

## **The Child Rights Convention: Asylum, refugee and children in situations of migration**

The following summaries were prepared (by Mary Crock, Rosemary Grey and Sydney Centre for International Law interns) for:

‘Cases before International Courts and Tribunals Concerning Questions of Public International Law involving Australia in 2021’ (2022) 40 *Australian Yearbook of International Law* (forthcoming)

‘Cases before International Courts and Tribunals Concerning Questions of Public International Law involving Australia in 2020’ (2021) 39 *Australian Yearbook of International Law* 416- 471

‘Cases before International Courts Courts and Tribunals Concerning Questions of Public International Law involving Australia in 2019’ (2020) 38 *Australian Yearbook of International Law* 416- 471

## **2019 Treaty body Reports and Jurisprudence**

### **United Nations Treaty Body Concluding Observations on Australia’s Compliance with Human Rights Obligations 2019**

As a party to the *UN Convention on the Rights of the Child* and *UN The Convention on the Rights of Persons with Disabilities* the Australian government must periodically report to the respective treaty monitoring bodies. The Committee on the Rights of the Child (CRC)<sup>1</sup> and Committee on the Rights of Persons with Disabilities (CRPD)<sup>2</sup> assess implementation and compliance with treaty obligations and provide recommendations moving forward. In 2019 Australia received concluding observations from both Committees after belated reporting. The two conventions overlap to some extent. For example, certain concerns and recommendations relating to children with disabilities were reiterated by both the CRC and the CRPD, making it a notable area of concern.

### **Committee on the Rights of the Child; Concluding observations on the combined fifth and sixth periodic reports of Australia**

UN CRC 82<sup>nd</sup> session,

CRC/C/AUS/CO/5-6, (1 November 2019)

---

<sup>1</sup> Convention on the Rights of the Child opened for signature 20 November 1989, 1577 UNTS 3, (entry into force 2 September 1990), art 44.

<sup>2</sup> Convention on the Rights of Persons with Disabilities opened for signature 30 March 2007, A/RES/61/106, (entry into force 3 May 2008), art 35.

## Commendations

Australia was commended for the creation of the position of Assistant Minister for Children and Families in 2018, the establishment of the National Children’s Commission within the Australian Human Rights Commission in 2012 and the Royal Commission into the Detention and Protection of Children in the Northern Territory in 2016.<sup>3</sup>

The CRC included recommendations about the impact of climate change on the rights of the child, demonstrating a notable shift in rights thinking and discourse. The Committee acknowledged that climate change is impacting children’s right to life, survival, development, non-discrimination, health and standards of living.<sup>4</sup> Furthermore the CRC endorsed childhood advocacy and the positive right children have to express their views and to be listened to by the State. The recommendations recognise children as the ultimate bearers of current climate related policy outcomes and placed pressure on the government to be more receptive and to fulfil obligations under the Paris Agreement promptly.

## Areas of concern

The CRC expressed its concern about Australia’s compliance with the Convention across several areas including violence, sexual violence, abuse and neglect,<sup>5</sup> children deprived of a family environment,<sup>6</sup> mental health,<sup>7</sup> and administration of child justice.<sup>8</sup> The committee noted that its concerns and recommendations about Australia’s administration of justice had been raised before: mandatory minimum criminal sentencing laws in Western Australia and the Northern Territory and the co-imprisonment minors and adults were raised as concerns in the Committee’s 2009 report.<sup>9</sup> In 2019 these matters featured once again,<sup>10</sup> alongside new concerns for ‘reports that children in detention are frequently subjected to verbal abuse and racist remarks, deliberately denied access to water, restrained in ways that are potentially dangerous and excessively subjected to isolation.’<sup>11</sup>

A common thread throughout the concluding observations was concern for Aboriginal and Torres Strait Islander children and asylum-seeker, refugee and migrant children. The report reiterates that children belonging to minority groups facing marginalisation are particularly vulnerable. Concern

---

<sup>3</sup> Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, UN CRC 82<sup>nd</sup> sess, CRC/C/AUS/CO/5-6, (1 November 2019), para 3.

<sup>4</sup> *Ibid*, para 40.

<sup>5</sup> *Ibid*, para 4.

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> *Ibid*

<sup>9</sup>

<sup>10</sup> *Ibid* para 47 (f) (e)

<sup>11</sup> *Ibid* para 47 (c)

for their rights are multifaceted and inter-related. The report is a reminder that an inability to access and enjoy rights has a cascading effect on many other aspects of children's lives.

#### *Aboriginal and Torres Strait islander children*

The committee expressed continued concern for the rights and outcomes of Aboriginal and Torres Strait Islander children across a number of areas. Recommendations addressed the exposure of these children to family violence,<sup>12</sup> overrepresentation in alternative care,<sup>13</sup> homelessness,<sup>14</sup> and poor mental health in particular among children living in rural areas.<sup>15</sup> The committee recognised that many educational targets reflected in the governments "Closing the Gap" scheme remain unmet.<sup>16</sup> Aboriginal and Torres Strait Islander parents and children remain overrepresented in the criminal justice system.<sup>17</sup> It recommended greater Indigenous involvement in working to overcome these issues and an increase in online resources which target, and can be accessed by, children.<sup>18</sup>

#### *Asylum-seeking, refugee and migrant children*

Australia's treatment of asylum-seeker, refugee and migrant children attracted eight major expressions of concern and nine recommendations making it the lengthiest individual section of the report.<sup>19</sup> The Committee expressed particular concern for children caught up in Australia's offshore and regional processing regime and the detention and treatment of children under the *Migration Act 1958* and *Maritime Powers Act 2013*.

