

# International Human Rights Law in Australia



**Murdoch**  
UNIVERSITY

**Human Rights in Australia and Beyond Politics and Law Teacher  
Professional Learning Day: 4 December 2015**

**Session title: The Status of International Covenants, Protocols  
and Treaties in Protecting Human Rights in Australia.**

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# Lecture overview

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1. What is international law?
2. International law vs domestic law
3. How does a treaty become law in Australia?
4. Australia and human rights treaties
5. International treaties in the absence of domestic law
6. International protection and its impact on Australia

# What is international law?

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- Two main sources:
  - Treaties
  - Customary international Law
- Treaties:
  - Written agreement between states
  - Bilateral & multilateral
  - Legally binding ('hard international law')



UNITED NATIONS  
TREATY COLLECTION

# What is international law?

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- Customary international law = law which is formed ...
  1. 'when there is uniform and consistent state practice across a wide range of states'; and
  2. 'where there is evidence that this practice is maintained out of a sense of legal obligation.'

*(Source: Charlesworth, H, Chiam, M, Hovell, D & Williams, G 2006, No Country is an Island: Australia and International Law, UNSW Press, Sydney, p. 32.)*

- All states obliged to follow customary international law (no need to sign written agreement)
- Examples: prohibitions against torture; genocide

# International law vs domestic law

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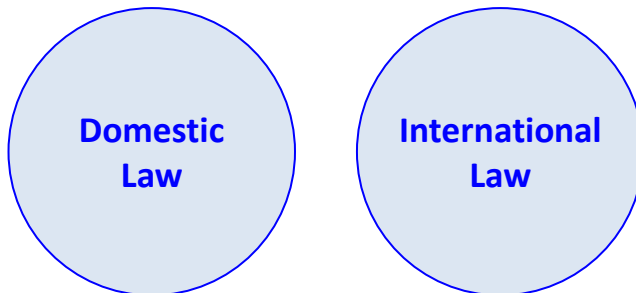
- International law:
  - The law between states
- Domestic (municipal) law:
  - Applies within a state
  - The *internal* laws of the state
  - E.g. all federal & state laws in force in Australia
- Tensions between international & domestic law
  - The concept of ‘sovereignty’

# International law vs domestic law

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- Australia = a 'dualist' system
  - Treaty obligations must be enacted into domestic law before they are legally binding
- Compare with a 'monist' system
  - Treaty obligations automatically incorporated into domestic law (therefore automatically legally binding)

