

International law and its implications for Australia's regulation of the involuntary or coerced sterilisation of people with disabilities.

Advice by Professor Ivan Shearer, AM

1. By letter dated 7 May 2013 I was invited by Senator Rachel Siewert, Chair of the Senate Standing Committee on Community Affairs, to give my advice regarding the status of comments by United Nations committees and officials on the interpretation and application of international human rights instruments, and, in particular, their relevance to, and effect on, a State's obligations under international human rights instruments.
2. The advice that follows is based on my general knowledge of international law, as evidenced by my academic career from 1964 to the present, including the holding of the Challis Chair of International Law at Sydney University 1993-2003, and my period of service as an elected member of the UN Human Rights Committee from 2001- 2008.
3. The question I shall attempt to answer arises from several of the submissions already before the Committee, in particular those of the Australian Human Rights Commission, and of Australian Lawyers for Human Rights, which point to Australia's obligations under certain international conventions. While none of those conventions explicitly prohibits involuntary sterilisation of people with disabilities, some have been argued to do so by implication.
4. Relevant international conventions and statements by committees and officials of the various UN bodies concerned with human rights are conveniently set out in paragraphs 14 to 22 of the submission of the Australian Human Rights Commission. All of the cited sources condemn involuntary sterilisation of people with disabilities based on their interpretation of the conventions or on general principles of human rights. The question is: are such statements binding on Australia as determinative of the international obligations Australia has entered into? Or, if not, what status do they have?
5. My short answer to the question posed is:

Such statements are not legally binding but must be considered seriously by Australian governments, at the legislative, executive and judicial levels, when contemplating the possible introduction of, or dealing with the interpretation and application of existing, domestic laws (Federal, State or Territory).

Where an Australian government body considers that for compelling reasons it must depart from those statements it should do so only after due reflection and debate, giving detailed and public reasons for its decision. Deriving from a general duty under international law to attend to international obligations in good faith, and to conduct relations with international institutions in a spirit of cooperation, Australian governments are not free simply to disregard such statements.

6. My longer answer begins with the general duties of good faith and cooperation with international institutions incorporated in my “short answer” above.
7. Good faith is a fundamental principle of both international law and national legal systems. In specific relation to treaties and conventions, article 26 of the Vienna Convention on the Law of Treaties, 1969, regarded as codifying customary international law, states that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 31(1) of the Vienna Convention states that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
8. It is common ground, in the present case, that there is no explicit treaty prohibition of involuntary sterilisation of people with disabilities. The nearest a treaty provision approaches it is the Convention on the Rights of Persons with Disabilities, which in article 17 states that “Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.” It has been argued that this, and other existing prohibitions, e.g. of torture or of breaches of privacy, may be regarded as extending, by way of interpretation or analogy, to involuntary sterilisation.

9. The Vienna Convention on the Law of Treaties, article 31(3)(b), allows for taking into account, together with the context, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” It is generally accepted that such “subsequent practice” means the practice of states parties to the treaty. This would require the demonstration of a widespread consensus among those states on the meaning of the treaty. Statements by UN bodies could not of themselves constitute such “practice” but might prompt state parties to form such a consensus in the longer term. Whether this has yet occurred in the present context is unclear. A detailed survey of state laws and practice in the matter might reveal a tendency in relation to involuntary sterilisation one way or the other; but whether states were acting specifically in relation to their perceived obligations under particular treaties would not necessarily have been publicly declared.
10. In considering the degree to which the principles of good faith and international cooperation require states to heed the statements of international bodies, it is necessary to assess the status of the relevant body making the statement. Although none will be found to be strictly binding in law, the degree of consideration to be accorded to them may differ.
11. The following sources of statements relevant to an interpretation of particular obligations under international human rights law may be identified:
- (a) Decisions of international courts and tribunals;
 - (b) Actions of the United Nations Human Rights Council;
 - (c) Views of the various treaty committees under the UN human rights system expressed in cases brought before them by individuals (e.g. the Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities);
 - (d) Concluding Observations by the UN human rights treaty committees expressed upon examination of the required regular reports of individual States Parties;
 - (e) General Comments by those committees;

- (f) Public statements by UN officials, e.g. by the High Commissioner for Human Rights.

