

**Universal Periodic Review Submission  
Australia  
March 2015**

Human Rights Watch submits the following information on five areas of concern regarding Australia's human rights record: protection of asylum seekers and refugees, counterterrorism, indigenous rights, rights of people with disabilities, and same-sex marriage equality. This submission also assesses Australia's progress in implementing the specific recommendations it accepted in the last UPR round in 2011.

This submission is not a comprehensive review of all human rights issues in Australia. It is our intention to complement the valuable reports submitted by Australian nongovernmental organizations on different aspects of Australia's human rights record.

**Asylum seekers and refugees**

Despite Australia's commitments at the 2011 UPR to address refugee protection, in the areas of mandatory detention, offshore processing and refoulement, there has been serious backsliding on the rights of asylum seekers and refugees. During the 2011 UPR, Australia accepted recommendations to process asylum seekers' claims in accordance with the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).<sup>1</sup> Through a 2014 amendment to the Migration Act 1958, Australia also removed most mentions of the Refugee Convention from the law instead creating a "new, independent and self-contained statutory framework" setting out Australia's own interpretation of its protection obligations under the Refugee Convention.

*Mandatory detention*

At the 2011 UPR, Australia committed to detaining asylum seekers for the shortest reasonable time and only when strictly necessary.<sup>2</sup> In practice, since the last UPR, Australia has maintained a policy of mandatory detention for all unauthorized arrivals. As of January 31, 2015, 2,298 people were detained on Australian territory, including 211 children. There is no legal limit on the length of detention.

Thirty-four refugees are being detained indefinitely on the basis of adverse security assessments, many of whom have been in detention for over four years. The 2014 Migration Amendment Act further strengthens the Australian Secret Intelligence Organization's (ASIO) power to administer adverse security assessments through a secretive process that is not subject to judicial review. Human Rights Watch remains concerned that this policy arbitrarily deprives refugees of their liberty.

In 2015, the UN special rapporteur on torture, Juan Mendez, concluded that by failing to provide adequate detention conditions, to end the practice of detaining children, and to put a stop to escalating violence in processing centers, Australia had violated the Convention against Torture.

*Offshore processing*

Since 2013, to deter boat arrivals of unauthorized migrants, the Australian government transfers all asylum seekers who arrive by boat to Nauru and Papua New Guinea for processing and resettlement. As of January 31, 2015, 1023 men were detained on Manus Island, and 549 men, 134 women and 119 children were detained on Nauru. In 2014, the Australian government concluded negotiations with Cambodia to accept refugees from Nauru for resettlement, ignoring concerns about safety, refoulement, and the lack of capacity of the Cambodian government. So far, no refugees have accepted the offer.

The UN Refugee Agency (UNHCR) has criticized Australia's offshore detention policy as "return-oriented." Detention centers on Manus and Nauru are overcrowded and dirty. Asylum claims are not

processed in a fair, transparent or expedient manner, at a significant cost to detainees' physical and mental health. There are reports of physical and sexual abuse of detainees. Recent hunger strikes on Manus Island point to the poor conditions endured by asylum seekers and the uncertainty they face because of prolonged refugee status determination procedures.

The centers are closed and UN experts, journalists, and human rights organizations have all experienced difficulties in obtaining access to independently assess conditions. All media and staff working in offshore processing centers are required to sign Deeds of Confidentiality with the Department of Immigration. Alarming, there are some [reports](#) that staff working with health and support service providers in the centers were told their digital communications would be monitored and warned they could face criminal action if they spoke out about conditions.

### *Refoulement*

In the 2011 UPR, Australia agreed to “cease the practice of refoulement of refugees and asylum-seekers, which puts at risk their lives and their families' lives.”<sup>3</sup> In 2014 and 2015, Australian custom officials ignored well-documented reports of torture and rape of ethnic Tamils detained by Sri Lanka and handed over to Sri Lankan authorities at least three boats carrying a total of 198 ethnic Sinhalese and Tamil asylum seekers after cursory screening processes at sea. In January 2015, the immigration minister confirmed that since introducing its Operation Sovereign Borders policy, the government has returned 15 boats carrying 429 asylum seekers to Indonesia or Sri Lanka.

The government's flawed “enhanced screening” procedures, conducted at sea without proper access to lawyers and review, do not give asylum seekers a genuine opportunity to make a claim for protection.

A 2014 migration law amendment gives the immigration minister greater powers to detain asylum seekers at sea and to transfer them to other countries. An asylum seeker can now be removed from Australia without any consideration of Australia's nonrefoulement obligations. Additionally, the government removed natural justice procedural safeguards from a range of powers in the Maritime Powers Act, which increases the risk of asylum seekers being forced to return to a country where they fear persecution. The UN special rapporteur on torture found that the migration law amendments violate the rights of migrants and asylum seekers to be free from torture and cruel, inhuman or degrading treatment.

