

Freedom Respect Equality Dignity: Action

NGO Submission to the UN Committee on Economic, Social and Cultural Rights

Addendum: Australia



May 2009

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ABOUT THIS SUBMISSION

This Addendum provides further updated information to the NGO Report that was submitted to the United Nations Committee on Economic, Social and Cultural Rights in April 2008 on Australia's compliance with the *International Covenant on Economic, Social and Cultural Rights*.

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Article 1 — Right of Self-Determination

A. RIGHT OF SELF-DETERMINATION

A.1 Recognition of Self-Determination for Indigenous Australians

This section updates and replaces the information commencing at page 14 of the NGO Report.

1. The current Australian Government has commenced a consultation process to develop a new national Indigenous representative body. The consultation aims to design an effective body that will represent the interests of Indigenous Australians in political and policy debates and foster a strong relationship between the government and Indigenous communities.¹
2. On 17 December 2008, the Minister for Indigenous Affairs, Jenny Macklin, invited the Australian Human Rights Commission's Social Justice Commissioner, Tom Calma, to convene an independent Indigenous Steering Committee to develop and present to government a model for a new National Indigenous Representative Body.²
3. Following a three-day workshop, the Steering Committee released a summary report on 17 April 2009.³ The report found that the representative body should be self-determining and independent. Commissioner Calma said: 'There is strong support for the representative body to be primarily an advocacy body and to focus on holding government to account for its performance in programs, service delivery and policy development.'⁴ Participants in the workshop broadly planned a 20 year vision for the representative body, focusing on achieving constitutional recognition for Aboriginal and Torres Strait Islander peoples and assisting to close the gap in Aboriginal and Torres Strait Islander health status.⁵

¹ *Consultations for the proposed National Indigenous Representative Body*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), available at <http://www.fahcsia.gov.au/internet/facsinternet.nsf/indigenous/rebody.htm>.

² *Aboriginals of Australia: New Representative Body*, Unrepresented Nations and Peoples Organisation (2008), available at <http://www.unpo.org/content/view/9029/77/>.

³ Australian Human Rights Commission, 'Workshop paints broad vision for planned national representative body for Aboriginal and Torres Strait Islander peoples' (Press Release, 17 April 2009), available at http://www.humanrights.gov.au/about/media/media_releases/2009/24_09.html; Australian Human Rights Commission, 'National Indigenous workshop kicks off in Adelaide next week' (Press Release, 6 March 2009), available at http://www.humanrights.gov.au/about/media/media_releases/2009/13_09.html.

⁴ Australian Human Rights Commission, 'Workshop paints broad vision for planned national representative body for Aboriginal and Torres Strait Islander peoples' (Press Release, 17 April 2009), available at http://www.humanrights.gov.au/about/media/media_releases/2009/24_09.html.

⁵ Australian Human Rights Commission, *National Indigenous Representative Body Workshop - Summary Report* (17 April 2009), 4, available at http://www.humanrights.gov.au/social_justice/rebody/summary_report.pdf.

4. The Steering Committee will continue consultations from May 2009 to clarify issues such as the membership and structure of the body.⁶
5. The establishment of a representative and effective Indigenous body is essential for the realisation of Article 1 of the *ICESCR* by Indigenous Australians. In its very recent Concluding Observations, the Human Rights Committee recommended that Australia establish an adequately resourced national indigenous representative body to ensure that Indigenous peoples are sufficiently consulted in the decision-making process with respect to issues affecting their rights.⁷

A.2 The Stolen Generations

This section updates the information commencing at page 16 of the NGO Report.

6. In 2008, Senator Andrew Bartlett introduced the Stolen Generation Compensation Bill 2008 into the Australian Parliament. However, the Senate Standing Committee on Legal and Constitutional Affairs rejected the Bill. The Committee instead recommended the establishment of ‘a National Indigenous Healing Fund to provide health, housing, ageing, funding for funerals, and other family support services for members of the stolen generation as a matter of priority’.⁸ Such a fund would not address one of the most powerful reasons for compensating individual members of the Stolen Generations, being recognition of the wrong that was committed against those individuals by the state.
7. In August 2007, an Indigenous man from South Australia, Bruce Trevorrow, was the first person from the Stolen Generations to secure compensation through the courts. While Mr Trevorrow’s success is significant, it is of great concern that he had to resort to the court system in order to be provided with compensation and that successive Federal Governments have failed to establish a compensation fund for the people and families of the Stolen Generations. Requiring individuals to bring cases suing the government is a very resource intensive and burdensome process for those individuals. This is reflected in the Human Rights Committee’s recommendation in its recent Concluding Observations that Australia ‘adopt a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the Stolen Generations policies’.⁹

⁶ Australian Human Rights Commission, ‘Workshop paints broad vision for planned national representative body for Aboriginal and Torres Strait Islander peoples’ (Press Release, 17 April 2009), available at http://www.humanrights.gov.au/about/media/media_releases/2009/24_09.html.

⁷ Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (3 April 2009), [13].

⁸ Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Stolen Generation Compensation Bill 2008* (2008) ix.

⁹ Human Rights Committee, *Concluding Observations: Australia*, above n 7, [15].

A.3 Intervention into Northern Territory Indigenous Communities

This section updates the information commencing at page 17 of the NGO Report.

8. The Northern Territory Intervention continues to constitute a major and contentious issue in Australian politics and society. Details of the draconian Northern Territory Intervention measures are provided at paragraphs 84 to 92 of the NGO Report.
9. After one year of operation of the Northern Territory Intervention, the Australian Government established the Northern Territory Emergency Response Review Board (**Review Board**) to conduct 'an independent and transparent review of the Northern Territory Intervention'.¹⁰ On 13 October 2008, the Review Board released its report, concluding that the situation in remote Northern Territory communities and town camps remained 'sufficiently acute to be described as a national emergency and that the Northern Territory Intervention should continue'.¹¹
10. In making this conclusion, the Review Board also made three overarching recommendations:¹²
 - (a) there is a continuing need to address the unacceptably high level of disadvantage and social dislocation experienced by Indigenous Australians living in remote communities in the Northern Territory;
 - (b) there is a requirement for a relationship with Indigenous people based on genuine consultation, engagement and partnership; and
 - (c) there is a need for government actions affecting Indigenous communities to respect Australia's human rights obligations and to conform to the *Racial Discrimination Act 1975* (Cth) (**Racial Discrimination Act**).
11. In its Report, the Review Board was highly critical of some elements of the Northern Territory Intervention, referring to:
 - (a) widespread Indigenous hostility to the Australian Government's actions;¹³
 - (b) a sense of betrayal and disbelief;¹⁴ and
 - (c) incomprehension at the linkage between child welfare and some of the measures of the Northern Territory Intervention.¹⁵

¹⁰ Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *NT Emergency Response Review Board*, 6 June 2008, available at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm.

