹⁶⁴

¹⁶³ This language on the website is the same across the pages on sex discrimination, age discrimination, racial discrimination, and disability discrimination. As an example, see Australian Human Rights Commission, Complaints under the Sex Discrimination Act <https://www.humanrights.gov.au/complaints/complaint-guides/making-complaint/complaints-under-sex-discrimination-act>.
¹⁶⁴ Ben Saul has suggested that this is quite untenable in real life. He states that the current coalition government ‘naively believes that victims of abuse on a bus can somehow engage a
It is only when the President of the AHRC has ‘terminated’ the complaint that the complainant can make an application to the Federal Court or the Federal Circuit Court.\textsuperscript{165} Presenting a cogent case within these large, institutional court settings is likely to necessitate paying for legal representation and court fees.\textsuperscript{166} The application to the court must be made within 60 days of the date that the notice of termination was issued.\textsuperscript{167} There is scope for the court to extend this limitation period, but this will necessarily involve engaging the court’s mechanisms, which can be a costly exercise.

The Human Rights Committee has commented on the lack of adequate access to justice in Australia for marginalised and disadvantaged groups.\textsuperscript{168} This issue is exacerbated by the progressive funding cuts by the Australian government to community legal centres, the Legal Aid Commission and the Aboriginal Legal Service.\textsuperscript{169}

H Use of Individual Complaints Procedures and Number of Communications

Australia has received individual complaints under the ICCPR (67 complaints), CAT (18 complaints), and CERD (seven complaints).\textsuperscript{170} No complaints have been made under the Optional Protocol mechanisms of CEDAW or CRPD, although Australia signed up to this instruments only relatively recently: it acceded to the CEDAW Optional Protocol in 2008, and the CPRD Optional Protocol in 2009. Committee views are not enforceable under Australian law.

According to Dianne Otto, as of 30 June 2008, the number of complaints against Australia was the third highest concluded against any state.\textsuperscript{171} Up until 2014, United Nations treaty bodies have upheld 33 complaints by Australian citizens under individual communications procedures.\textsuperscript{172} However, ‘the Australian government has not acted promptly on most of the findings of racist thug in a reasoned conversation and persuade them that they are wrong’: see Saul, above n 27, 4.

\textsuperscript{165} Australian Human Rights Commission Act 1986 (Cth) s 46PO(1).

\textsuperscript{166} The court fees in both the Federal Circuit Court and the Federal Court for human rights complaints under section 46PO or 46PP under the Human Rights Commission Act 1986 are significantly lower than standard fees, at $55 in both instances. For other matters in the Federal Circuit Court the fee is $600, and in the Federal Court, $1,255.

\textsuperscript{167} Australian Human Rights Commission Act 1986 (Cth) s 46PO(2).

\textsuperscript{168} ICCPR Concluding Observations, UN Doc CCPR/C/AUS/CO/5, [25].


violations’. Of the 33 complaints where violations were found, only six have been fully remedied (one requiring no action on Australia’s part). One in five of the cases have been partially implemented. The rest have not been remedied at all.\footnote{Remedy Australia, above n 172.}

\section*{IV REVIEW OF THE STATE BY THE UPR AND SPECIAL PROCEDURES}

\subsection*{A The Universal Periodic Review}

The Australian government’s National Report to its first UPR is typical of most national reports—the report details the initiatives undertaken by the government (then, the Australian Labor Party) to promote human rights, and also provides some defence for policies which have attracted criticism from the international community.\footnote{Often, these defences use domestic law, rather than international human rights law, as a reference point: eg. ‘[m]igration detention of unlawful non-citizens in Australia is required by the Migration Act 1958 and is intended to support the integrity of Australia’s immigration program’: \textit{Australian National Report to the UPR}, UN Doc A/HRC/WG.6/10/AUS/1, [137]. Statements like this imply that the Australian government’s hands are bound, whereas in reality it would be very open for the Australian government to propose amendments to the Migration Act.} The National Report is dated, given that the policies surrounding what are Australia’s biggest human rights problems—mandatory detention of asylum-seekers and disadvantage suffered by the Indigenous population—both changed in some respects when the Coalition parties assumed government in 2013.

Many recommendations received by Australia from other states focused on the difficulties faced by Australia’s Indigenous population. A significant number of recommendations also encouraged Australia to ratify outstanding human rights treaties, or implement existing treaty obligations into domestic law. There were large groups of recommendations on asylum-seeker policies, counter-terrorism laws, gender equality, racism and trafficking.