### **Counterterrorism measures**

In 2014, the government introduced a range of new counterterrorism provisions in response to the threat of “home-grown terrorism.” As some of the measures are overly broad and vague, they contradict the recommendation accepted by Australia in 2011 to “ensure that its legislation and methods to combat terrorism are in accordance with the International Covenant on Civil and Political Rights (ICCPR).”<sup>4</sup>

The new laws impose severe criminal penalties for the vague offense of “advocating terrorism” and making unauthorized disclosures related to “special intelligence operations.” These offenses directly infringe on the right to freedom of expression, and will mean that journalists, whistleblowers and peaceful activists will risk prison for certain disclosures, even when made in the public interest. It is now a criminal offense to travel to “declared areas” abroad unless the person can demonstrate a “legitimate reason” to travel to the area, an overbroad and excessive restriction on freedom of movement. Australia has also extended the use of control orders and preventive detention. The amended procedure for imposing a control order violates the right to a fair hearing by lowering the threshold of proof and significantly expanding the grounds for issuance.

Proposed measures currently before Parliament would force telecommunications companies to retain metadata for a period of two years so that Australian intelligence organizations can access the data. If passed, these metadata laws would breach rights to privacy of individuals when the government retains their data.<sup>5</sup>

### **Disability rights**

During its UPR in 2011, Australia accepted the recommendation to “continue its laudable measures to address the plight of persons with disabilities, in particular through pursuance of the draft National

Disability Strategy.”<sup>6</sup> Although the government has formally endorsed the implementation of the National Disability Strategy, further commitment is needed to carry out this recommendation to fulfill Australia’s obligations under the Convention on the Rights of Persons with Disabilities.

In 2014, the Australian Human Rights Commission found that inadequate safeguards and poor access to support services leave many people with disabilities without adequate legal or social protection when they come into contact with the criminal justice system. They are disproportionately at risk of violence in the community and in institutional settings, and are more likely to be jailed. Some are deemed unfit to stand trial based on prejudicial assessments of their competency to give evidence and then indefinitely detained in prisons, psychiatric facilities, or other highly restrictive places of detention without appropriate review mechanisms.

In December 2014, the UN Committee against Torture found that women with disabilities experience disproportionately higher levels of violence in Australia.<sup>7</sup> Additionally, the Australian government continues to allow the ongoing practice of involuntary sterilization of people with disabilities, an unacceptable violation of their rights and autonomy. Australia thus broke its commitment in the 2011 UPR to “abolish non-therapeutic sterilization of women and girls with disabilities.”<sup>8</sup>

### **Indigenous peoples’ rights**

In the 2011 UPR, Australia committed to intensifying “its on-going efforts to close the gap in opportunities and life outcomes between indigenous and non-indigenous peoples, especially in the areas of housing, land title, health care, education and employment.”<sup>9</sup> In February 2015, the prime minister’s [Close the Gap](#) report highlighted the continued systemic disadvantage faced by indigenous Australians across all key outcomes. While there have been modest improvements to certain education and health outcomes, there was no overall improvement in indigenous reading and numeracy rates since 2008 and little progress on closing the life expectancy gap by 2031. Aboriginal and Torres Strait Islander peoples still live on average 10-12 years less than non-indigenous Australians, have an infant mortality rate almost two times higher, and continue to die at alarmingly high rates from treatable and preventable conditions such as diabetes and respiratory illness.

The disproportionately high rate of incarceration of indigenous people remains a critical issue for Australia. While indigenous Australians account for only 3 percent of Australia’s population, they account for 27 percent of Australia’s prison population. As a result, mandatory sentencing laws in force in a number of states and territories disproportionately affect indigenous people. At the 2011 UPR, Australia accepted that it “will continue to address over-representation of Indigenous people in prison.”<sup>10</sup> But some state and territory governments have ignored calls by the UN Committee against Torture to abolish harsh mandatory sentencing laws in an effort to reduce indigenous imprisonment rates.<sup>11</sup>

### **Sexual Orientation and Gender Identity Rights**

In 2013, Australia successfully implemented the recommendation to prohibit discrimination on the grounds of sexual orientation, gender identity and intersex status in the Sex Discrimination Act. However Australia rejected the 2011 UPR recommendation to amend the federal Marriage Act to allow same-sex partners to marry.<sup>12</sup> Despite increasing public support for same-sex marriage in Australia, marriage remains restricted to opposite-sex partners. Some states and territories have moved to develop laws recognizing same-sex marriage, however only one territory actually enacted laws, and in December 2013 the High Court ruled that these laws were inconsistent with federal legislation and therefore invalid. The Australian government should reconsider the rejection of this recommendation, in line with articles 2 and 26 of the ICCPR, which enshrine the rights to non-discrimination and equality before the law.