¹¹ *Report of the NTER Review Board October 2008* (20 September 2008), 10; Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Compulsory income management to continue as key NTER measure*, 23 October 2008, available at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm.

¹² *Report of the NTER Review Board October 2008*, above n 11, 12.

¹³ *Ibid*, 8.

¹⁴ *Ibid*.

¹⁵ *Ibid*, 34.

12. The Review Board commented that experiences of racial discrimination and humiliation were told with such passion and regularity that it felt compelled to advise the Minister for Indigenous Affairs during the course of the review that such widespread Indigenous hostility to the Australian Government's actions should be regarded as a matter for serious concern.¹⁶ Nonetheless, it observed definite gains and heard widespread, if qualified, community support for many Northern Territory Intervention measures.¹⁷
13. In its report, the Review Board stressed the importance of consultation at the grass roots level.¹⁸ Despite this recommendation, there are no systematic or formal mechanisms by which the Australian Government consults or engages with people who are subject to the Northern Territory Intervention to formulate policy and measures to address Indigenous disadvantage. This is particularly concerning as many of the Northern Territory Intervention measures are a backward step at a time when, as discussed above, there is no representative body for Indigenous people in Australia.
14. Despite the number of concerns expressed by the Review Board,¹⁹ the current Australian Government has also continued to maintain the application of most of the Northern Territory Intervention measures in full. Indeed, as recently as 5 March 2009, the Australian Government moved to bolster the Northern Territory Intervention measures by guaranteeing funding for three more years.²⁰
15. Given the continued operation of many aspects of the Northern Territory Intervention, there remain very significant concerns about the ongoing serious and pervasive effects that the measures are having on Indigenous communities and, in particular, their traditional culture and way and life.
16. Most recently, the Northern Territory Intervention has been the subject of criticism by both the UN Committee on the Elimination of Racial Discrimination (in response to a Request for Urgent Action, discussed in further detail under Article 2: Indigenous Peoples) and the Human Rights Committee. Both treaty bodies have called for the reinstatement of the operation of the *Racial Discrimination Act* and for a re-design of the Northern Territory Intervention measures in direct consultation with Indigenous peoples and in conformity with Australia's international human rights obligations.²¹
17. This ongoing lack of consultation with affected Indigenous communities represents serious concerns in relation to Article 1 of the *ICESCR*.

¹⁶ Ibid, 8.

¹⁷ Ibid, 34.

¹⁸ *Report of the NTER Review Board October 2008*, above n 11, 47.

¹⁹ The Review Board made a number of specific recommendations, including that income quarantining continue on a voluntary basis imposed only as a precise part of child protection measures or where specified by statute and that it be subject to independent review. See *Report of the NTER Review Board October 2008*, above n 11, 12 and 21.

²⁰ Patricia Karvelas, 'Macklin extends intervention', *The Australian*, 6 March 2009, available at www.theaustralian.news.com.au/story/0,25197,25145772-601,00.html.

²¹ See Human Rights Committee, *Concluding Observations: Australia*, above n 7, [14].

18. The Northern Territory Intervention also raises concerns in relation to Australia's obligations regarding other Covenant rights, namely:
- (a) the right to work (see Article 6: Indigenous People);
 - (b) the right to social security (see Article 9: Indigenous Australians);
 - (c) the right to family (See Article 10: Indigenous Children);
 - (d) the right to an adequate standard of living (see Article 11: Indigenous Peoples);
 - (e) the right to health (see Article 12: Indigenous Health);
 - (f) the right to education (see Articles 13 & 14: Indigenous Education); and
 - (g) cultural rights (see Article 15: P.1, P.2 and P.3).

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government immediately enter into direct, ongoing and formal consultations with affected Indigenous communities and their advocates regarding the operation and impact of the Northern Territory Intervention.

A.4 UN Declaration on the Rights of Indigenous Peoples (new section)

This is a new section.

19. On 3 April 2009, the Australian Government announced its formal support for the UN Declaration on the Rights of Indigenous Peoples. The Government's announcement represents an important acknowledgement of the rights of Indigenous Australians to self-determination and freedom from discrimination.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government be commended for its formal support for the UN Declaration on the Rights of Indigenous Peoples.

Articles 2 and 26 — Treaty Entrenchment and Non-Discrimination

B. ENTRENCHMENT OF BASIC HUMAN RIGHTS

B.1 Federal Charter of Human Rights

This section updates the information commencing at page 23 of the NGO Report.

20. Coinciding with the 60th anniversary of the adoption of the *Universal Declaration of Human Rights*, the Commonwealth Attorney-General announced a broad-ranging community consultation on whether, and if so how, human rights should be better protected in Australia. The national consultation process is being conducted by an independent Consultation Committee appointed by the Attorney-General.
21. Public submissions to the Consultation Committee are due by 15 June 2009, and the Committee has been asked to submit a report to the Australian Government by 31 August 2009 which sets out the means by which the Government can improve the protection and promotion of human rights, the costs and benefits (both social and economic) of the various options and their level of community support.²²
22. While the terms of reference for the consultation process are broad, of particular concern is the fact that they:
 - (a) explicitly rule out the option of a constitutional ‘bill of rights’ (on the grounds that the Australian Government wishes to preserve ‘parliamentary sovereignty’);
 - (b) do not make any specific reference to the question of whether — and if so how — economic, social and cultural rights should be protected; and
 - (c) do not commit the Australian Government to any legislative measures to protect human rights.²³
23. The Australian Government must ensure that all rights, including economic, social and cultural rights, are comprehensively protected in Australia’s domestic law in order to ensure its compliance with Article 2 of the *ICESCR*.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government ensure that economic, social and cultural rights are protected in Australia’s domestic law in order to ensure Australia’s compliance with Article 2 of the *ICESCR*.

²² Details about the National Human Rights Consultation are available at www.humanrightsconsultation.gov.au.

²³ National Human Rights Consultation, Terms of Reference, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference.

B.3 Optional Protocol to ICESCR

This section updates the information commencing at page 24 of the NGO Report.

24. On 10 December 2008, the United Nations adopted the Optional Protocol to the *ICESCR*. The adoption of the Optional Protocol represents an historic advance for human rights in providing an avenue for redress for victims of violations of their economic, social and cultural rights. Disappointingly, the current Australian Government did not play a positive and constructive role in the negotiation and adoption of the text of the Optional Protocol.
25. In light of the Australian Government's intention to engage more positively with international human rights bodies, and particularly in light of the lack of available remedies in Australia's domestic laws for breaches of ESC rights, adoption of the Optional Protocol would provide victims with an important avenue for redress where their ESC rights may have been breached.