In some instances, Australia’s responses to the recommendations it received can be deemed ritualistic, or lacking in substance. Australia regularly resorts to bureaucratic language that does not give much information about what it actually intends to do. For example, in response to Recommendations 8 and 11, given by France and Bolivia and concerning ratification of the \textit{International Convention for the Protection of All Persons from Enforced Disappearance} (CED) and the ILO Convention No 169, Australia responded: ‘Australia cannot commit to becoming party to the CED or ILO 169, but will formally consider becoming a party to those treaties.’\footnote{Human Rights Council, \textit{Report of the Working Group on the Universal Periodic Review—Australia—Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review, 17\textsuperscript{th} sess, UN Doc A/HRC/17/10/Add.1 (31 May 2011) [4], in response to Recommendations 8 and 11 (‘\textit{Report of the Working Group on the UPR—Australia—Addendum}’).} It does not provide any rationale for why it cannot, or will not, commit. For the purposes of publicising
its activities in the UPR, the Australian government labelled its response to this recommendation as an ‘acceptance-in-part’. 

Australia’s response to many of the recommendations indicates how the UPR model, and its reliance on deference to individual states, can be exploited to evade a substantive commitment to a recommendation, or the rights contained therein. In another example, France made a recommendation that Australia ‘[t]ake the necessary measures to fully incorporate into Australian legislation its international obligations in the field of human rights’.177 In the wider context of Australia’s human rights performance, this recommendation seems to point towards the failure to implement rights treaties (see section III(C) on domestic implementation, above). Rather than responding to the substance of the recommendation, Australia responded by saying: ‘[t]he Australian Government incorporates international obligations into domestic law to the extent considered necessary, noting that some obligations are reflected in policy’.178 Australia also classified this as a recommendation that it ‘accepted-in-part’, despite not committing to any concrete action to further implement its international obligations. Australia’s response should arguably be classified as a rejection, given that Australia made no new commitments. This example demonstrates how Australia takes a selective interpretation of the recommendation, and then uses the platform it has to push its own policy agenda. The dialogue between the states is limited to this superficial exchange. Australia can say that it has accepted the recommendation ‘in part’, which sounds as though it has responded positively, despite having answered defensively to the recommendation. The cumulative effect of these types of responses is that Australia can report that it has accepted, or accepted-in-part, ‘94%, that is 137 of the recommendations’.179

Some of Australia’s responses to the recommendations it received seem disingenuous. For example, in response to a recommendation by Iran that Australia ‘[t]ake immediate legal measures to remove restrictions against access of indigenous women and children to appropriate health and education services and employment opportunities’180 Australia responded: ‘no legal impediments to access have been identified’.181 This answer appears to ignore the central focus of Iran’s recommendation—which was to create legal measures of redress for social impediments that affect Indigenous women and children. In its response that there are no ‘legal impediments,’ Australia

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interpreted the recommendation in a way that allows it to evade the core of the problem that was cited by Iran.

The Australian government rejected eight recommendations in their entirety, and elements of two recommendations. The rejected recommendations concern:

- amendments to the *Marriage Act* to accommodate same-sex marriage;\(^{182}\)
- the prohibition of corporal punishment, which Australia believes should remain lawful;\(^{183}\)
- a recommendation to establish a National Compensation Tribunal for members of the Stolen Generation, as recommended in the *Bringing Them Home* report;\(^{184}\)
- three recommendations concerning asylum-seekers: one to abolish mandatory detention, and two to ensure all irregular migrants have equal access to and protection under Australian law;\(^{185}\)
- the prohibition of TASERs;\(^{186}\)
- considering a national human rights act;\(^{187}\) and
- becoming a party to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. Australia views ‘existing protections in place for migrant workers as adequate and does not intend to become a party to the ICRMW’.\(^{188}\)

Since 2012, many commitments and initiatives taken on by Australia in its response to UPR recommendations have been undermined. The National Congress of Australia’s First Peoples—an initiative mentioned by the government in its response to the recommendations received—had its funding cancelled in the 2014–2015 budget.\(^{189}\) The Congress notes on its website:

> [a]t its last UPR examination Australia pledged to acknowledge Congress as the national institution representing the Aboriginal Peoples and Torres Strait Islander Peoples. This was not the reality. Nothing has been attempted to build this link with our people.\(^{191}\)

\(^{182}\) Ibid 5 (Recommendation 70).
\(^{183}\) Ibid 5 (Recommendation 75).
\(^{184}\) Ibid 7 (Recommendation 97).
\(^{185}\) Ibid 9 (Recommendations 126, 132 and 133).
\(^{186}\) Ibid 6 (Recommendation 88).
\(^{187}\) Ibid 3 (Recommendation 22).
\(^{188}\) Ibid 2 (Recommendation 9).
\(^{189}\) Ibid 8, in response to Recommendation 110.
The government’s commitment to implementing the Millennium Development Goals\(^\text{192}\) has been undermined by the government’s cut of $7.6 billion (over five years) to foreign aid spending in 2014.\(^\text{193}\) In a similar fashion, Australia’s response to the recommendation that the Australian government ‘does not forcibly return […] [asylum-seekers] where to do so would be in breach of non-refoulement obligations under the Refugees Convention or relevant international human rights treaties’ is now contradicted by s 179C of the amended \textit{Migration Act 1958}, which provides that ‘it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.’

B \textit{Interaction with Special Procedures}

In 2008, Australia issued a standing invitation to thematic special procedures.\(^\text{194}\) It has received visits from the following mandate holders:

- Special Rapporteur on Freedom of Religion or Belief (1997);
- Special Rapporteur on Contemporary Forms of Racism (2001);
- Working-Group on Arbitrary Detention (2002);
- Special Rapporteur on Adequate Housing (2006);
- Special Rapporteur on Indigenous People (2009);
- Special Rapporteur on Health (2009);
- Independent Expert on Foreign Debt (2011); and
- Special Rapporteur on Trafficking in Persons (2011).

In addition, a visit has been agreed upon for the Special Rapporteur on Migrants, which is scheduled to take place from 27 September to 10 October 2015.

V NGO ASSESSMENTS

Commentary by Human Rights Watch and Amnesty International on the situation in Australia is dominated by concern over the welfare of asylum-seekers. Concern about the rights of Australia’s Indigenous population is also prominent. Amnesty International’s treatment of Australia in its 2015 World Report was not lengthy, comprising barely two pages and commenting on asylum-seekers, Indigenous rights, the new counter-terrorism legislation and feedback on Australia from the UN Committee against Torture.\(^\text{195}\) Aside from issues concerning asylum-seekers and the Indigenous population, the Human Rights Watch World Report criticised Australia’s standing on disability rights, commenting that 45 per cent of people with disabilities live near or below the poverty line, and that the Coalition government made negative changes to the Disability Support Pension and abolished the separate position of Disability

Discrimination Commissioner at the AHRC.\(^{196}\) The Human Rights Watch World Report also cites the prohibition on same sex marriage,\(^{197}\) as well as recent curtailments on freedom of expression. These include a prohibition on community legal centres from using federal funds for law reform or advocacy, as well as the new counter-terrorism laws.\(^{198}\)

Human Rights Watch has been particularly critical of the Australian government’s foreign policy with respect to human rights. In early 2015, Human Rights Watch published news items urging Australia to push rights related policy in its engagement with Laos\(^{199}\) and Iran,\(^{200}\) as well as admonishing Australia for not doing more to advocate the abolishment of the death penalty in the Asia-Pacific as part of the commentary surrounding the death sentences carried out on Australian drug traffickers Andrew Chan and Myuran Sukumaran.\(^{201}\) In its World Report 2015, Human Rights Watch reported on the government’s cuts to the aid budget, and that it ‘muted its criticism of authoritarian governments in Sri Lanka and Cambodia in recent years, apparently in hopes of winning the support of such governments for its refugee policies.’\(^{202}\) In 2014, Foreign Minister Julie Bishop did not support the resolution establishing an international inquiry into human rights abuses in Sri Lanka, stating that ‘a separate internationally-led investigation without the cooperation of the Sri Lankan government’ was not the best way forward, and that the resolution did not adequately recognise the ‘significant progress taken by the Sri Lankan government to promote economic growth.’\(^{203}\) At the time, President Rajapaksa was still in power.