(a) International courts.

12. I am unaware of any decision of the International Court of Justice, or of any other international tribunal, regarding the issue at hand. It is possible that the European Court of Human Rights, or some other regional human rights court, may have considered the issue in the past, or may do so in the future (I have been unable to find such a reference). If so, Australia should regard such a decision as constituting a persuasive (but not binding) precedent. Particular persuasive force would attend decisions of the European Court since the European Convention on Human Rights, 1950, is very similar in its wording to the International Covenant on Civil and Political Rights, 1966, to which Australia is a party.

(b) The UN Human Rights Council.

13. The UN Human Rights Council replaced the earlier Commission on Human Rights in 2006. It conducts a process of review called the Universal Periodic Review (UPR) in which all Member States of the UN are called up for review on a periodic basis. This contrasts with the procedures of the UN treaty bodies in the field of human rights which examine the records only of those states that are parties to specific treaties on human rights. I am unaware whether the issue of enforced sterilisation has yet come up for discussion in the Council. Were it to do so, it would form part of the recommendations of the Council directed to the state in question. The UN General Assembly resolution constituting the Council allows a reviewed state either to accept particular recommendations or reject them. The UPR process is regarded by some as thus weak and politicised, but there are indications that its procedures are becoming more rigorous.
14. The Human Rights Council has maintained the system of thematic rapporteurs, inherited from the previous Commission, who report to the Council on matters of concern arising from their mandates. There are 35 such thematic mandates. The most relevant ones, for the purposes of the present inquiry, are those concerned with physical and mental health, and with torture, cruel and degrading treatment or punishment. As noted in the submission of the Australian Human Rights Commission,

the Special Rapporteur on torture, cruel and degrading treatment or punishment has recognised involuntary or coerced sterilisation as a form of torture. Such statements do not carry binding legal weight deriving from any of the foundation documents of the Council, but are to be considered as carrying recommendatory weight within the Council and thus – to an extent – advisory weight in the international community as a whole.

(c) The UN Treaty Bodies: the Individual Complaints Procedures.

15. There are nine UN treaty bodies in the field of human rights, each charged with the monitoring of the observance of their specific covenant or convention. The most relevant to the present inquiry are the Human Rights Committee (in respect of the International Covenant on Civil and Political Rights, 1966), the Committee on Economic, Social and Cultural Rights (in respect of the counterpart Covenant on Economic, Social and Cultural Rights, 1966), the Committee on the Elimination of All Forms of Discrimination against Women, the Committee against Torture, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities.
16. Decisions of the UN treaty bodies in cases where complaints have been made against Australia or other countries call for consideration. Findings of those bodies against Australia will have a higher claim to consideration than findings against other countries, but even the latter must be regarded as significant.
17. The Human Rights Committee has the widest mandate of all the treaty committees. Australia became a party to the Optional Protocol to the International Covenant on Civil and Political Rights in 1991. By doing so, it opened the way to any person who considers that his or her rights under the Covenant have been infringed by Australia, and who has exhausted all domestic avenues of redress, to petition the Human Rights Committee. Numerous petitions have been brought against Australia since 1991, beginning with the famous Toonen case, complaining against Tasmania's laws criminalising consensual homosexual activity between adult males. Upon consideration of the petition, and having established that the complaint is admissible, the Committee expresses its opinion whether a breach of the Covenant is established or not. In finding for the

complainant, the Committee expresses its “Views” to the complainant and to the respondent government.