B.7A Role of the Australian Human Rights Commission

This section updates the information contained in B.7 Human Rights Education at pages 28-29 of the NGO Report.

26. In 2007-08, the Australian Human Rights Commission (formerly the called the Human Rights and Equal Opportunity Commission, or 'HREOC') received 2,077 complaints under federal anti-discrimination and human rights law. The number of complaints has increased by 28 per cent compared to the average number of complaints received over the past four years and 17 per cent compared to the previous reporting year.²⁴
27. While the number of individual complaints has increased, the overall structure of dealing with issues of discrimination has not changed significantly. Individuals continue to bear the weight of bringing a complaint, along with the financial, psychological and social costs associated with this. The review into the Sex Discrimination Act discussed this issue and recommended various changes to this system.²⁵
28. As stated in the NGO report, the authority of the Australian Human Rights Commission is limited to enquiry into complaints; it cannot make enforceable determinations and there is no requirement that the Australian Government implement or even respond to its recommendations.
29. The Australian Human Rights Commission appropriation revenue in 2008-09 is \$13.55 million. This is approximately 12.5% less than the budget appropriation for 2007-08.²⁶ This is the greatest decrease in the Commission's budget since 1996 when the Commission's total

²⁴ Australian Human Rights Commission, *Annual Report, 2007-2008*, available at www.humanrights.gov.au/about/publications/annual_reports/2007_2008/chap4.html#4_3_7.

²⁵ See discussion of the Sex Discrimination Act review below in paragraph 46.

²⁶ Budget appropriation for 2007-08 was \$15,5m reduced to \$14,981m at additional estimates with the withdrawal of funding for workplace relations reform and the application of the additional 2% efficiency dividend. Human Rights and Equal Opportunity Commission, 'Submission to the Senate Legal And Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality' (1 September 2008), 217.

funding base was reduced by 40% over four years. The effect of the decrease in 1996 was that staffing across the Commission had to be reduced by approximately 60.²⁷

30. The Australian Human Rights Commission conducts policy development, education, research, submission, public advocacy and inquiry functions related to a range of human rights areas including Indigenous, race, gender, age and disability issues. As a result of the funding cuts referred to above, all units have been impacted. To accommodate the reduction in the Commission's appropriation in 2008-09, all business units have had their operating budgets reduced by 14.5%. For example, the Sex and Age Discrimination Unit has experienced a reduction in its budget in 2008-09 of 14.5%. The Unit employs five full-time equivalent permanent staff, including management and administration, to carry out policy development, education, research, submissions, public awareness and inquiry functions under both the Sex Discrimination Act and Age Discrimination Act.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government ensure that the Australian Human Rights Commission is provided with adequate funding to properly discharge its functions.

C. NON-DISCRIMINATION

C.1 Indigenous Peoples

This section updates the information commencing at page 30 of the NGO Report.

31. As referred to above under Article 1: Intervention into Northern Territory Indigenous Communities, the measures involved in the Northern Territory Intervention continue to exclude the operation of the *Racial Discrimination Act*. This raises serious concerns in relation to Article 2 of the *ICESCR*. No other anti-discrimination legislation has been suspended at any point and, given the entrenched discrimination that Indigenous peoples experience, the suspension is of serious concern.
32. In response to the Review Board's report (discussed above at paragraphs 9 to 12), the Australian Government acknowledged that the Northern Territory Intervention will not achieve robust long term outcomes if measures do not conform to the *Racial Discrimination Act*.²⁸ The Australian Government indicated its intention to revise the core measures of the Northern Territory Intervention, such as compulsory income quarantining and compulsory five year leases, so that they are either more clearly 'special measures' or non-discriminatory, in conformity with the *Racial Discrimination Act*.²⁹

²⁷ Human Rights and Equal Opportunity Commission, Annual Report (1996-97), 7.

²⁸ Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Compulsory income management to continue as key NTER measure*, 23 October 2008, available at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm.

²⁹ Ibid.

33. Despite these stated commitments by the Australian Government, the exclusion of the operation of the *Racial Discrimination Act* remains in force. Legislative amendments to bring the Northern Territory Intervention within the scope of the *Racial Discrimination Act* are said to be planned to be introduced in the September Parliamentary session in 2009. However, the nature and detail of these amendments, and whether they will be passed by the Senate (in which the Government does not have a majority), remains uncertain.³⁰
34. In light of the continued suspension of the *Racial Discrimination Act*, a group of 20 Indigenous Australians affected by the Northern Territory Intervention measures submitted a Request for Urgent Action under the *International Convention on the Elimination of All Forms of Racial Discrimination*. On 13 March 2009, the Committee on the Elimination of Racial Discrimination sent an Urgent Action letter to the Australian Government calling for the reinstatement of the *Racial Discrimination Act 1975* (Cth) and to build a new relationship with Aboriginal Australia.³¹ The Australian Government is required to report in four months' time on the progress it has made.
35. As discussed in paragraph 16 above, the Human Rights Committee also expressed its concern about the ongoing suspension of the operation of the *Racial Discrimination Act*.³²

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government immediately reinstate the operation of the *Racial Discrimination Act* in respect of all aspects of the Northern Territory Intervention and that it engage in meaningful consultation with affected Aboriginal communities.

C.1B Racial Discrimination (new section)

This is a new section relating to Article 2.

(a) Multicultural Advisory Council (new section)

36. In December 2008, the Australian Government established the Multicultural Advisory Council. The 16-member Council's term runs until 30 June 2010 during which time it will provide the Minister for Immigration and Citizenship with advice on:
- (a) social cohesion issues relating to Australia's cultural and religious diversity;
 - (b) overcoming intolerance and racism in Australia;
 - (c) communicating the social and economic benefits of Australia's cultural diversity to the broad community; and
 - (d) issues relating to the social and civic participation of migrants in Australian society.³³

³⁰ Ibid.

³¹ A copy of the Request for Urgent Action and Letter of Urgent Action from the Committee is available at <http://www.hrlrc.org.au/content/topics/equality/northern-territory-intervention-request-for-urgent-action-cerd/>.

³² See Human Rights Committee, *Concluding Observations: Australia*, above n 7, [14].

³³ Department of Immigration and Citizenship, *Stakeholder Engagement - Multicultural Advisory Council* (2008), available at www.immi.gov.au/about/stakeholder-engagement/national/advisory/amac/.

37. The establishment of the Council creates a focus on multicultural affairs and the development of a multicultural policy framework that was absent under the former Australian Government.