Some NGOs have also commented on the impacts of Australian entities and their activities on overseas communities. In a submission to its UPR, the Australian Corporate Accountability Network commented on the frequency with which Australian corporations are involved in the violation of human rights beyond Australia’s territorial boundaries and the lack of accountability under the law to date for such violations.\(^{204}\)


\(^{197}\) Ibid 78.

\(^{198}\) Ibid.


\(^{202}\) Human Rights Watch, above n 196, 79.


The submission states two examples in particular: the forced land dispossession of local residents in Didipio, Philippines by OceanaGold Corporation, involving intimidation, a lack of due process and no compensation, and the complicity of Anvil Mining employees in rights violations occasioned by FARDC soldiers in the DRC, including war crimes, torture and murder.

Another stakeholder group in Australia’s UPR recommended

Australia develop a legislative framework by 2012 to ensure the mitigation of the effects of the emission of greenhouse gases from Australian sources, with a view to protecting fundamental rights of the citizens of countries affected by human-induced climate change.

VI RIGHTS RITUALISM

Though Australia has ratified seven of the nine major human rights treaties, it has not enacted legislation to comprehensively enshrine the norms contained in any of them. This in itself is ritualistic, in that it demonstrates a formal commitment to the main instruments of the international human rights system, without corresponding domestic implementation. Christof Heyns and Frans Viljoen reviewed Australia’s implementation of human rights treaties in 2002. They note that,

[f]undamentally, this problem [of insufficient domestic implementation] is a matter of attitude. Throughout the course of the present study it has been made clear, both by those outside and inside government, that the treaty reporting process is seen by government as a chore that it, reluctantly, must undertake. Within government it is seen precisely as that which the UN’s Manual on Human Rights Reporting expressly warns against, namely “an isolated event, absorbing precious bureaucratic resources solely to satisfy the requirements of an international treaty”, or even more seriously, a process designed to show the government in a bad light. The government does not see the task of fulfilling its reporting obligations – as the manual proclaims ought to be the case – as an “integral part of a continuing process designed to promote and enhance respect for human rights”, which must include, as an indispensable first step, the identification and subsequent remedying of any human rights problems that might exist [...] The viability of the treaty system hinges on a fundamental shift away from this restricted and sometimes defensive perspective on the part of the Australian government.

Despite this reticence to substantively engage with the international human rights system, domestic realisation of human rights in Australia is comparatively quite good. Indeed, the good protection of (some) rights in

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205 See ibid, from [2.2].
206 See ibid, from [2.15].
practice is used as justification for arguments against the introduction of a Commonwealth bill of rights.209

Australia’s strong traditions of liberal democracy, independent judiciary, robust media and largely harmonious and prosperous society can collectively mask ‘weaknesses and gaps in the protection of human rights that are compounded by the Federated system of government.’210 The government often subordinates the protection of marginalised interests to more ‘mainstream’ or ‘centrist’ concerns.211 The most significant areas where Australia fails to protect the human rights of people within its jurisdiction are treatment of asylum-seekers and of Australia’s Indigenous population, and anti-terrorism legislation.

Australia’s offshore processing system has been heavily criticised—asylum-seekers are subjected to indefinite detention in harsh conditions. Since Australia’s first UPR, in which Australia received significant criticism on the issue, the Australian government has made further changes to Australia’s immigration policy. In 2014, the government passed the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. The amendments authorise the Immigration Minister to pursue a policy of intercepting and taking control of boats carrying asylum-seekers in open waters. It allows for an expedited process for the consideration of refugee protection claims in situ, and in circumstances which are not amenable to scrutiny. In practice, this involves breaches of the customary law principle of non-refoulement. The Australian government has justified its policy on the basis that towing back boats saves lives at sea and deters people-smugglers.212 This rationale—particularly in light of media reports in 2015 that Australian officials paid people smugglers to turn back to Indonesia—is particularly ritualistic.213 The AHRC report on children in immigration detention further noted that two former Australian Ministers for Immigration agreed on oath before the National Inquiry on Children in Immigration Detention that holding children in detention does not deter either asylum-seekers or people-smugglers.214 Nonetheless, this remains the stated aim of the government’s detention policy.