18. The procedure before the other relevant treaty committees is substantially similar: the Committee against Torture (CAT), the Committee for the Elimination of All Forms of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC), and the Committee on the Rights of Persons with Disabilities (CRPD).
19. Of these committees the only one to have considered the precise question at issue under its complaints procedures is the CEDAW Committee which concluded, in 2006, in a petition brought against Hungary, that the practice of coerced sterilisation violated articles 10(h), 12, and 16(1)(e) of the Convention.¹ Those articles relate principally to access to information on health and family planning, “appropriate services” in relation to pregnancy, and the right to decide freely and responsibly on the number and spacing of children.
20. Australia is not bound by such a decision since it was a decision against Hungary. But it is a finding which Australia would be well advised, under the principle of good faith in the interpretation of its own obligations, to take into account in framing and executing its own policies.
21. But suppose Australia had been the respondent party to this complaint. Would it have been legally bound by the decision of the Committee? The CEDAW Committee is empowered, under article 14(7)(b) of the Convention, merely to “forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.” This language is not the kind of language associated with decisions of binding force. Nor is the equivalent expression in the provisions of the Optional Protocol to the International Covenant on Civil and Political Rights, which is “Views”. However, there remains the question whether such findings of a committee, charged with the task of monitoring implementation of its constituent convention by States Parties, and composed of independent experts, constitute something more than mere opinions to be accepted or rejected at will.
22. Australia does not regard the views of the treaty committees in individual complaint proceedings as legally binding. This position, which

¹ A S v Hungary, Communication No. 4/2004, UN Doc CEDAW/C/36/D/4/2004 (2006).

it shares with a number of other countries, e.g. Canada, drew a sharp response from the Human Rights Committee in its Concluding Observations on the 5th Periodic Report of Australia to the Committee in 2009. The Committee stated:

“While acknowledging the measures taken by the State party to reduce the likelihood of future communications [complaints] regarding issues raised in certain of its Views, the Committee expresses once again its concern at the State party’s restrictive interpretation of, and failure to fulfil, its obligations under the First Optional Protocol and the Covenant, and at the fact that victims have not received reparation. The Committee further recalls that, by acceding to the First Optional Protocol, the State party has recognised its competence to receive and examine complaints from individuals under the State party’s jurisdiction , and that a failure to give effect to its Views would call into question the State party’s commitment to the First optional Protocol (art. 2).”

The Committee followed this expression of concern with the following recommendation:

“The State party should review its position in relation to Views adopted by the Committee under the First Optional Protocol and establish appropriate procedures to implement them, in order to comply with article 2, paragraph 3 of the Covenant which guarantees a right to an effective remedy and reparation where there has been a violation of the Covenant.”

23. The Human Rights Committee thus considers, in these Concluding Observations in relation to Australia, that its Views in individual complaints cases are essentially binding. It does not acknowledge that Australia is not the only State party to consider them recommendatory only. Nor does it acknowledge that Australia has been assiduous in responding to every complaint by an individual lodged against it and in providing detailed and respectful reasons in those cases where it has felt itself to be unable to accept the Committee’s Views. (Many of these cases against Australia have involved detention of asylum seekers).
24. The Human Rights Committee seems to have retreated somewhat from this position in its subsequent General Comment No. 33 (2008), where it

adopted a rather more nuanced position on the status of its Views. The Committee stated:

“The Views of the Committee under the Optional Protocol represent an authoritative determination of the organ established under the Covenant itself charged with the interpretation of that instrument. These Views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol....The character of the Views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.”

25. The Human Rights Committee is the only treaty committee to have addressed directly the status of its findings and views in individual complaints procedures. Its General Comment on this issue is likely to reflect the position of the other treaty committees. In my view, the position of the Committee, as stated in General Comment No. 33, is not incompatible with Australia's position that the Committee's views are not strictly binding but are to be accorded respectful attention.
26. The full text of this General Comment is appended to this advice.

(d) Concluding Observations of the Committees.

27. All the UN treaty bodies mentioned above issue Concluding Observations following the submission of the regular reports of all states parties. Each report is considered at a public meeting of the relevant committee, held in either New York or Geneva. Concluding Observations contain the opinions of the committee, and its recommendations, on the reporting state's record of observance of the relevant convention, based on the national report, the additional information obtained during the committee's examination of that report, and on external sources (such as reports by NGOs in the field of human rights).
28. So far as I am aware, the only committee that has considered the situation of enforced sterilisation in respect of Australia is the

Committee on the Rights of the Child. In its Concluding Observations dated 28 August 2012 the Committee recommended that Australia “adopt a specific plan of action to make operational the provisions under the National Plan to Reduce Violence against Women and their Children (2010-2022) including such measures as ...(b) developing and enforcing strict guidelines to prevent the sterilization of women and girls who are affected by disabilities and are unable to consent.”