(b) Diverse Australia Program (new section)

38. In January 2009, following several incidents of racially motivated violence, the Australian Government introduced a grants scheme, entitled the *Diverse Australia Program*, to fund projects aimed at reducing cultural, racial and religious intolerance by promoting respect, fairness, inclusion and a sense of belonging.³⁴

39. Despite these developments, several commentators have argued that more work needs to be done to assist recently arrived migrants to integrate into the Australian community through language, culture and skills training.³⁵

(c) Recently arrived African communities (new section)

40. Despite the positive developments referred to above, concerns have recently been raised regarding the racism and violence experienced by young people in the Australian-Sudanese community. In December 2008, the Victorian Equal Opportunity and Human Rights Commission released a report on the experiences of young people in the Australian-Sudanese community in Melbourne.³⁶ The report highlights the discrimination faced by the Sudanese community and provides an insight into the ostracised nature of Sudanese and African immigrant communities due to fear, poor integration and systemic racism. Many young Sudanese immigrants continue to be victims of systemic racial discrimination and are often too scared to venture onto the streets.

41. One major concern raised in the Report is the limited access to employment opportunities of Sudanese young people who reported many experiences of discrimination in this area. Employment provides important social and economic participation in the community. Unemployment and underemployment as a result of discrimination are compromising the Sudanese community's social integration into Australian society.

42. The Commission's report makes a number of recommendations — in the areas of health, education, services, employment, accommodation, sport and recreation, and policing — that seek to develop a targeted approach to improve the situation and treatment of the Sudanese community.³⁷

³⁴ Department of Immigration and Citizenship, *Diverse Australia Program*, available at www.harmony.gov.au/aboutus.htm.

³⁵ Michael Edwards, 'Govt's Human Rights record under spotlight', ABC Online, 3 October 2008, available at www.abc.net.au/news/stories/2008/10/03/2381492.htm.

³⁶ Victorian Equal Opportunity and Human Rights Commission, *The experiences of Australian-Sudanese young people*, available at http://www.humanrightscommission.vic.gov.au/pdf/rights_of_passage.pdf.

³⁷ Ibid.

Case Study 1³⁸

- *I went for a job and was told, '(I'm) wary of employing Sudanese as they are always late.'*
- *'Oh we already have 10 Sudanese people working here,' was another reason given for not giving the young person employment.*

Case Study 2³⁹

One youth worker who approached a school to accept an Australian-Sudanese client was asked by a teacher at the school: 'Is he going to be a lot of trouble like the other Sudanese young people? I don't think we are equipped to cater for him, why don't you try another school?'

43. The ongoing experience of Sudanese and other African communities requires urgent attention and action from governments at both federal and state and territory levels in order to ensure Australia's compliance with Articles 2 and 15 of the *International Covenant on Economic, Social and Cultural Rights*, and in order that these communities are able to realise the Covenant rights on an equal basis with other groups.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government implement programs to address discrimination faced by newly arrived African communities.

C.2 Women

This section provides additional information to that commencing at page 32 of the NGO Report.

(a) OP-CEDAW (new section)

44. In November 2008, the Australian Government acceded to the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW)*. The Australian Government is to be congratulated for this significant step, which will provide Australian women with an international avenue to seek redress if they believe their rights have been violated. To date, however, no formal steps have been taken by the Australian Government to implement the mechanisms required by the OP-CEDAW.

³⁸ Ibid.

³⁹ Ibid, 44.

(b) Review of the Sex Discrimination Act 1984 (Cth) (new section)

45. The *Sex Discrimination Act 1984 (Cth)* (**Sex Discrimination Act**) fails to provide the legislative framework necessary to properly address direct or systemic discrimination or to promote substantive equality. It therefore also fails to fully implement the standards and obligations required under the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*.
46. On 12 December 2008, the Senate Legal and Constitutional Affairs Committee released a report on its review of the *Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality in Australia*. The Senate Committee's review makes 43 recommendations about how better to ensure gender equality in Australia, including recommending changes to the *Sex Discrimination Act*, the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* and the *Equal Opportunity for Women in the Workplace Act 1999 (Cth)*.
47. The review also recommended that a national public inquiry be held to examine the merits of replacing existing federal anti-discrimination laws with a single Equality Act, which would create a comprehensive regime promoting equality and addressing all grounds of discrimination.⁴⁰ Such an inquiry would provide 'an opportunity to re-invigorate all of Australia's anti-discrimination laws and place them at the vanguard of legislative schemes that promote equality'.⁴¹ The creation of federal legislation covering all grounds of discrimination was also recommended by the Human Rights Committee in its recent Concluding Observations on Australia.⁴²
48. The Australian Government is currently considering the recommendations of the Senate Committee.

⁴⁰ Senate Legal and Constitutional Affairs Committee, *Report on the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (December 2008), 43-45, 164-165.

⁴¹ *Ibid*, 165.

⁴² Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, CCPR/C/AUS/CO/5/CRP/1 (2009), 4.

Additional Proposed Recommendations for Concluding Observations

THAT the Australian Government be congratulated for signing the OP-CEDAW and encouraged to establish mechanisms to implement it.

THAT the Australian Government implement the recommendations of the Senate Legal and Constitutional Affairs Committee in relation to strengthening the *Sex Discrimination Act 1984*.

THAT, as recommended by the Senate Legal and Constitutional Affairs Committee, the Australian Government conduct a comprehensive review of all existing federal anti-discrimination legislation with a view to:

- (a) enacting an Equality Act which creates a comprehensive regime promoting equality and addressing all grounds of discrimination; and
- (b) conducting a referendum on a Constitutional amendment to include a guarantee of equality before the law.

C.3 People with Disability

This section provides additional information to that commencing at page 33 of the NGO Report.

(a) Convention on the Rights of Persons with Disabilities (new section)

- 49. In July 2008, Australia ratified the UN *Convention on the Rights of Persons with Disabilities*.⁴³ An Australian, Professor Ron McCallum, has been elected to the UN Committee on the Rights of Persons with Disabilities.
- 50. To date, Australia has not committed to signing the Optional Protocol to the Convention, which gives the Committee the power to receive complaints from individuals and groups who believe that their rights under the Convention have been breached. In December 2008, a National Interest Analysis was tabled in parliament, which recommended accession to the Optional Protocol. In March 2009 the parliamentary Joint Standing Committee on Treaties unequivocally supported the ratification of the Optional Protocol to the Convention, however the Government has not yet acted to ratify.⁴⁴

⁴³ Stephen Smith, *Australia Ratifies UN Disabilities Convention*, 18 July 2008, available at www.foreignminister.gov.au/releases/2008/fa-s080718.html.