In the opinion of Ben Saul, ‘the thrust of […] [the new law] is to take refugee decisions as far outside the rule of law as possible, by narrowing the refugee

209 Kirby, above n 15.
211 Saul, above n 27.
214 Australian Human Rights Commission, above n 72, 10.
definition, cementing “fast track” processing; excluding natural justice; limiting review; extending and immunising powers to detain and expel at sea; and pre-empting High Court challenges.\footnote{Saul, above n 27.} The amended immigration regime suggests that Australia is seeking to cordon off its management of the asylum-seeker issue from international or domestic review, with little regard for the human cost of its actions, or its obligations under international law. In a telling example, the \textit{Migration Act 1958} now explicitly states that ‘it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen’,\footnote{\textit{Migration Act 1958} (Cth) s 197C.} in direct contraposition to Australia’s obligations under art 3 of CAT. Despite Australia’s actions in ratifying CAT, Australia has passed legislation mandating that breaches of \textit{non-refoulement} are, in some circumstances, ‘irrelevant.’ This, too, forms a clear instance of ritualism.

guards to ‘beat asylum seekers to death.’ Grievous bodily harm could be inflicted on detainees if the officer ‘reasonably believes that doing the thing is necessary to protect the life of, or prevent serious injury to, another person (including the authorised officer).’ Detainees would only be allowed to bring a personal injury claim if it can be demonstrated that the detention officer did not exercise force in ‘good faith.’

There is evidence that the detention centres and Australia’s example are having a negative impact on the rule of law in Nauru. In early May 2015, the Nauruan government censored Facebook on the island as a measure to stop ‘criminals and sexual perverts.’ Opposition members of the Nauruan parliament raised concerns that the restrictions were designed to prevent the flow of information to Nauruans and from asylum seekers being held in immigration detention. Additionally, new amendments to the Nauru Criminal Code provide that anyone who ‘coerces, intimidates, harasses, or causes emotional distress to a person’ can be jailed if the statement is ‘likely to threaten national defence, public safety, public order, public morality or public health.’

The second issue is the treatment of Australia’s Indigenous population. Australia’s first people have suffered violence and discriminatory treatment since British settlers first arrived on the continent in 1788. Australia is still grappling with the legacy of many policies, including the forcible removal of thousands of Aboriginal and Torres Strait Islander children from their families that took place from the early 20th century up until the late 1960s.

In its first UPR, Australia emphasised the Apology that was made to Australia’s Indigenous Peoples in 2008, and described the establishment of the National Congress of Australia’s First Peoples, a new national representative body. As mentioned above, the Coalition government cut the funding of the Congress in 2014, electing to establish the Prime Minister’s Indigenous Advisory Council. In early 2015, some members of the Indigenous Advisory Council spoke of their frustration with the slow pace of reform in

226 Ibid.
Australia. Since that time, in July 2015, Prime Minister Abbott and Opposition Leader Bill Shorten hosted a joint summit with Indigenous representatives to discuss a referendum on changes to the Australian constitution to be held in 2017.

Within Australia, progress towards fuller realisation of rights for Indigenous Australians has been slow. Australia rejected a recommendation to establish a National Compensation Tribunal to provide compensation to Aboriginal and Torres Strait Islander people affected by its assimilation policy, stating that ‘[t]he Australian government will continue to work in partnership to address the immediate and practical needs of the Stolen Generations.’ Indigenous Australians suffer from disparity of access to adequate education and health services, as well as higher levels of ill health. Indigenous Australians are extraordinarily over-incarcerated in Australian prisons. In a submission to Australia’s UPR, the Aboriginal and Torres Strait Islander Legal Services of Australia stated that over-incarceration is a result of ‘systemic racism, intergenerational poverty, over-policing and tough-on-crime policies.’ In 2014, a 22-year-old Indigenous woman died in custody after being detained for not paying a fine.

The Committee on the Elimination of Racial Discrimination has noted that the Northern Territory Intervention measures in effect discriminate on the basis of race, by restricting Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work and remedies. To Saul, this amounts to a denial of control over communities and customary laws and denial of representative political institutions, leaving Indigenous peoples ‘under the reign of a paternalistic, racially interventionist, centrist white state’.