### **Recommendations**

Regarding the treatment of asylum seekers and refugees, Australia should:

- End the policy of mandatory detention, introduce reasonable statutory time limits for detention and ensure asylum seekers are only detained as a last resort.
- As a priority, immediately end the mandatory detention of migrant children in both onshore and offshore facilities and develop alternative care arrangements that take the best interests of children into account.

- Provide for substantive and effective judicial review of adverse security assessments and pending the assessment, release those found to be refugees arbitrarily and indefinitely detained, and offer them compensation and rehabilitation as appropriate.
- Ensure onshore and offshore asylum claims are dealt with thoroughly and promptly, in accordance with the Refugee Convention and subject to judicial review.
- Close offshore processing centers and process all asylum seeker claims in a fair, thorough and transparent manner in Australia.
- Until offshore detention centers are closed, allow journalists and human rights organizations full access to ensure independent monitoring of conditions.
- Discontinue the practice of assessing asylum claims at sea, and ensure preliminary screening processes meet international standards.
- Cease summary, forced returns of Sri Lankan asylum seekers interdicted at sea until they are provided fair and thorough processing of their protection claims.
- Respect the principle of non refoulement and reinstate it into Australian law.

Regarding counter terrorism legislation and policies, Australia should:

- Repeal the offense of advocating terrorism, which unnecessarily restricts freedom of speech in light of the existing laws that already criminalize incitement to violence.
- Repeal legislation extending the use of preventive detention orders and control orders that violate basic civil liberties and the right to due process.
- So long as control orders remain in effect, put in place effective legal safeguards to ensure that the cumulative effect of the restrictions imposed by an order is not tantamount to indefinite detention.
- Repeal the offense of entering or remaining in a “declared area,” which excessively restricts freedom of movement.
- Repeal the offense in section 35P of the ASIO Act or introduce a public interest defense to ensure that disclosures of information made in the public interest are protected from criminal sanction.
- Withdraw draft legislation requiring telecommunications companies to retain customer metadata and ensure its national security laws adequately protect the right to privacy.

Regarding the rights of people with disabilities, Australia should:

- Take practical steps to fully implement its National Disability Strategy at the federal and state level to ensure people with disabilities enjoy equal rights and opportunities in the Australian community.
- Enact federal legislation prohibiting the non-therapeutic sterilization of children, regardless of whether they have a disability, and adults with disabilities without their fully informed and free consent.
- Strengthen safeguards and support services for people with disabilities in contact with the criminal justice system, whether as victims or accused persons.

Regarding the rights of indigenous Australians, Australia should:

- Intensify its commitment to addressing the underlying causes of gaps in opportunities and outcomes in health, education, housing and employment between indigenous and non-indigenous Australians.
- Adopt the recommendation by the UN Committee against Torture to review mandatory sentencing laws with a view to abolishing them.

Regarding sexual orientation and gender identity rights, Australia should:

- Amend the Marriage Act to remove any legal barriers for same-sex couples to marry.

## Annex: Endnotes

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- <sup>1</sup> Recommendation accepted from Norway, “Ensure the processing of asylum-seekers' claims in accordance with the United Nations Refugee Convention and that they are detained only when strictly necessary.”
- <sup>2</sup> Recommendation accepted from Ghana, “Review its mandatory detention regime of asylum-seekers, limiting detention to the shortest time reasonably necessary”; recommendation accepted from Brazil, “Consider alternatives to the detention of irregular migrants and asylum-seekers, limit the length of detentions, ensure access to legal and health assistance and uphold its obligations under the Vienna Convention on Consular Relations.”
- <sup>3</sup> Recommendation accepted from Slovenia.
- <sup>4</sup> Recommendation accepted from Moldova. Australia also accepted a recommendation from Switzerland to “Ensure, in particular through its Independent National Security Legislation Monitor, that its national legislation is in keeping with its international obligations in the field of human rights” and a recommendation from Belgium to “Review the compatibility of its legislative framework to combat terrorism with its international obligations in the field of human rights and remedy any possible gaps.”
- <sup>5</sup> The right to privacy is enshrined in articles 2(1) and 17 of the ICCPR.
- <sup>6</sup> Recommendation accepted from Botswana.
- <sup>7</sup> United Nations, Committee against Torture, Concluding observations on the combined fourth and fifth periodic reports of Australia, 23 December 2014, CAT/C/AUS/CO/4-5.
- <sup>8</sup> Recommendations accepted from Belgium, Denmark, Germany and the United Kingdom.
- <sup>9</sup> Recommendation accepted from Thailand.
- <sup>10</sup> Recommendation accepted from Austria.
- <sup>11</sup> UN Committee against Torture, Concluding observations on the combined fourth and fifth periodic reports of Australia, 23 December 2014, CAT/C/AUS/CO/4-5.
- <sup>12</sup> Recommendation rejected from Norway.