## Dualist System (separate spheres):



## Monist System (same sphere):

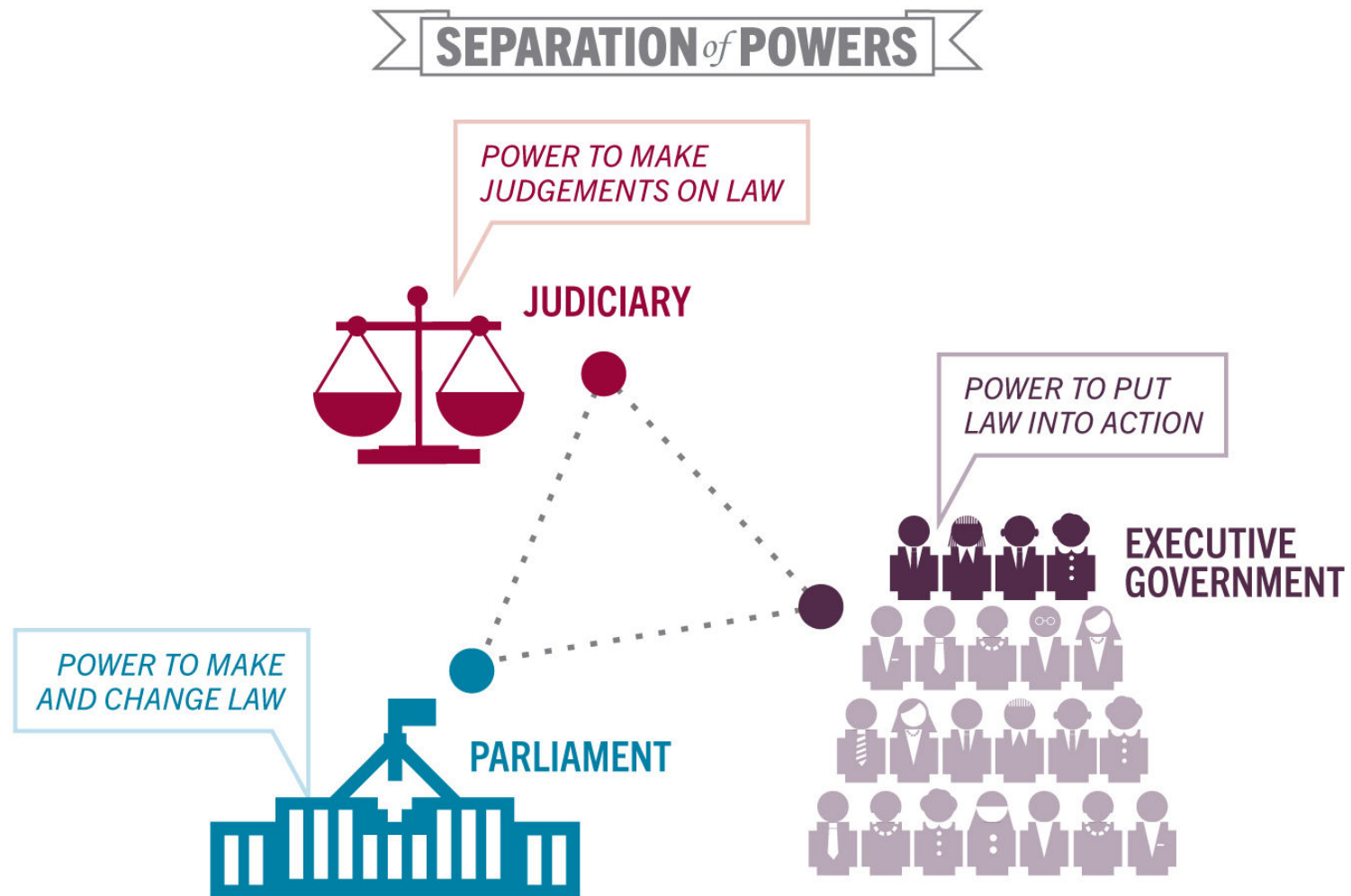


# The Australian legal system

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- Constitution of Australia – establishes 3 branches of the *federal* government:
  - Parliament
  - Executive Government
  - Judiciary
- Australian system described as:
  - ‘Parliamentary’ system
  - System of ‘responsible government’
- Principle of the separation of powers:
  - Parliament: legislative power to make laws
  - Executive: executive power to carry out and enforce laws
  - Judiciary: judicial power to interpret laws and judge whether they apply