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234 ICESCR Concluding Observations, UN Doc E/C.12/AUS/CO/4, [31] and [30].
235 Ibid [28].
236 See Saul, above n 27, and Amnesty International, above n 195, 64.
239 CERD Concluding Observations, UN Doc CERD/C/AUS/CO/15-17, [16].
240 Saul, above n 27.
In particular, treaty bodies have criticised the Australian Native Title regime for its complexity and high cost. Although this legislation purports to recognise the rights of Indigenous Australians to their traditional lands, in reality, subsequent amendments to the legislation have dulled much of its original power. To be recognised as a holder of native title under Australian law, a traditional owner group must prove continual connection to country since the assertion of British sovereignty. This is a difficult threshold to meet, given that government policies over the past 100 years have focused on the systemic eradication of Indigenous culture, or its assimilation into white society. Further, the legislation mandates that wherever native title rights are perceived to be in conflict with other non-Indigenous rights, those other rights prevail. This can be deemed ritualistic—although the formal structure is in place for recognition of traditional lands, in practice the expensive nature of the exercise, weighty evidentiary burdens and complex system of regulation mean that it is difficult for Indigenous Australians to realise their land rights.

The Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people commented in 2010 that overall there is a need to incorporate into government programmes a more integrated approach to addressing indigenous disadvantage across the country [...] by encouraging indigenous self-government at the local level, ensuring indigenous participation in the design, delivery and monitoring of programmes and promoting culturally appropriate programmes that incorporate or build on indigenous peoples’ own initiatives.

Despite the many bodies and initiatives that have been established, these multiple failures indicate a lack of willingness on the part of the Australian government to integrate the interests of its Indigenous population, and ensure they have a meaningful role in domestic governance and regulation.

Thirdly, over the past decade and a half, the Australian government has introduced wide-ranging anti-terrorism legislation that curtails civil and political rights. In Australia’s UPR, the AHRC noted that the Australian government had introduced more than 50 new counter-terrorism laws since 2001, often without adequate consideration of their potential impact on human rights [...] these laws [...] enable [...] detention without charge for 12 days, secret searching of homes and planting of surveillance devices, restricting movement through control orders issued by...
In 2014, new laws were introduced which provide that journalists can be jailed for up to ten years for exposing errors made by security agencies.\textsuperscript{246} In early 2015, a mandatory data retention scheme passed both houses of Parliament, despite privacy concerns that have been expressed by minor political parties, independent MPs, NGOs, and the media.

The position of national security legislation monitor was established in 2010 to ‘review the operation and effectiveness of counter-terrorism and national security legislation.’\textsuperscript{247} Despite this, the Australian government faced criticism in late 2014 and early 2015 after it ‘failed to appoint a new monitor during a period where substantial powers were granted to Australia’s law enforcement and intelligence agencies across three tranches of legislation.’\textsuperscript{248} A new national security legislation monitor was appointed in December 2014. Significantly, two significant anti-terrorism bills were passed when the office was vacant.\textsuperscript{249}

\textsuperscript{245} Australian Human Rights Commission, above n 114, [16].
\textsuperscript{247} Report of the Working Group on the UPR—Australia, UN Doc A/HRC/17/10, [72].
### Addendum: Status of International Human Rights Treaties

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Date of signature, ratification or accession</th>
<th>Reservations / Declarations?</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICCPR</td>
<td>Ratification 13.08.80</td>
<td>Yes. There are three reservations:</td>
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<tr>
<td></td>
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<td>• to art 10: the principle of segregation between accused persons and convicted persons is to be achieved progressively. The obligation to segregate juvenile offenders from adults is accepted only to the extent that such segregation is considered to be beneficial to the juveniles or adults concerned;</td>
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<td>• to art 14: compensation for miscarriage of justice may be by administrative procedures rather than pursuant to specific legal provision; and</td>
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<td>• Australia considers that the rights to hold opinions without interference, (art 19) freedom of expression (art 19), peaceful assembly (art 21) and freedom of association with others (art 22) are consistent with art 20 (prohibition on war propaganda and advocacy of national, racial or religious hatred), and therefore reserved the right not to legislate domestically for arts 19, 21 and 22.</td>
</tr>
<tr>
<td>First OP</td>
<td>Accession 25.09.91</td>
<td>No reservations</td>
</tr>
<tr>
<td>Second OP(^{250})</td>
<td>Accession 02.10.90</td>
<td>No reservations</td>
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<tr>
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<tr>
<td>ICESCR</td>
<td>Ratification 10.12.75</td>
<td>No reservations</td>
</tr>
<tr>
<td>OP Art 11 inquiry procedure</td>
<td>No</td>
<td>No</td>
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<tr>
<td>CRC</td>
<td>Ratification 17.12.90</td>
<td>Yes. With respect to art 37(c) regarding the deprivation of a child’s liberty, Australia has stated the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.</td>
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<tr>
<td>OP 1(^{251})</td>
<td>Ratification 08.12.07</td>
<td>No reservations</td>
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</table>
| OP 2\(^{252}\)      | Ratification 26.09.06 | Australia made a declaration:  
• The Australian Defence Force (ADF) shall continue to observe a minimum voluntary recruitment age of 17 years. Pursuant to art 3(5) of the Optional Protocol, age limitations do not apply to military schools.  
• All ADF applicants who are less than 18 years of age must present the written informed consent of their parents and guardians. Recruiting officers must be satisfied that the application for membership is made on a genuinely voluntary basis. |
| OP 3\(^{253}\)      | No | No |
| OP Art 13 inquiry procedure | No | No |
| CAT                 | Ratification 08.08.89 | No reservations  
Australia made an objection to the reservations made by Pakistan upon ratification in June 2011. |