The Committee expressed its disapproval of the fact that:

the best interests of the child are not a primary consideration in asylum, refugee and migration processes, leading to children going through lengthy assessment and determination procedures, and that the 286 children transferred from Nauru and the many thousands of children before them (the "legacy caseload") "will not be settled in Australia and are encouraged to engage in third-country migration options" leaving them in limbo for an undetermined period of time.<sup>20</sup>

---

<sup>12</sup> *Ibid* para 29(a)

<sup>13</sup> *Ibid* para 33

<sup>14</sup> *Ibid* para 42

<sup>15</sup> *Ibid* para 38

<sup>16</sup> *Ibid* para 43 (a)

<sup>17</sup> *Ibid* para 47 (b)

<sup>18</sup> *Ibid* para 38 (d)

<sup>19</sup> *Ibid* section H

<sup>20</sup> *Ibid* para 44 (e)

The committee recommendations call for the *Migration Act* 1959 (Cth) to be amended so as to ‘prohibit the detention of asylum-seeking, refugee and migrant children’<sup>21</sup> and to prohibit ‘the detention of children and their families in regional processing countries.’<sup>22</sup>

In addition, the Committee expressed grave concern for the fact that migration laws policies still allow disability to be the basis for rejecting an immigration request.<sup>23</sup>

Concerns for asylum-seeking, refugee and migrant children was not limited to their treatment in the resettlement processes but extended to their education, mental health, freedom of expression and freedom from discrimination as individuals within the community. A greater appreciation of cultural and linguistic diversity in the provision of services to children was encouraged overall.

---

<sup>21</sup> *Ibid para 45 (b)*

<sup>22</sup> *Ibid para 45 (d)*

<sup>23</sup> *Ibid para 44 (g)*

## Committee on the Rights of Persons with Disabilities

### Concluding observations on the combined second and third periodic reports of Australia

UN CRPD 22<sup>nd</sup> session,

UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019)

#### Commendations

The Committee on the Rights of Persons with Disabilities (CRPD [Committee](#)) commended Australia on the following:<sup>[1]</sup>

- (a) The adoption of the National Disability Insurance Scheme Act 2013;
- (b) The adoption of states' and territories' legislation and policies such as the Disability Inclusion Act 2018, the Disability Services Act 1986, the disability justice plans and the Disability Discrimination Act 1992 action plans;
- (c) The adoption of the disability inclusion strategy for development assistance Development for All 2015–2020;
- (d) The adoption of the new National Disability Employment Framework;
- (e) The adoption of the Australian Government Plan to Improve Outcomes for Aboriginal and Torres Strait Islander People with Disability;
- (f) The establishment of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in 2019;
- (g) The establishment of the National Disability and Carers Advisory Council;
- (h) The commitment to introduce a 7 per cent employment target for persons with disabilities in the public service;
- (i) The endorsement of a new national disability data set bringing together Commonwealth, state and territory data from across multiple sources and systems to provide a more complete picture of the requirements of persons with disabilities.

The Convention on the Rights of Persons with Disabilities not only seeks to improve the lives of those with disabilities but also aims to bring awareness to the diversity amongst persons living with disabilities. Overall, the CRPD recommendations sought to encourage comprehensive systems which adequately reflect international legal obligations. Emphasis was placed on individuals exposed to multiple types of disadvantage including children, women, Aboriginal and Torres Strait islander people, asylum-seekers and refugees, cultural and linguistically diverse individuals and the LGBTIQI community. Recommendations frequently encouraged the meaningful engagement of persons with disabilities either directly or through representative

---

<sup>[1]</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Australia, UN CRPD 22<sup>nd</sup> sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), para 4.

organisations in working towards solutions to systemic and structural barriers often experienced by persons with disabilities.

In relation to Australia's international aid initiative – Development for All - the Committee expressed concern about the absence of appropriate mechanisms to measure the impact of development cooperation efforts on persons with disabilities. It also lamented the lack of information about the 'effective involvement of organisations of persons with disabilities as development cooperation partners.'<sup>[2]</sup>

The CRPD Committee called for improvements in data collection, noting 'the lack of information on the representation of women with disabilities, particularly Aboriginal and Torres Strait Islander women with disabilities, in political and public life,'<sup>[3]</sup> along with 'no national disaggregated data on students with disabilities, including on the use of restrictive practices and cases of bullying,'<sup>[4]</sup> and the 'absence of national data disaggregated by disability at all the stages of the criminal justice system, including data on the number of persons unfit to plead who are committed to custody in prison and other facilities.'<sup>[5]</sup>

#### *National Disability Insurance Scheme (NDIS)*

Although Australia was commended on the creation of the NDIS, the CRPD Committee recommended changes to the scheme to address the following concerns:

The disability assessment that individuals must undergo in order to be eligible to receive services through the National Disability Insurance Scheme, which still relies heavily on the medical model of disability and does not provide older persons with disabilities, persons with disabilities from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander persons with disabilities and persons with intellectual or psychosocial disabilities with equal opportunities;

The inaccessibility of the National Disability Insurance Scheme due to complex procedures, limited publicly available and accessible information and the lack of services in remote areas.<sup>[6]</sup>

#### *Access to justice*

The CRPD Committee discussed at length access to justice, participation within the justice system and the related issues of liberty and security of the person.<sup>[7]</sup> In particular the Committee expressed concern for the number of grounds or

---

<sup>[2]</sup> *Ibid*, para 59.