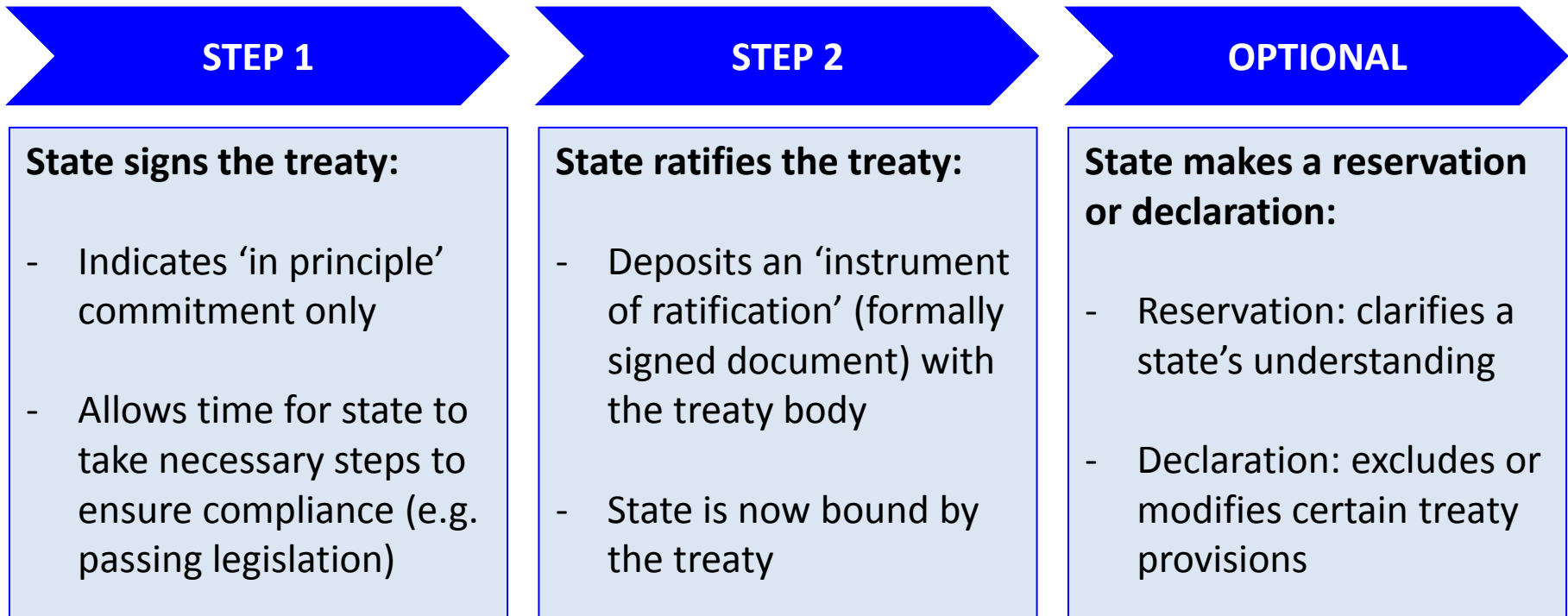
# The Australian legal system





# How does a treaty become law in Australia?

The general process by which a state becomes a party to a treaty:



# How does a treaty become law in Australia?

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- In Australia:
  - **Remember!** Treaty obligations must be enacted into domestic law before they are legally binding
  - This means that, after a treaty is signed by Australia, the government must consider whether:
    - It will pass new legislation to specifically implement the treaty obligations into domestic (Australian) law
    - OR
    - It will rely on existing legislation (as already effectively implementing the treaty obligations)

# How does a treaty become law in Australia?

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- The procedure followed in practice:
  1. Executive Government signs the treaty
  2. Executive Government tables the treaty in Parliament
    - Parliament may refer treaty to the Joint Standing Committee on Treaties
    - Also a National Impact Assessment (NIA) may be undertaken
  3. Executive Government decides whether to pass new legislation or rely on existing legislation (to implement treaty obligations into domestic law)
  4. Parliament passes new legislation (if considered necessary)
    - Power to pass legislation found in Section 51 (xxix) of the Australian Constitution ('external affairs power')
    - New (or changes to existing) federal *or* state legislation may be required
    - If state legislation required – cooperate with states or rely on Section 51 (xxix)
  5. Executive Government ratifies the treaty
  6. Executive Government makes a declaration or ratification (if permitted and if considered necessary)

# How does a treaty become law in Australia?

## Example: Disabilities Convention

13 December 2006	UN Convention on the Rights of Persons with Disabilities adopted by the UN General Assembly
30 March 2007	Treaty opened for signature
30 March 2007	Australia signed the treaty
4 June 2008	Government tabled the treaty in Parliament
19 June 2008	Joint Standing Committee provided <i>preliminary report</i> supporting ratification of the treaty
17 July 2008	Australia ratified treaty (and lodges a declaration)
	<i>** A-G's Department / Executive Government did not consider any new legislation to be necessary to implement treaty obligations</i>
12 March 2009	Joint Standing Committee on Treaties provided <i>full report</i> supporting ratification of the treaty

# Incorporation into domestic law

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- Incorporation can be achieved by enacting specific legislation to reflect international conventions:
  - *Racial Discrimination Act 1975* (Cth)
  - *Sex Discrimination Act 1984* (Cth)
- Alternatively, incorporation can also be achieved by simply indicating that a particular piece of legislation is to be read so as to be consistent with international law, or particular treaty obligations:
  - *Endangered Species Protection Act 1992* (Cth)
  - *Industrial Relations Reform Act 1993* (Cth)
  - *Workplace Relations Act 1996* (Cth)

# Australia and human rights treaties

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- Australia has ratified most of the core international human rights treaties
- But, it has often shown reluctance in implementing human rights treaty obligations into domestic law
  - Slow to implement appropriate domestic legislation (e.g. legal recognition of genocide as a crime)
  - Lack of recognition of economic, social and cultural rights (as required by the ICESCR)
  - Limited mechanism for investigating complaints of human rights violations (and lack of enforceable remedies)
  - Attitude towards implementing recommendations of the UN and treaty bodies

# Australia and human rights treaties

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*“The image that emerges is of a Janus-faced Australia, a nation that embraces human rights in the international sphere, but is much more cautious about the application of human rights domestically.”*



(Charlesworth et al 2006)