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<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No reservations&lt;sup&gt;254&lt;/sup&gt;</th>
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<tbody>
<tr>
<td><strong>Art 20 inquiry procedure?</strong></td>
<td>Yes</td>
<td></td>
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<tr>
<td><strong>Art 21 declaration?</strong></td>
<td>Yes</td>
<td></td>
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<td><strong>Art 22 declaration?</strong></td>
<td>Yes</td>
<td></td>
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<tr>
<td><strong>OP</strong></td>
<td>Signed 19.05.09; not ratified</td>
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<thead>
<tr>
<th><strong>CERD</strong></th>
<th>Ratification 30.09.75</th>
<th>Yes:</th>
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<tbody>
<tr>
<td><strong>Art 14 declaration?</strong></td>
<td>Yes</td>
<td>- the Australian government stated that it is not at present in a position specifically to treat as offices all the matters covered by art 4(a).&lt;sup&gt;255&lt;/sup&gt; Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts; and</td>
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<td>- the Australian government stated that it was its intention, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of art 4(a).&lt;sup&gt;256&lt;/sup&gt;</td>
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<tr>
<th><strong>CEDAW</strong></th>
<th>Ratification 28.07.83</th>
<th>Yes</th>
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<tr>
<td><strong>OP</strong></td>
<td>Accession 04.12.08</td>
<td>No reservations</td>
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To art 11(2): the government stated that it was not at present in a position to take the measures required by art 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

<sup>254</sup> The Australian delegation said in its 2011 UPR that it was ‘committed to ratifying the Optional Protocol to the Convention against Torture as a matter of priority’: see Report of the Working Group on the UPR—Australia, UN Doc A/HRC/17/10, [31].

<sup>255</sup> Namely, ‘all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof’: International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 4(a).

<sup>256</sup> The exclusion of provisions related to the unlawfulness of inciting racial hatred were cut from the Racial Discrimination Act 1975 (Cth) in the Senate, despite the government’s push for these to be included. At the time, provisions on racial hatred came up against significant opposition from the Coalition opposition, who argued that they would be against the interests of maintaining a ‘completely free society’: see Hansard, House of Representatives, 9 April 1975, 1408. The Racial Hatred Act was only introduced in 1995, and has the effect of extending the coverage of the Racial Discrimination Act.
<table>
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<tr>
<th>OP Art 8-9 inquiry procedure?</th>
<th>Yes</th>
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<tbody>
<tr>
<td>CMW Art 76</td>
<td>No</td>
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<td>Art 77</td>
<td>No</td>
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<td>CRPD</td>
<td>Ratification 17.07.08</td>
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<td></td>
<td>Australia has interpretive declarations in relation to articles 12 and 18 of the Convention. According to Australia, the Convention—</td>
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<td>• allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort, and subject to safeguards;</td>
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<td>• allows for compulsory assistance and treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards; and</td>
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<td>• does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia’s health requirements for non-nationals seeking to enter or remain in Australia where these requirements are based on legitimate, objective and reasonable criteria.</td>
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<tr>
<td>OP Art 6-7 inquiry procedure?</td>
<td>Accession 21.08.09</td>
</tr>
<tr>
<td>OP</td>
<td>Yes</td>
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<tr>
<td>CED Art 31 declaration?</td>
<td>No</td>
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<td>Art 33 inquiry procedure?</td>
<td>No</td>
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<tr>
<td>No reservations</td>
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