<sup>[3]</sup> *Ibid*, para 53.

<sup>[4]</sup> *Ibid*, para 45 (c).

<sup>[5]</sup> *Ibid*, para 25 (f).

<sup>[6]</sup> *Ibid*, para 5 (f).

<sup>[7]</sup> *Ibid*, paras 7-9.

circumstances in which individuals with ‘cognitive and mental impairment’ may find themselves detained indefinitely.<sup>[8]</sup> It noted in particular:

The reported abuse of young Aboriginal and Torres Strait Islander persons with disabilities by fellow prisoners and prison staff, the use of prolonged solitary confinement, particularly of persons with intellectual or psychosocial disabilities, and the lack of safe and accessible channels for making complaints.<sup>[9]</sup>

#### *Liberty of movement and nationality (Art 18)*

The Committee expressed concern over the discrimination against people with disabilities under the *Migration Act 1958* and *The Disability Discrimination Act 1992* which exempts certain provisions within the Migration Act 1958. These result in the exclusion of persons with disabilities. The 10-year qualifying period for certain migrants to access the Age Support Pension and the Disability Support Pension was lamented, as was the transfer of refugees and asylum seekers with disabilities to Nauru, Papua New Guinea and other ‘regional processing countries.’<sup>[10]</sup> The Committee recommended that Australia:

- (a) Review and amend its migration laws and policies to ensure that persons with disabilities do not face discrimination in any of the formalities and procedures relating to migration and asylum and, especially, remove the exemption in the Disability Discrimination Act 1992 to certain provisions of the *Migration Act 1958*;
- (b) Remove the 10-year qualifying period for migrants to access the Age Support Pension and the Disability Support Pension;
- (c) Cease the transfer of refugees and asylum seekers, particularly persons with disabilities, to Nauru, Papua New Guinea and other “regional processing countries”, as requested by the Office of the United Nations High Commissioner for Refugees in a factsheet on the protection of so-called “legacy caseload” asylum seekers, and establish a minimum standard of health care and support for persons with disabilities held in immigration detention.<sup>[11]</sup>

#### *Living independently and being included in the community (art. 19)*

A matter of concern to the Committee was the number of young persons with disabilities in Australia forced to live in residential aged care. It recommended the closure of all disability specific residential institutions and preventing ‘transinstitutionalization, including by addressing how persons with disabilities not eligible for the National Disability Insurance Scheme can be supported to transition from living in an institution to living independently in the community’.<sup>[12]</sup> The CRPD Committee called for an increase in the range, affordability and accessibility of public and social housing for persons with disabilities, and for a revision of the Younger

---

<sup>[8]</sup> *Ibid*, para 27.

<sup>[9]</sup> *Ibid*, para 29 (b).

<sup>[10]</sup> *Ibid*, para 35.

<sup>[11]</sup> *Ibid*, para 36.

<sup>[12]</sup> *Ibid*, para 38.

People in Residential Aged Care action plan, setting 2025 as a target date for ensuring that no person under 65 years of age enters or lives in residential aged care.<sup>[13]</sup>

### *Education*

The CRPD Committee recommended that a robust review be conducted into the disability standards for education and to develop a national action plan for inclusive education.<sup>24</sup>

### *Work and Employment*

The CRPD Committee recommended that a comprehensive review be undertaken of Australian Disability Enterprises (sheltered workshops), and that Australia ‘Implement measures to address systemic and structural barriers experienced by persons with disabilities, particularly by women with disabilities, Aboriginal and Torres Strait Islander persons with disabilities, persons with disabilities from culturally and linguistically diverse backgrounds and refugee and asylum-seeking persons with disabilities.’<sup>25</sup>

### *Participation in Political and Public Life*

The CRPD Committee reiterated its 2013 recommendation that the *Electoral Act 1918* (Cth) be amended to ensure that all persons with disabilities be entitled to vote.<sup>26</sup>

### *Other recommendations*

Overall, the Committee called on Australia to better appreciate diversity and to work on accommodating every person’s abilities as well as disadvantages either associated with their disability and/or age, gender, location and ethnicity.

The Committee noted that the daily lives of many persons with disabilities in Australia could be improved in simple ways. Examples include:

- implementing recommendations of better infrastructure including affordable housing options;<sup>[14]</sup>
- better access to public transport;<sup>[15]</sup> and
- ‘legally binding information and communications standards so that information, particularly all information about significant changes to laws, policies, systems and obligations, is provided in accessible modes, means and formats, including Braille, Easy Read and sign language (Auslan)’.<sup>[16]</sup>

---

<sup>[13]</sup> *Ibid*, para. 38 (b) and (c).

<sup>24</sup> *Ibid*, para 46.

<sup>25</sup> *Ibid*, para 50.

<sup>26</sup> *Ibid*, para 54. Note that s 293(8) of that Act does not permit persons ‘of unsound mind’ to vote.

<sup>[14]</sup> *Ibid*, para 38 (b).