29. Acceptance of such a recommendation is a matter of good faith and acting in a spirit of cooperation rather than a strict legal obligation. All the committees practise a procedure of follow-up, in which reporting states are requested to inform the committee of action taken to implement the recommendations. Failure to do so will result in repeated adverse comment at the time of the next due report and examination. Even states other than the state the subject of the adverse comment or recommendation would do well to take note of it, since the same result is to be expected when their turn comes to submit to an examination of their record.

(e) General Comments of the Committees.

30. From time to time the treaty bodies issue General Comments on particular themes arising from their work and on the interpretation of their constituent treaty instrument (covenant or convention). The issue of involuntary or coerced sterilisation has been included in General Comments by several of the treaty bodies, as noted in the submission of the Australian Human Rights Commission viz. the Human Rights Committee, the CEDAW Committee, and the Committee on the Rights of the Child.
31. In addition, the Committee on Economic, Social and Cultural Rights (CESCR) has issued, in its General Comment No.5 (1994), an interpretation of article 10 of the Covenant on Economic, Social and Cultural Rights that would prohibit the sterilisation of a woman with disabilities without her prior informed consent.
32. The status of General Comments is to be regarded as slightly lower than that of Views following individual petitions, and Concluding Observations on national reports, but nevertheless commanding respect. They indicate the mind of the committee in question and thus

the probable attitude of that committee in its future consideration of national reports and individual petitions.

33. The General Comment No. 33 (2008) of the Human Rights Committee on the status of its Views in individual complaints cases has been noted in paragraph 24 above, and the text is appended to this advice.

(f) Public Statements by UN Officials.

34. Of themselves, statements by UN officials declaratory of human rights are not legally binding. Politically, however, they may be of a nature that would require serious attention. For example, a statement by the UN High Commissioner for Human Rights (the highest official in the UN human rights system) criticising an aspect of Australian policy could not be ignored. If it is not accepted, a reasoned response would be called for. From other officials, statements would need to be read in context and in relation to the particular organisational framework. An example, given in paragraph 17 of the submission of the Australian Human Rights Commission, is the UN Special Rapporteur on Torture, Mr Manfred Nowak, who declared in his regular report to the Human Rights Council that involuntary or coerced sterilisation is a form of torture. That statement might or might not be accepted as the policy of the Council in its future conduct of the UPR process for all states. Like other statements by UN officials it is non-binding but entitled to respectful attention by Australia.

Adelaide, 24 May 2013.

APPENDIX

**International covenant
on civil and political
rights**

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General Comment No 33

**The Obligations of States Parties under the Optional Protocol to the International Covenant
on Civil and Political Rights**

1. The Optional Protocol to the International Covenant on Civil and Political Rights was adopted and opened for signature, ratification or accession by the same act of the United Nations General Assembly, resolution 2200 A (XXI) of 16 December 1966, that adopted the Covenant itself. Both the Covenant and the Optional Protocol entered into force on 23 March 1976.
2. Although the Optional Protocol is organically related to the Covenant, it is not automatically in force for all States parties to the Covenant. Article 8 of the Optional Protocol provides that States parties to the Covenant may become parties to the Optional Protocol only by a separate expression of consent to be bound. A majority of States parties to the Covenant has also become party to the Optional Protocol.
3. The preamble to the Optional Protocol states that its purpose is “further to achieve the purposes” of the Covenant by enabling the Human Rights Committee, established in part IV of the Covenant, “to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.” The Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.
4. Article 1 of the Optional Protocol provides that a State party to it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. It follows that States parties are obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee.

5. Article 2 of the Optional Protocol requires that individuals who submit communications to the Committee must have exhausted all available domestic remedies. In its response to a communication, a State party, where it considers that this condition has not been met, should specify the available and effective remedies that the author of the communication has failed to exhaust.

6. Although not a term found in the Optional Protocol or Covenant, the Human Rights Committee uses the description “author” to refer to an individual who has submitted a communication to the Committee under the Optional Protocol. The Committee uses the term “communication” contained in article 1 of the Optional Protocol instead of such terms as “complaint” or “petition”, although the latter term is reflected in the current administrative structure of the Office of the High Commissioner for Human Rights, where communications under the Optional Protocol are initially handled by a section known as the Petitions Team.