# Australia and human rights treaties

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- Why does this matter?
  - Without effective domestic implementation, human rights treaties cannot properly protect Australian people from human rights violations
- Why the reluctance?
  - Human rights treaties often deal with matters relating to how a country orders its internal affairs, which typically fall within the legislative power of the state parliaments (not the Commonwealth Parliament)
  - Utilitarian confidence in existing governmental structure
  - Issues of sovereignty and a fear of handing over power to unelected international committees



# International treaties in the absence of domestic law

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- If international treaty obligations are not implemented into domestic legislation, international law has a very limited effect in Australia:
  - Statutory interpretation
  - Development of the common (judge-made) law
  - Administrative decision-making
  - Constitutional interpretation

# International treaties in the absence of domestic law

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- Statutory interpretation:
  - Where an Australian statute conflicts with an international treaty, then the terms of the statute will prevail
  - However, where the statute is ambiguous, international treaties may be used by the court to help it resolve the ambiguity

# International treaties in the absence of domestic law

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- Mason and Deane JJ in *Minister for Immigration and Ethnic Affairs v Teoh* (1995 High Court decision):

*“... the fact the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour a construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. This is because Parliament, prima facie, intends to give effect to Australia’s obligations under international law.”*

# International treaties in the absence of domestic law

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- Presumption that a statute is not intended to curtail fundamental human rights
  - Unless clear and unambiguous language to the contrary
  - Not a rule that enables an interpretation that *promotes* fundamental human rights

# International treaties in the absence of domestic law

- Development of the common (judge-made) law:
  - International treaties may be relied on by a court as an influence on the development of the common law
  - See: *Mabo v Queensland [No 2]*; *Dietrich v The Queen*; *Minister for Immigration and Ethnic Affairs v Teoh*