<sup>[15]</sup> *Ibid*, para 17.

<sup>[16]</sup> *Ibid*, para 42.



CRPD cases

## United Nations Committee on the Rights of Persons with Disabilities

HUMAN RIGHTS — DISCRIMINATION — Right to inclusive education for a child with Down syndrome — Right to inclusive education — discrimination and cruel, inhuman or degrading treatment or punishment on the basis of disability — respect for home and the family

PROCEDURE — Admissibility — non-substantiation of claims

### *Background*

The authors of the communication are Rubén Calleja Loma and Alejandro Calleja Lucas, nationals of Spain who were born, respectively, on 25 August 1999 and 25 October 1962. At the time of the submission of the present communication, Rubén was a minor and was challenging the State party's administrative decision to enrol him in a special education centre on account of his Down syndrome. The authors claim that they are the victims of violations by the State party of their rights under articles 7, 13, 15, 17, 23 and 24, read in conjunction with article 4, of the Convention. Rubén is represented by his father, Calleja Lucas.<sup>27</sup> The Optional Protocol to the Convention entered into force for Spain on 3 May 2008.<sup>28</sup>

*The CRPD Committee published its views on the complaint in accordance with the Optional Protocol process, which involves consideration of written submissions on relevant matters in closed session and seeking a response from the relevant State.*<sup>29</sup>

### Facts submitted by the authors

*Rubén's complaint centred on a decision that he be forced to attend a special education school instead of being allowed to continue, with support, at a mainstream public school.<sup>30</sup> Until entering Year 5 of compulsory primary school, he had received support from a special education assistant and had "been going well" at the mainstream school.<sup>31</sup> Rubén's troubles began in fourth grade, when his teacher subjected him to discrimination, neglect and abuse. This teacher 'X' advised Rubén's parents that he should be transferred to a special education centre. He physically assaulted Rubén, including grabbing him by the neck, threatening to throw him out of a window and hitting him with a chair.<sup>32</sup> Rubén was also physically assaulted by teacher 'Y' who slapped him on multiple occasions.<sup>33</sup> Although Rubén's*

---

<sup>27</sup> Rubén provided a power of attorney that he had signed, authorizing his father to represent him.

<sup>28</sup> Spain signed the CRPD and the Optional Protocol on 3 December 2007. The Convention entered into force on 3 May 2008. See United Nations Treaty Collection, Convention on the Rights of Persons with Disabilities (entered into force 3 May 2008) [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=en); a Optional Protocol to the Convention on the Rights of Persons with Disabilities (entered into force 3 May 2008) [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-15-a&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15-a&chapter=4&clang=en).

<sup>29</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, art 5.

<sup>30</sup>, at [2.1]-[2.3].

<sup>31</sup> *Ibid.*, at [2.1].

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

parents reported these incidents to the Provincial Director of Education, no investigation was undertaken.<sup>34</sup>

*The following year Rubén progressed to Fifth Grade. For nearly two months, Rubén did not receive any support from a special education assistant, because his teacher (Mr Z) “did not consider it necessary”.<sup>35</sup> After an assistant was appointed, teacher Z continued to discriminate against Rubén. The assistant reported that teacher Z “completely ignored and gave up teaching” Rubén. Again, his parents were asked to transfer him to a special education centre.<sup>36</sup> Despite continued complaints by his parents, the school’s management did not take any action to address the situation.<sup>37</sup>*

A social worker, in a report dated 13 December 2010, attributed Rubén’s difficulties at school to the “poor relationship with his teacher(s)” and recommended that the boy be transferred to another mainstream school with “similar characteristics and resources”.<sup>38</sup> The report obtained by the school was done without Rubén’s parents involvement and did not address the discrimination and abuse that *Rubén* suffered.<sup>39</sup>

Rubén’s parents exhausted all domestic legal remedies available to them prior to making their complaint to the CRPD Committee.<sup>40</sup> This included an attempt to have the León juvenile prosecution service action the abuse and discrimination Rubén suffered. The matter was “shelved” on the ground that “the actions of the teaching staff are not considered to constitute the criminal offence of assault, coercion or abuse of [Rubén]”.<sup>41</sup> The parents appealed unsuccessfully to the Administration Court No. of León, challenging the decision of the Provincial Directorate of Education to enrol Rubén in a special education centre on 20 June 2011. They argued that the order violated *Rubén’s* constitutional right to equality and to be educated in a mainstream public school.<sup>42</sup> The Administration Court noted that the principle of equality requires that “equal treatment” be given “to those in equal legal situations”. It held that Rubén’s rights had not been violated because his situation was legally different to other children without disabilities.<sup>43</sup> This decision was affirmed by the High Court of Justice of Castile and León on 22 March 2013.<sup>44</sup>

Moreover, Rubén’s parent’s demands for the protection of his right to inclusive education and their decision not to take him to the special education centre led to them being prosecuted for the criminal offence of neglect on 12 May 2014.<sup>45</sup> They were acquitted of these charges on 20 April 2015.<sup>46</sup>

---

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, at [2.3].

<sup>36</sup> *Ibid.*, at [2.3], [8.2].

<sup>37</sup> *Ibid.*, at [2.3].

<sup>38</sup> *Ibid.*, at [2.4].

<sup>39</sup> *Ibid.*, at [2.5]-[2.6].