⁴⁴ See report of the Joint Standing Committee on Treaties, *Report 99: Treaties Tabled on 3 December 2008 and 3 February 2009*, March 2009, <http://www.aph.gov.au/house/committee/jsct/3december2008/report/fullreport.pdf>.

(b) Proposed Amendments to the Disability Discrimination Act (new section)

51. The Australian Government recently introduced the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth). The Bill seeks to amend the *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**) to provide a broader definition of what amounts to discrimination on the basis of disability. For example, the Bill creates a positive duty to make 'reasonable adjustments' for people with a disability.⁴⁵
52. In December 2008, the Senate referred the Bill to the Senate Legal and Constitutional Affairs Committee for inquiry and report. The Senate Committee's report, released in March 2009, included the following important recommendations:
- (a) that the Australian Government undertake additional consultation with stakeholders and give further consideration to refining the test for direct discrimination in the *Disability Discrimination Act*, in particular:
 - (i) the removal of the 'comparator' test; and
 - (ii) amendments to the definition of discrimination to ensure better protection against both direct and indirect discrimination;
 - (b) that the Australian Government consider implementing the Productivity Commission's recommendation that the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) be amended to allow disability organisations with a demonstrated connection to the subject matter of a complaint to initiate complaints in their own right and proceed to the Federal Court or Federal Magistrates Court if required; and
 - (c) that the Australian Electoral Commission expedite the implementation of more accessible voting procedures for voters with a disability.
53. Better protection against disability discrimination is badly needed, particularly as the Australian Human Rights Commission has reported a 17 per cent rise in complaints of disability discrimination in 2007-08 compared to the average number of disability discrimination complaints received in the previous four year period.⁴⁶

(c) National Disability Strategy (new section)

54. The Australian Government has boosted funding for disability support services and is currently creating a National Disability Strategy. The strategy aims to address the barriers that are faced by Australians with disability and to promote social inclusion. Over 750 submissions have been received. The Australian Government has indicated that a draft National Disability Strategy will be released in late 2009, with the final National Disability Strategy implemented in 2010.

⁴⁵ Further discussion of the Bill is available at www.apf.gov.au/Senate/committee/legcon_ctte/disability_discrimination/info.htm.

⁴⁶ Australian Human Rights Commission, *Annual Report, 2007-2008*, available at www.humanrights.gov.au/about/publications/annual_reports/2007_2008/chap4.html#4_3_7.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government implement the recommendations of the Senate Legal and Constitutional Affairs Committee to strengthen the *Disability Discrimination Act 1992* and the *Human Rights and Equal Opportunity Commission Act 1986*.

THAT the Australian Government be congratulated for ratifying the Disability Convention and encouraged to accede to the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*.

C.6 Sexual Orientation and Gender Identity

This section updates the information commencing at page 37 of the NGO Report.

55. In November 2008, the Australian Parliament passed two pieces of legislation expanding the rights of same-sex couples in relation to financial and work-related benefits and entitlements. These amendments followed a report by the Australian Human Rights Commission in 2007 and an audit by the current Australian Government which revealed that approximately 100 laws discriminated against same-sex couples.⁴⁷ As a result of these welcome amendments, same-sex couples are now entitled to:
- (a) leave their superannuation entitlements to their partner or children upon death;⁴⁸
 - (b) receive the same government entitlements as married and opposite-sex couples and their dependent children;⁴⁹ and
 - (c) the same rights in relation to tax, social security, health care, aged care and employment as married and opposite-sex couples and their dependent children.⁵⁰
56. Despite these welcome amendments, there is still no comprehensive federal law prohibiting discrimination against same-sex couples and discrimination continues to occur in the areas of marriage and family rights. This issue is also discussed further under Article 10 in the context of family rights.

⁴⁷ Patricia Karvelas, '100 Laws Ignore Same-Sex Couples', *The Australian* (Sydney), 1 March 2008, available at www.theaustralian.news.com.au/story/0,25197,23300057-5013871,00.html.

⁴⁸ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws Superannuation) Act* (Cth) 2008.

⁴⁹ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws General Law Reform) Bill* (Cth) 2008.

⁵⁰ *Aged Care Act 1997* (Cth), *Health Insurance Act 1973* (Cth), *National Health Act 1953* (Cth), *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) and *Research Involving Human Embryos Act 2002* (Cth).

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government be congratulated for the significant changes to the protection of the rights of same-sex couples and their families.

THAT the Australian Government introduce comprehensive legislation prohibiting all forms of discrimination against same-sex attracted people and their families, especially in the areas of marriage and family rights.

C.7 Age Discrimination

This section updates the information commencing at page 38 of the NGO Report.

57. As discussed in paragraph 51 above, the Australian Government recently introduced the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth). This Bill seeks to remove the ‘dominant reason’ test from the Age Discrimination Act 2004 (Cth). As a result, conduct that unreasonably discriminates against a person based on their age will be unlawful even if there are other non-discriminatory reasons for the conduct.

C.7A Asylum Seekers (new section)

This is a new section providing information on asylum seekers in relation to Article 2.

58. The treatment of asylum seekers in Australia raises concerns about discrimination against persons on the basis of their national origin and their status as a refugee.

(a) Changes to Immigration Detention Policy

59. In July 2008, the current Australian Government announced proposed reforms to Australia’s immigration policy. The proposed reforms involved a statement by the Minister for Immigration and Citizenship of ‘seven key immigration values’:⁵¹

- (a) Mandatory detention is an essential component of strong border control.
- (b) To support the integrity of Australia’s immigration program, three groups will be subject to mandatory detention:
 - (i) all unauthorised arrivals, for management of health, identity and security risks to the community;
 - (ii) unlawful non-citizens who present unacceptable risks to the community; and
 - (iii) unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
- (c) Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.

⁵¹ Senator Chris Evans, ‘New Directions in Detention – Restoring Integrity to Australia’s Immigration System’ (Speech delivered at the Australia National University, Canberra, 29 July 2008).