7. Terminology similarly reflects the nature of the role of the Human Rights Committee in receiving and considering a communication. Subject to the communication being found admissible, after considering the communication in the light of all written information made available to it by the individual author and by the State party concerned, “the Committee shall forward its views to the State party concerned and to the individual.”¹

8. The first obligation of a State Party, against which a claim has been made by an individual under the Optional Protocol, is to respond to it within the time limit of six months set out in article 4 (2). Within that time limit, “the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State.” The Committee’s Rules of Procedure amplify these provisions, including the possibility in exceptional cases of treating separately questions of the admissibility and merits of the communication.²

9. In responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State party (the *ratione temporis* rule), the State party should invoke that circumstance explicitly, including any comment on the possible “continuing effect” of a past violation.

10. In the experience of the Committee, States do not always respect their obligation. In failing to respond to a communication, or responding incompletely, a State which is the object of a communication puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of full information relating to the communication. In such circumstances, the Committee may conclude that the allegations contained in the communication are true, if they appear from all the circumstances to be substantiated.

11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

¹ Optional Protocol, article 5(4).

² Rules of Procedure of the Human Rights Committee, Rule 97(2). UN Doc. CCPR/C/3/Rev.8, 22 September 2005. CCPR/C/GC/33 page 3

12. The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is “views”.³ These decisions state the Committee’s findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.

13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

14. Under article 2, paragraph 3 of the Covenant, each State party undertakes “to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity.” This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found:

“In accordance with article 2, paragraph 3(a) of the Covenant, the State party is required to provide the author with an effective remedy. By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s views.”

15. The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.⁴

³ In French the term is “constatations” and in Spanish “observaciones”.

⁴ Vienna Convention on the Law of Treaties, 1969, article 26.

⁵ Rules of Procedure of the Human Rights Committee, Rule 101.

16. The Committee decided, in 1997, under its rules of procedure, to appoint a member of the Committee as Special Rapporteur for the Follow-Up of Views.⁵ That member, through written representations, and frequently also through personal meetings with diplomatic representatives of the State party concerned, urges compliance with the Committee’s views and discusses factors that may be impeding their implementation. In a number of cases this procedure has led to acceptance and implementation of the Committee’s views where previously the transmission of those views had met with no response.

Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.8, 22 September 2005, Rule 92 (previously Rule 86):

“The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform the State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication.”

17. It is to be noted that failure by a State party to implement the views of the Committee in a given case becomes a matter of public record through the publication of the Committee’s decisions *inter alia* in its annual reports to the General Assembly of the United Nations.

18. Some States parties, to which the views of the Committee have been transmitted in relation to communications concerning them, have failed to accept the Committee’s views, in whole or in part, or have attempted to re-open the case. In a number of those cases these responses have been made where the State party took no part in the procedures, having not carried out its obligation to respond to communications under article 4, paragraph 2 of the Optional Protocol. In other cases, rejection of the Committee’s views, in whole or in part, has come after the State party has participated in the procedure and where its arguments have been fully considered by the Committee. In all such cases, the Committee regards dialogue between the Committee and the State party as ongoing with a view to implementation. The Special Rapporteur for the Follow-up of Views conducts this dialogue, and regularly reports on progress to the Committee.

19. Measures may be requested by an author, or decided by the Committee on its own initiative, when an action taken or threatened by the State party would appear likely to cause irreparable harm to the author or the victim unless withdrawn or suspended pending full consideration of the communication by the Committee. Examples include the imposition of the death penalty and violation of the duty of non-refoulement. In order to be in a position to meet these needs under the Optional Protocol, the Committee established, under its rules of procedure, a procedure to request interim or provisional measures of protection in appropriate cases.⁶ Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.

20. Most States do not have specific enabling legislation to receive the views of the Committee into their domestic legal order. The domestic law of some States parties does, however, provide for the payment of compensation to the victims of violations of human rights as found by international organs. In any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee.