<sup>40</sup> *Ibid.*, at [7.3].

<sup>41</sup> *Ibid.*, at [2.7].

<sup>42</sup> *Ibid.*, at [2.8]-[2.9].

<sup>43</sup> *Ibid.*, at [2.10].

<sup>44</sup> *Ibid.*, at [2.13].

<sup>45</sup> *Ibid.*, at [2.16].

<sup>46</sup> *Ibid.*

Rubén enrolled in 2017-8 at a publicly funded subsidized private education centre, “Down León Amidown Amigos del Síndrome de Down”.<sup>47</sup> Rubén had to enrol at this centre as there were no adequate mainstream educational centres that offered effective inclusive education in the surrounding area.<sup>48</sup> However, his parents assert that this is not a mainstream educational establishment and therefore his right to inclusive education under article 24 of the Convention had still not been realised.<sup>49</sup>

### Views and recommendations

*The communication was found to be admissible under the Optional Protocol to the CRPD. Claims related to violation of articles 24, 23, 7, 15 and 17 of the CRPD, read alone and in conjunction with article 4 as Spain had not adopted legislation or policies to ensure Rubén’s rights under these articles at the time of the case.*<sup>50</sup>

*The Committee held that the administrative decision to enrol Rubén in a special education centre constituted a violation of his right to inclusive education in accordance with article 24.*<sup>51</sup> *It found that the government made its decision without considering the opinion of Rubén’s parents; the reports of the clinical psychologist and special education assistant or allegations of discrimination and abuse Rubén suffered. There was also a failure to effectively investigate “reasonable accommodations” that could have been made to support Rubén to remain in the mainstream education system.*<sup>52</sup> *The Committee noted that an inclusive education system “requires the abolition of the separate education system for students with disabilities”.*<sup>53</sup>

Furthermore, the accusation of neglect against Rubén’s parents by the State parties’ prosecution department was found to constitute a violation of its obligations under article 23.<sup>54</sup>

The failure of the State party to investigate allegations between 2009 and 2011 by Rubén’s parents, in respect of the discrimination and physical abuse he suffered at the mainstream public school, were held by the Committee to violate Rubén’s rights under articles 15 and 17.<sup>55</sup>

The Committee recommended that the State party compensate Rubén and his parents for the psychological and emotional harm suffered, and recommended that the family be reimbursed for their legal costs.<sup>56</sup> It found that the State was obliged to: support Rubén’s admission to a “truly inclusive vocational training programme”; effectively investigate the allegations of discrimination and abuse; publicly recognise the violation of Rubén’s rights; and make available the Views of the Committee.<sup>57</sup> The

---

<sup>47</sup> *Ibid*, at [5.1].

<sup>48</sup> *Ibid*, at [5.3].

<sup>49</sup> *Ibid*, at [5.1].

<sup>50</sup> *Ibid*, at [7.6], *Optional Protocol*, art 2.

<sup>51</sup> *Ibid*, at [8.8].

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid*, at [8.5].

<sup>54</sup> *Ibid*, at [8.10].

<sup>55</sup> *Ibid*, at [8.11]-[8.13].

<sup>56</sup> *Ibid*, at [9](a)(i).

<sup>57</sup> *Ibid*, at [9](a)(ii)-(v).

Committee also found that the State party was obliged to “prevent similar violations in the future”.<sup>58</sup> It recommended that the State party take measures including measures such as: expediting legislative reform in accordance with the Convention; adopting “inclusive education” as a right owed to all students; formulating a “comprehensive, inclusive education policy”; and eliminating “educational segregation of students with disabilities”. It also recommended that parents of children with disabilities should be protected from prosecution for neglect if they demand, as Rubén’s parents did, that their child’s right to inclusive education be realised.<sup>59</sup>

The State party was required to respond in writing to the Committee within six months, including in respect of measures taken in consideration of its Views and recommendations.<sup>60</sup>

---

<sup>58</sup> *Ibid*, at [9](b).

<sup>59</sup> *Ibid*, at [9](b)(i)-(v).

<sup>60</sup> *Ibid*, at [10]; *Optional Protocol*, art 5.

Offshore processing

## ICC Prosecutor's decision regarding Australia and offshore processing centres

International Criminal Court (ICC)

Office of the Prosecutor

INTERNATIONAL CRIMINAL LAW — INTERNATIONAL CRIMINAL COURT — preliminary examination — crimes against humanity — meaning of 'attack' — imprisonment — deportation — Australia's offshore processing centres — asylum seekers and refugees

### *Background*

A 'preliminary examination' is an initial enquiry conducted by the ICC Office of the Prosecutor (OTP) in order to determine whether the statutory criteria for opening a full-scale investigation have been satisfied.<sup>61</sup> In its *Report on Preliminary Examination Activities 2020*, the OTP considered whether to open a 'preliminary examination' into Australia's offshore processing of asylum system.<sup>62</sup> The Report explained that, between 2016 and 2017, the OTP received communications alleging that Australian government authorities had committed crimes against humanity against asylum seekers and refugees who arrived by boat, and were then detained in offshore processing centres in Nauru and Manus Island (Papua New Guinea).