- (d) Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
 - (e) Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
 - (f) People in detention will be treated fairly and reasonably within the law.
 - (g) Conditions of detention will ensure the inherent dignity of the human person.
60. Although representing considerable and welcome improvements, the proposed reforms to Australia's immigration detention regime have not been legislatively incorporated into the Migration Act or its regulations. Further, the Australian Government has signalled its intention to maintain a policy of mandatory detention of all unauthorised arrivals 'for management of health, identity and security risks to the community'.
61. Therefore, Australia's immigration law, policy and practice continue to raise serious concerns in relation to Article 2 of the *ICESCR*. Even supposing the changes are implemented, 'unauthorised arrivals' are still detained:
- (a) for health checks, to which authorised arrivals are not subject, which is discriminatory and arguably a disproportionate limitation;
 - (b) if they are an 'unacceptable risk to the community', an undefined and potentially over-broad criterion; and
 - (c) for an indeterminate period, with limited access to effective judicial review.
62. In June 2008, there were 377 people in immigration detention, including 302 in immigration detention centres.⁵² In September 2008, the number of immigration detainees had decreased to 281 people, 198 of whom were in immigration detention centres.⁵³
63. The conditions of Australia's immigration detention facilities have been the subject of both domestic and international criticism. Domestically, the Australian Human Rights Commission has expressed significant concerns about:
- (a) the incidence and impact of 'prolonged and indeterminate detention', particularly given the absence of independent review of the need to detain;
 - (b) detainees' lack of access to legal advice and information;
 - (c) lack of educational and recreational opportunities in detention;
 - (d) overcrowding; and
 - (e) children in detention, and the separation of families.⁵⁴

⁵² Detention and Offshore Services Division, DIAC, *Immigration Detention Statistics Summary* (20 June 2008).

⁵³ Detention and Offshore Services Division, DIAC, *Immigration Detention Statistics Summary* (5 September 2008).

⁵⁴ Human Rights and Equal Opportunity Commission, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities 2007* (2007), available at http://www.humanrights.gov.au/human_rights/immigration/ldc2007.html.

64. On 13 January 2009, Human Rights Commissioner Graeme Innes ‘called on the government to translate its “new directions” for Australia’s immigration detention system into policy, practice and legislative change as soon as possible’.⁵⁵ This call to the government is backed up by the Australian Human Rights Commission’s 2008 *Immigration Detention Report*.⁵⁶ The report found that: ‘children [are still] being held in detention facilities, people [are] being detained for prolonged and indefinite periods and dilapidated detention centres [are] being used for accommodation’.⁵⁷
65. Abolition of Australia’s policy of mandatory detention of unauthorised arrivals is necessary to ensure compliance with Australia’s obligations under Article 2 of the *ICESCR*, as well as Articles 11 and 12.

(b) Visa Processing on Christmas Island

66. Another concern in relation to Australia’s policy of mandatory detention is the re-opening in December 2008 of immigration detention centres on Christmas Island.⁵⁸
67. As explained above, the *Migration Act* provides that asylum seekers who arrive ‘unlawfully’ in Australia must be detained. Certain unauthorised arrivals are not considered to have entered Australia as a result of legislation passed by the previous Government to excise certain places from the legal notion of ‘Australia’. These arrivals are taken to Christmas Island.
68. Christmas Island is situated 2,600 kilometres off the coast of Perth, Western Australia and is extremely remote and inaccessible. Christmas Island contains several places of detention, including a new detention centre.
69. The Australian Human Rights Commission’s 2008 *Immigration Detention Report* stated that the new detention centre on Christmas Island ‘looks and feels like a high-security prison’ and expressed
- serious concerns about the immigration detention facilities on Christmas Island, particularly the new detention centre. It is a harsh facility with excessive levels of security.⁵⁹
70. Unauthorised arrivals who, as a result of the excision legislation, never entered Australia, have their asylum claims processed under a distinct system to asylum seekers on the mainland. While their claims are determined under a refugee determination process consistent with UNHCR guidelines, they do not have access to the same review and appeal rights available to asylum seekers on the mainland applying for protection under Australian refugee law.

⁵⁵ Australian Human Rights Commission, ‘New report highlights ongoing problems in immigration detention’ (Press release, 13 January 2009).

⁵⁶ Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia’s immigration detention facilities* (2008), available at http://www.humanrights.gov.au/human_rights/immigration/idc2008.html.

⁵⁷ Australian Human Rights Commission, ‘New report highlights ongoing problems in immigration detention’ (Press release, 13 January 2009).

⁵⁸ Paul Maley, ‘John Howard’s detention centre to open,’ *The Australian*, December 2008 available at www.theaustralian.news.com.au/story/0,25197,24821584-601,00.html.

⁵⁹ Available at http://www.hreoc.gov.au/human_rights/immigration/idc2008.html.

71. The report found that, regardless of what the detention facilities are like, Christmas Island is not an appropriate location to hold people in immigration detention or to process applications for asylum. Instead, all unauthorised arrivals who make claims for asylum should have those claims assessed through the refugee status determination process on the Australian mainland.

(c) Services Provided to Asylum Seekers in the Community

72. The Australian Government has made some important reforms to improve the services provided to persons seeking asylum. On 9 August 2008, the Australian Government abolished temporary protection visas for refugees.⁶⁰ People engaging the protection obligations of Australia are now placed on permanent protection visas, which provide immediate access to social security allowances and health care benefits. Provided they meet health, security and character requirements, refugees already on temporary protection visas are now placed on Resolution of Status Visas. These provide permanent protection and the same range of benefits as the permanent protection visas.
73. The abolition of temporary protection visas is to be welcomed, however reforms are needed to ensure that *all* asylum seekers receive adequate nutrition and healthcare while their immigration status is waiting to be resolved. Many asylum seekers still cannot access work, welfare benefits or healthcare if they are on Bridging Visas.⁶¹
74. Asylum seekers may be granted a Bridging Visa while their application for a Protection Visa is being processed by the Department of Immigration and Citizenship; while their application is awaiting appeal to the Refugee Appeals Tribunal; or if they have made a request to the Minister to be granted a visa. A range of conditions and restrictions can be imposed on a bridging visa, including restrictions on work rights and health care entitlements. Bridging Visas are not substantive visas and these visa holders cannot access social security.
75. The Australian Government has indicated that it plans to reform the access to work, social security and healthcare under the bridging visa scheme. To date, there have been no concrete changes to eligibility for these benefits. The Australian Government must ensure that all asylum seekers released from immigration detention and living in the community have work, social security and health rights.
76. In its recent Concluding Observations, the Human Rights Committee expressed serious concern in relation to Australia's immigration laws, policies and practices. Its recommendations included that Australia:⁶²
- (a) consider abolishing the remaining elements of its mandatory immigration detention policy;

⁶⁰ Department of Immigration and Citizenship, 'Fact Sheet 68 - Abolition of Temporary Protection visas (TPVs) and Temporary Humanitarian visa (THVs), and the Resolution of Status (subclass 851) visa' (2008), available at http://www.immi.gov.au/media/fact-sheets/68tpv_further.htm; Senator Evans, 'Budget 2008-09 – Rudd Government scraps Temporary Protection Visas' (Press Release, 31 May 2008), available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce05-buget-08.htm>.