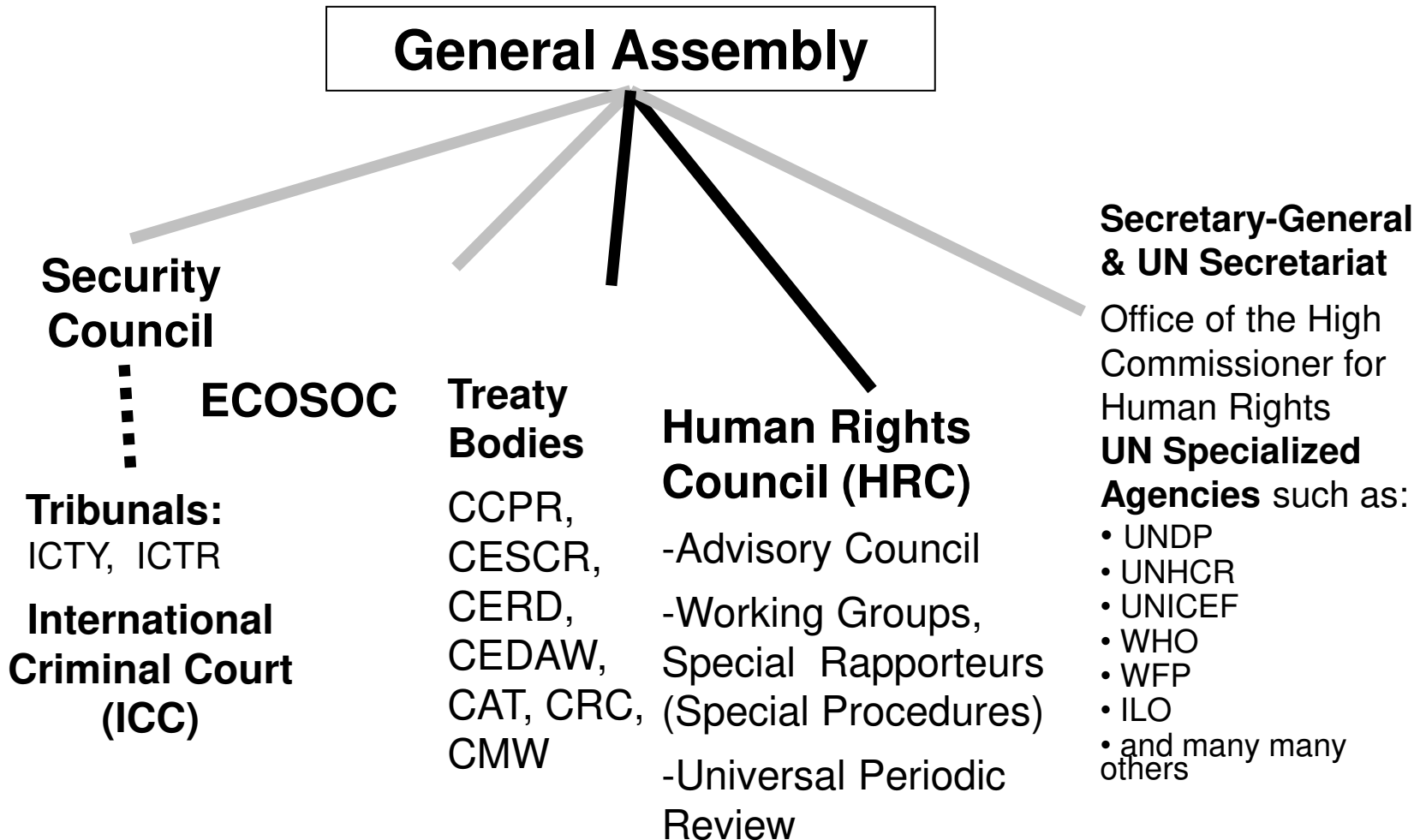


# International Human Rights Protection

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What can be done at an International level to protect the Human Rights of Australians?

# UN Human Rights Machinery



# Treaty Monitoring Bodies

United Nations Treaty Bodies				
Committee	Established by	Membership	Reporting Requirements	Petitions/ Communications
Human Rights Committee	International Convention Civil and Political Rights Art 28	18 members 4yr term nominated and elected by state parties to treaty serve in individual capacity	5yrs	Individual through 1 <sup>st</sup> optional protocol State-state through declaration
Committee for ESCR	International Convention for Economic, Social and Cultural Rights Art 16 and ECOSOC res.1988 (LX) (1976)	18 members 4yr term elected by ECOSOC serve in individual capacity	5 yrs	New Individual Mechanism as of 2009 Optional Protocol
Committee for the Elimination of Racial Discrimination	Convention for the Elimination of Racial Discrimination Art 8	18 members 4yr term nominated and elected by state parties to treaty serve in individual capacity	2yrs with power to ask for further reports from states as they think fit.	Individual through declaration State-state through declaration
Committee for the Elimination of Discrimination Against Women	Convention for the Elimination of Discrimination Against Women Art 17	23 members 4yr term nominated and elected by state parties to treaty serve in individual capacity	4yrs with power to ask for further reports from states as they think fit	Individual through optional protocol
Committee on the Rights of the Child	Convention for the Rights of the Child Art 43	10 members 4yr term nominated and elected by state parties to treaty serve in individual capacity	5 yrs	Being developed
Committee Against Torture	Convention Against Torture Art 17	10 members 4yrs terms nominated and elected by state parties serve in individual capacity	Urgent, confidential reports if alerted to systematic practice of torture	Individual through declaration State-to-state through declaration
Committee for Migrant Workers	Convention for the Protection of Migrant Workers Art 72	10 members (then 14) 4yr term elected by state parties to treaty serve in individual capacity	5yrs power to ask for further reports as they think fit.	Individual through art 77 state through art. 76.
Committee on the Rights of Persons with Disabilities	Convention on the Rights of Persons with Disabilities Article 34	members (then 18) 4yr term elected by state parties to treaty serve in individual capacity	4yrs with power to ask for further reports as they think fit.	individual through optional protocol



# Human Rights Council

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- Special Procedures
  - Special rapporteurs
  - Independent Experts and
  - Working groups

<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

- Universal Periodic Review
  - Rolling review of all UN member states Australia has just had one.

<http://hrc.org.au/international-community-condemns-australias-treatment-of-asylum-seekers-during-major-human-rights-review-at-un/>

- Complaints Procedure (Communications)

<http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>

# Domestic Follow Through

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International recognition of breaches of Human Rights in Australia are just a starting point. There are many examples of international condemnation that has fallen on deaf ears here in Australia

Eg.

Immigration detention (particularly the detention of children)

- Human Rights Committee Communication No. 560/1993 (A v Australia)
- Human Rights Committee Communication No. 1050/2002 (D & E v Australia)
- Human Rights Committee Communication No: 1069/2002 (Bakhtiyari v Australia)

Criminal deportations (see the Nystrom case <http://www.hrlc.org.au/files/CCPR-C-102-D-1557-2007-English.pdf>)

# Australia at the UN

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<http://www.ohchr.org/EN/countries/AsiaRegion/Pages/AUIndex.aspx>