In response to these communications, the OTP considered whether authorities of the Australia, Nauru and Papua New Guinea governments, and/or private actors, had commission of crimes against humanity under Article 7 of the Rome Statute of the International Criminal Court ('Rome Statute')<sup>63</sup> against migrants or asylum seekers detained in these centres. The specific crimes against humanity examined were: 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law';<sup>64</sup> 'deportation';<sup>65</sup> 'persecution';<sup>66</sup> 'torture';<sup>67</sup> and 'other inhumane acts'.<sup>68</sup>

### *Decision*

---

<sup>61</sup> Rosemary Grey and Sara Wharton, 'Lifting the curtain: Opening a preliminary examination at the International Criminal Court' (2019) 16(3) *Journal of International Criminal Justice* 593–621.

<sup>62</sup> The Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities 2020* (14 December 2020) 13–16 ('OTP Preliminary Examination Report'), available at: <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>

<sup>63</sup> Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute').

<sup>64</sup> *Ibid.* art. 7(1)(e).

<sup>65</sup> *Ibid.* art. 7(1)(d).

<sup>66</sup> *Ibid.* art. 7(1)(h).

<sup>67</sup> *Ibid.* art. 7(1)(f).

<sup>68</sup> *Ibid.* art. 7(1)(k).

The OTP concluded that it appeared that some asylum seekers and refugees had been subjected to ‘imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.’<sup>69</sup> This conclusion was based on information indicating that:

[M]igrants and asylum seekers living on Nauru and Manus Island were detained on average for upwards of one year in unhygienic, overcrowded tents or other primitive structures while suffering from heatstroke resulting from a lack of shelter from the sun and stifling heat. These conditions also reportedly caused other health problems—such as digestive, musculoskeletal, and skin conditions among others—which were apparently exacerbated by the limited access to adequate medical care. It appears that these conditions were further aggravated by sporadic acts of physical and sexual violence committed by staff at the facilities and members of the local population. The duration and conditions of detention caused migrants and asylum seekers — including children —severe mental suffering, including by experiencing anxiety and depression that led many to engage in acts of suicide, attempted suicide, and other forms of self-harm, without adequate mental health care provided to assist in alleviating their suffering.<sup>70</sup>

However, the OTP found that there was insufficient evidence demonstrate that the above acts were pursuant to a widespread or systematic attack directed against any civilian population, as required for all crimes against humanity under the Rome Statute.<sup>71</sup> Australia’s intention to ‘deter immigration’ was insufficient to support such a finding.<sup>72</sup>

The OTP further concluded that there was insufficient information regarding other relevant crimes against humanity. In relation to the crime of ‘deposition’, the conduct examined was ‘Australia’s interdiction and transfer of migrants and asylum seekers arriving by boat to third countries’.<sup>73</sup> The critical issue was whether the migrants and asylum seekers would be ‘persons... lawfully present’ in the area from which they were removed, which is a required element of this crime.<sup>74</sup> Having regard to ‘domestic legislation, international refugee law, the law of the sea, and human rights and international law principles generally’, the OTP could not identify a basis to establish this element.<sup>75</sup> As to ‘torture’ and ‘other inhumane acts’, the OTP concluded that there was insufficient information to indicate either crime.<sup>76</sup> Nor did the crime of ‘persecution’ appear to be committed, because the information did not indicate that the acts were committed with an intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law.<sup>77</sup>

---

<sup>69</sup> OTP Preliminary Examination Report, 14 [46].

<sup>70</sup> Ibid, 14 [46].

<sup>71</sup> Ibid 15 [53]–[54].

<sup>72</sup> OTP Preliminary Examination Report (n X) 15 [54].

<sup>73</sup> Ibid.

<sup>74</sup> Rome Statute (n X) art 7(2)(d); see also International Criminal Court, Elements of Crimes (n X) 4.

<sup>75</sup> OTP Preliminary Examination Report (n X) 14–15 [49]–[50].

<sup>76</sup> Ibid, 14 [48].

<sup>77</sup> Ibid. See also Rome Statute, art. 7(1)(h).

Therefore, the OTP did not open a preliminary examination because, based on the information available, the relevant conduct appeared to fall outside the ICC's subject-matter jurisdiction.

UPR

## Human Rights Council and Australia in 2021

*Report of the Working Group on the Universal Periodic Review – Australia*, Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8 (21 June-9 July 2021) and

*Report of the Working Group on the Universal Periodic Review – Australia (Addendum)*, Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8/Add.1 (21 June-9 July 2021)

### **Report of the Working Group on the Universal Periodic Review –Australia**

The Report of the Working Group on the Universal Periodic Review (UPR) for Australia was handed down during the 47<sup>th</sup> session of the Human Rights Council. The Review was facilitated by Italy, the Marshall Islands and Senegal.<sup>78</sup> General comments noted Australia's 'proactive approach to human rights domestically'<sup>79</sup> since the last UPR in 2015, specifically the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the implementation of the National Agreement on Closing the Gap and the legalisation of same-sex marriage.<sup>80</sup> However, it was also observed that Australia still faces issues relating to human rights, most notably relating to the 'mistreatment of vulnerable people in institutional settings and challenges faced in improving the lives of Indigenous Australians'.<sup>81</sup>

Australia was commended for its response to the COVID-19 pandemic, success as a multicultural society and actions taken to address domestic violence.<sup>82</sup> Despite the strong protections of civil and political rights noted in the UPR, it was observed that efforts still need to be made to address racism and discrimination against Indigenous Australians and other minority groups.<sup>83</sup>

A total of 122 delegations made 344 specific comments relating to Australia's human rights record. A brief summary of the most popular recommendations are as follows:<sup>84</sup>

---

<sup>78</sup> *Report of the Working Group on the Universal Periodic Review – Australia*, Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8 (21 June-9 July 2021) [2].