⁶¹ Department of Immigration and Citizenship, 'Fact Sheet 62 – Assistance for Asylum Seekers in Australia' (2008), available at <http://www.immi.gov.au/media/fact-sheets/62assistance.htm>.

⁶² Human Rights Committee, *Concluding Observations: Australia*, above n 7, [22].

- (b) implement the recommendations of the Human Rights Commission made in its Immigration Detention Report of 2008; and
 - (c) consider closing down the Christmas Island detention centre.
77. Further updates on the impact of Australia's policy in relation to asylum seekers is discussed under the right to work (Article 6: Asylum Seekers), the right to family (Article 10: Immigration), the right to an adequate standard of living (Article 11: Asylum Seekers) and the right to health (Article 12: Asylum Seekers).

Additional Proposed Recommendations for Concluding Observations

THAT the Australian Government be congratulated for the steps taken to improve the human rights of asylum seekers, including the closure of some detention centres and the ending of Temporary Protection Visas.

THAT the Australian Government immediately end the policy of mandatory detention.

THAT the Australian Government recognise those parts of Australian territory that have been excised for the purpose of asylum seekers making applications of asylum.

THAT the Australian Government ensure that all asylum seekers, irrespective their visa status (including while awaiting for the processing of their application and any reviews) be eligible to access all basic services including social security and medical services.

C.8 Exemptions to Discrimination Legislation

This section updates the information commencing at page 38 of the NGO Report.

78. In addition to the judicially sanctioned exemptions from federal, state and territory anti-discrimination laws identified at paragraph 147 of the NGO Report, there are also many legislated exemptions from anti-discrimination laws within those very laws. For example, the *Sex Discrimination Act 1992* (Cth) has numerous specific exemptions from its operation, including an exemption enabling voluntary bodies to discriminate against a person on the ground of their sex, marital status or pregnancy in connection with membership or the provision of services to members of the voluntary body.⁶³ Such exemptions perpetuate systemic discrimination, for example by condoning the operation of elite male-only business clubs.
79. The scope of Australian federal, state and territory anti-discrimination laws is also generally very restricted. Such laws typically operate only in relation to certain 'public' fields, such as work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of government laws and programs. As a result of the limited scope of anti-discrimination laws in Australia, the right to non-discrimination is not fully protected.

⁶³ *Sex Discrimination Act 1992* (Cth), section 39.

Article 3 — Equal Rights of Men and Women

D. EQUAL RIGHTS OF MEN AND WOMEN

D.1 Violence against Women

This section updates the information commencing at page 41 of the NGO Report.

80. In 2008, the Australian Government established the National Council to Reduce Violence Against Women and Children ('National Council'). The purpose of the National Council is to assist with the development and implementation of a *National Plan to Reduce Violence Against Women and Children*, which aims to reduce domestic violence and sexual assault.
81. On 29 April 2009, the National Council released a major report *Time for Action*.⁶⁴ The Australian Government has agreed to immediately progress 18 of the 20 priority recommendations made by the National Council in *Time for Action*. These recommendations include:
- (a) investing:
 - (i) \$12.5 million for a new national telephone and online crisis service;
 - (ii) \$9 million to improve the quality and uptake of respectful relationships programs for school age young people;
 - (iii) \$17 million for a public information campaign focused on changing attitudes and behaviours that contribute to violence; and
 - (iv) \$3 million to support research on perpetrator treatment and nationally consistent laws;
 - (b) asking the Australian Law Reform Commission to work with State and Territory law reform commissions to examine the inter-relationship of laws that relate to the safety of women and their children;
 - (c) establishing the Violence Against Women Advisory Group to advise on the National Plan to Reduce Violence against Women; and
 - (d) working with the States and Territories to enforce domestic and family violence orders across State borders through national registration, improve the uptake of domestic violence coronial recommendations, and identify the best methods to investigate and prosecute sexual assault cases.

⁶⁴ Prime Minister, Attorney General and Minister for Women, *Time for Action to Reduce Violence Against Women and Children*, (media release), 29 April 2009.

82. The Australian Government has also recognised the links between homelessness and family violence and has committed to a ‘comprehensive’ approach to address homelessness.⁶⁵ In response, the Australian Government has also announced a \$6.4 billion investment to build at least 20,000 new social housing dwellings as part of the Nation Building Economic Stimulus Plan.
83. The Government is to be commended on its efforts in this area and its commitment to promptly action the majority of the priority recommendations made by the National Council in *Time for Action*.
84. However, it is important that Government implement the remaining recommendations and ensure that the National Plan to Reduce Violence against Women:
- (a) operates within a human rights framework;
 - (b) is based on international best practice;
 - (c) provides an integrated approach that includes a variety of sectors, government departments and ministerial portfolios;
 - (d) includes quantifiable targets and assign responsibilities;
 - (e) supports a client-focused approach to service provision;
 - (f) addresses and resource service provision in the areas of housing, health, access to support services, education and the reduction of poverty, in addition to policing and legal services, which has been the focus of funding to date;
 - (g) involves consultation with Indigenous women and services, in rural and remote as well as metropolitan areas;
 - (h) provides for better resourcing of, and improved access to, legal and other services for Indigenous women; and
 - (i) prioritises establishing a domestic violence death review process.
85. In its recent Concluding Observations on Australia, the Human Rights Committee welcomed the establishment of the National Council but recommended that the Australian Government promptly implement its National Plan of Action to Reduce Violence against Women and their Children, as well as the recommendations of the 2008 Family Violence and Homeless report.⁶⁶

D.3 Outworkers (or ‘Homeworkers’)

This section updates the information commencing at page 43 of the NGO Report.

86. Outworkers will be afforded greater protection as a result of recent positive legislative change. The *Fair Work Act 2009* (Cth) (**Fair Work Act**), which is discussed in further detail below in relation to Article 6 – Right to Work, contains special provisions for dealing with outworkers.

⁶⁵ Australian Government, *Homelessness: A New Approach* (2008) available at [http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/new_approach/\\$File/homelessness_a_new_approach.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/new_approach/$File/homelessness_a_new_approach.pdf).

⁶⁶ Human Rights Committee, *Concluding Observations: Australia*, above n 7, [7] and [17].

87. Under the Fair Work Act permit holders will have special entry rights in relation to the investigation of breaches relating to outworkers. Permit holders will not be required to 'reasonably suspect a breach' or to give 24 hours notice to occupiers in order to have right of entry.⁶⁷ Further, the new legislation will allow a permit holder from a union that is entitled to represent outworkers to enter premises, regardless of whether a union member is present.⁶⁸ These changes reflect the special circumstances and vulnerability of outworkers.
88. Outworkers will also be covered by the modern Textile, Clothing and Footwear Award,⁶⁹ compliance with which can be monitored by both Fair Work Australia and the relevant unions. We commend the Government's provisions in the Fair Work Act 2009, offering greater protection for outworkers.