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Report of the Working Group on the Universal Periodic Review – Australia*, Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8 (21 June-9 July 2021) [3]-[9].

<sup>83</sup> *Ibid.*

<sup>84</sup> *Report of the Working Group on the Universal Periodic Review – Australia*, Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8 (21 June-9 July 2021) [9]-[27].

1. Australia should sign and/or ratify the following international human rights instruments:
  - a. International Convention for the Protection of All Persons from Enforced Disappearance;
  - b. Optional Protocol to the Convention on the Rights of the Child;
  - c. Convention on Migrant Workers;
  - d. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; and
  - e. the ILO Indigenous and Tribal Peoples Convention.
2. Australia should withdraw its reservations to the convention on the Rights of the Child (requiring children to be detained separately to adults and raising the age of criminal responsibility).
3. The Australian government should provide greater support for the Australian Human Rights Commission and steps should be taken to ensure greater integration of human rights commitments into domestic law, including the implementation of a domestic Human Rights Act at the federal level.
4. Necessary steps should be taken in order to combat racial discrimination and ensure the protection of the rights of vulnerable people and minorities.
5. Australia should take measures to ensure its target contribution of 0.7% of GDP to official development assistance is met.
6. Additional policies regarding climate change should be implemented.
7. Laws and policies relating to incarceration should be reformed. This includes areas such as violence in prisons and mandatory minimum sentences, as well as ensuring access to mental support services for prisoners with disabilities, as well as all prisoners generally. There was significant support for an increase in the age of criminal responsibility, with the consensus being to 14 years of age. Comments were also made that the disproportionate representation of Indigenous Australians in the prison system should be addressed, and that allegations of war crimes within the Australian Defence Force should be thoroughly investigated.
8. Policies should be strengthened to attempt to eliminate gender-based violence, the gender pay gap and discrimination against women.
9. A national plan to protect the rights of children should be developed to provide better access to childhood services (including mental health services), increased school funding and inclusive education for children with disabilities.
10. Discriminatory practices against people with disabilities should be eliminated, noting especially unjustified medical procedures (including forced sterilisation) and better access to resources relating to the justice system.
11. Action to recognise and promote the human rights of Indigenous Australians should continue to occur. This includes steps to address housing needs, access to quality education, meaningful political participation and access to health services.
12. Efforts to improve the human rights of migrants should be strengthened. The comments noted particularly the processing of asylum seekers, observing that families should not be separated and that children should not be kept in immigration detention centres. It was also suggested that the non-refoulement principle (under which Australia could not send asylum seekers back to a country where they would be subject to harm) should be guaranteed.
13. Protections relating to free speech of journalists and whistle-blowers should be increased.
14. Additional frameworks should be implemented to prevent human trafficking and modern slavery, including increased cooperation with regional neighbours.
15. Laws relating to counter-terrorism should be reviewed to ensure they are in compliance with international human rights obligations.



The UPR concluded with five voluntary commitments made by the Australian government to address Australia's human rights record. These were:<sup>85</sup>

1. Implement a new national disability strategy for 2021-2030. This will act as the primary mechanism by which Australia will implement its obligations under the Convention on the Rights of Persons with Disabilities.
2. Continue to support older Australians in living in their own homes, including greater access to home-based aged care services.
3. Develop a new national plan to reduce violence against women and children, building on the Fourth Action Plan of the National Plan to Reduce Violence Against Women and Children 2010-2022.
4. Commit to work in partnership with Aboriginal and Torres Strait Islander Australians on decisions that impact them, with an emphasis on Indigenous voice and partnering with Indigenous community organisations.
5. Commit to work towards a referendum recognising Australian and Torres Strait Islander Australians in the Constitution, to be held when the referendum has the best chance of succeeding.

Addendum to the Report of the Working Group on the Universal Periodic Review – Australia: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review

Australia provided a response to the conclusions and recommendations provided in the UPR in the form of an addendum. It was noted by Australia that a number of recommendations in the UPR were highly aspirational, and that the federal government shares the responsibility of implementing the recommendations with the states and territories.<sup>86</sup> This addendum covered the following topics and recommendations:<sup>87</sup>

1. International instruments: Australia committed to ratifying the 2014 ILO Protocol to the Forced Labour Convention, and will consider ratification of the International Convention for the Protection of All Persons from Enforced Disappearance.
2. International engagement: Australia considers their current \$4bn development assistance program budget to be proportionate and sustainable.
3. Domestic frameworks: Australia considers the Australian Human Rights Commission to be adequately resourced, and that the current network of anti-discrimination legislation to be

---

<sup>85</sup> Report of the Working Group on the Universal Periodic Review – Australia, Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8 (21 June-9 July 2021) [27].

<sup>86</sup> Report of the Working Group on the Universal Periodic Review – Australia (Addendum), Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8/Add.1 (21 June-9 July 2021) [2].

<sup>87</sup> Report of the Working Group on the Universal Periodic Review – Australia (Addendum), Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8/Add.1 (21 June-9 July 2021) [2]-[8].

sufficient. There is no intention to introduce any bill of rights at the federal level or to consolidate existing anti-discrimination legislation.

4. Indigenous Australians: The commitment to co-designing an Indigenous 'voice' to Parliament was discussed in addition to the implementation of the new Closing the Gap Agreement.
5. Racism: Australia committed to preventing racism and race-based discrimination.
6. Older Australians: The Addendum noted the establishment of the Royal Commission into Aged Care Quality and Safety.
7. Sexual orientation, gender identity and intersex status: The Addendum noted the requirement for authorisation from a court or guardianship tribunal if a person is a child or otherwise unable to consent to non-therapeutic procedures.
8. Climate change: The Addendum restated Australia's commitment to meeting the goals of the Paris Agreement and working with vulnerable communities to create local solutions to natural disasters and extreme weather events.
9. Rights of women: Australia's National Plan to Reduce Violence against Women and Children was noted, as well as the target of a 50% reduction in violence against Indigenous women as contained in the Closing the Gap Framework.
10. Rights of children: It was noted that the minimum age of criminal responsibility is partially the responsibility of states and territories, although some states and territories have announced an intention to raise this minimum age. Australia considers that its obligations under the Convention on the Rights of the Child have been adequately implemented into domestic law.
11. Rights of persons with disabilities: It was noted that the National Disability Strategy exists, and that the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability was currently in progress.
12. Modern slavery, human trafficking and business and human rights: Australia's National Action Plan to Combat Modern Slavery 2020-25 will aim to prevent and prosecute modern slavery practices.
13. Migrants, refugees and asylum seekers: The Addendum states that immigration detention is an 'essential component'<sup>88</sup> of border management, but is (along with the immigration detention of children) a last resort. Australia maintains that the current system is consistent with non-refoulement obligations.
14. Civil and political rights: Australia is committed to protecting free speech and freedom of opinion, and specifies that legislation should not infringe upon these freedoms unless it expresses a clear intention to do so. However, it was noted that the freedom to publish is subject to laws on defamation, criminal offences, the right to a fair trial and national security. Australia is satisfied that its temporary suspension of the right to vote for persons serving a sentence of at least three years is reasonable, proportionate and non-discriminatory.
15. Freedom of religion: Mention was made of the Religious Discrimination Bill, and the prohibition on discrimination on the basis of religion at the federal level.
16. Criminal justice and counter-terrorism: Australia considers that the current national security laws contain 'appropriate safeguards and protections'<sup>89</sup> to protect against human rights abuses such as arbitrary deprivation of liberty and the right to privacy.

---

<sup>88</sup> Report of the Working Group on the Universal Periodic Review – Australia (Addendum), Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8/Add.1 (21 June-9 July 2021) [6].

<sup>89</sup> Report of the Working Group on the Universal Periodic Review – Australia (Addendum), Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8/Add.1 (21 June-9 July 2021) [7].

17. Economic, social and cultural rights: Australia is concerned by the disproportionate impact on vulnerable groups of the COVID-19 pandemic, and states that it is monitoring and responding to issues as they arise.
18. International humanitarian law: Regarding the ADF's alleged war crimes in Afghanistan, the Australian government has created the Inspector General of the Australian Defence Force Afghanistan Inquiry. Any relevant matters arising from the findings of this inquiry will be referred to the Commonwealth Director of Public Prosecutions.

Australia's response to the UPR made mention of China's recommendation relating to the use of false information to make 'baseless accusations against other countries for political purposes'<sup>90</sup> and did not respond to this comment as it did not consider it to be within the scope of the UPR.<sup>91</sup>

### Further reading

1. ***Children and Young People in Asylum and Refugee Processes: Towards Best Practice*** (Federation Press, 2020) (Mary Crock, Kate Bone, Jemma Hollonds and Mary Anne Kenny)
2. ***Protecting the Migrant Child: Central Issues in the Search for Best Practice*** (Elgar Publishing, 2018) (Editor with Lenni Benson, author of introduction, ch 1, 3, 4), 528pp.
3. 'Migrant and Non-citizen Children' in *Children and the Law in Australia* Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds) (2<sup>nd</sup> ed, Sydney: Lexis Nexis, 2016), 238-255 (with Mary Anne Kenny)
4. 'Justice for the Migrant Child: The Protective Force of the Convention on the Rights of the Child' in Said Mahmoudi et al *Child Friendly Justice: a Quarter Century of the UN Convention on the Rights of the Child* (Leiden: Koninklijke Brill NV, 2015), 221 – 241.
5. 'Of Relative Rights and Putative Children: Re-thinking the Critical Framework for the Protection of Refugee Children and Youth' (2013) 20 *Australian Journal of International Law* 33-53.
6. "Re-thinking the Paradigms of Protection: Children as Convention Refugees in Australia", in Jane McAdam (ed) *Moving On: Forced Migration and Human Rights*, (Hart Publishing, 2008), 155-180.

---

<sup>90</sup> Report of the Working Group on the Universal Periodic Review – Australia, Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8 (21 June-9 July 2021) [11].

<sup>91</sup> Report of the Working Group on the Universal Periodic Review – Australia (Addendum), Human Rights Council, 47<sup>th</sup> sess, Agenda Item 6, UN Doc A/HRC/47/8/Add.1 (21 June-9 July 2021) [8].