D.4 Representation of Women (new section)

This is a new section relating to Article 3.

89. Women are significantly under-represented at managerial levels in business, reflecting a lack of family-friendly working policies and conditions, such as paid maternity leave (discussed in further detail under Article 10: Maternity Leave and Child Care). In 2006, women held just:
- (a) 12 per cent of executive manager positions;⁷⁰
 - (b) 129 of 1,487 company board directorships (9 per cent);⁷¹ and
 - (c) six of the Chief Executive Officer positions with the Australian Stock Exchange's top 200 companies (3 per cent).⁷²
90. Women continue to earn much less than their male counterparts, with an average pay gap of over 16 per cent.⁷³ A 2008 report by the Equal Opportunity in the Workplace Agency analysed the pay gap in top earning positions in the Australian Stock Exchange's top 200 companies.⁷⁴ The report found that the overall median pay for women was only 58% of the overall median pay for men.⁷⁵

⁶⁷ Ibid, 128-9.

⁶⁸ Senate Hansard, 19 March 2009, 128, available at: www.aph.gov.au/hansard/senate/dailys/ds190309.pdf.

⁶⁹ Ibid, 129.

⁷⁰ Equal Opportunity for Women in the Workplace Agency, Australian Government, *2006 EOWA Census of Women in Leadership* (2006), 5.

⁷¹ Ibid 24.

⁷² Ibid 17.

⁷³ Department of Families, Housing, Community Services and Indigenous Affairs, 'Pay Equity' (2009), available at <http://www.fahcsia.gov.au/sa/women/progserv/economic/pages/payequity.aspx>.

⁷⁴ Equal Opportunity for Women in the Workplace Agency, Australian Government, *Gender Income Distribution of Top Earners in ASX200 Companies: 2006 EOWA Census of Women in Leadership* (2008).

⁷⁵ Ibid, 9.

D.5 Sexual Harassment in the Workplace (new section)

This is a new section that relates to Article 3.

91. A recent report by the Australian Human Rights Commission into the equality of women in the workplace has found that one in five women are subject to sexual harassment in the workplace.⁷⁶ Sex Discrimination Commissioner Elizabeth Broderick says the Commission's research reveals 'a significant lack of understanding, among both women and men, about what behaviours constitute sexual harassment'. The report, entitled *Sexual Harassment: Serious Business*, contains a range of recommendations aimed at:
- (a) the prevention, reporting and monitoring of sexual harassment;
 - (b) better legal protection from sexual harassment; and
 - (c) better support for victims of sexual harassment.
92. The prevention of sexual harassment is crucial to protect the equal rights of women.

Additional Proposed Recommendations for Concluding Observations

THAT the Australian Government be commended for the introduction of the *Fair Work Act 2009* and for new measures to protect Outworkers.

THAT all Australian Governments and other relevant public and private authorities fully implement the recommendations contained in the October 2008 report of the Australian Human Rights Commission, *Sexual Harassment: Serious Business*.

⁷⁶ Australian Human Rights Commission, *Sexual Harassment: Serious Business* (October 2008) available at www.humanrights.gov.au/sexualharassment/serious_business/index.html.

Article 6 — Right to Work

E. RIGHT TO WORK

E.2 'Forward with Fairness' – the *Fair Work Act 2009* (Cth) and Fair Work Australia

This section updates the information commencing at page 48 of the NGO Report.

93. On 20 March 2009, the Australian Parliament passed the *Fair Work Act 2009* (Cth) (**Fair Work Act**). The Fair Work Act is a comprehensive reworking of the *Workplace Relations Act 1996* (Cth) and seeks to dismantle the 'Work Choices' legislation that was introduced by the former Australian Government (see page 47 of the NGO Report for further information about Work Choices).
94. The Fair Work Act introduces new national employment standards, modern awards, improved unfair dismissal laws, good faith bargaining rules and an emphasis on collective bargaining. Changes to these specific areas are discussed in further detail below in relation to Article 7: Right to Just and Favourable Conditions of Work and Article 8: Freedom of Association and Right to Strike.
95. Under the Fair Work Act, there will be no new individual statutory agreements, such as Australian Workplace Agreements (**AWAs**). As indicated in the Australian Government's response to the Committee's List of Issues, the increased use of AWAs resulted in a reduction of employee entitlements.⁷⁷ The Fair Work Act is a positive shift away from individualised agreement-making towards collective agreement-making.
96. The Australian Industrial Relations Commission will be replaced by a new 'one stop shop' to be called Fair Work Australia. However, Fair Work Australia will not have as broad powers as the Australian Industrial Relations Commission did prior to Work Choices. For instance, it will only be able to make new awards in certain circumstances and the subject matter which awards may cover will be restricted to building on 10 legislated national employment standards and 10 further minimum employment standards. The Australian Industrial Relations Commission is currently in the process of modernising awards, to ensure that they are more streamlined and comply with these requirements.
97. The current Australian Government is to be commended for its commitment to reforming Work Choices and establishing a new industrial relations system in which individual statutory contracts are phased out and unfair dismissal rights and minimum standards of employment are strengthened.⁷⁸ However, it is concerning that the proposed new system will limit the realisation of worker rights under Article 7: Right to Just and Favourable Conditions of Work and Article 8: Freedom of Association and Right to Strike, as discussed in detail below.

⁷⁷ *Replies by the Government of Australia to the List of Issues* (E/C.12/AUS/Q/4), 11 February 2009, 61 at [311].

⁷⁸ See Australian Labor Party, *Forward with Fairness: Labor's plan for fairer and more productive Australian Workplaces* (April 2007).

E.5 Indigenous People

This section updates the information commencing at page 51 of the NGO Report.

Community Development Employment Projects

98. The current Australian Government has announced that Community Development Employment Projects (**CDEP**) program will cease in areas with established economies from 1 July 2009.⁷⁹ A reformed CDEP program will continue to operate in communities where there are limited economic opportunities.⁸⁰ The government is encouraging CDEP participants to find paid jobs through the Indigenous Employment Program and the new Employment Service providers, even if they have to travel further from their communities to work.⁸¹ Indigenous Affairs Minister Jenny Macklin said of the changes: 'We've massively expanded the Indigenous Employment Program ... that is all about making sure we get people work ready, that we get people not having to rely on CDEP wages'.⁸²
99. Opponents of the changes to CDEP say that it will remove Aboriginal people from their land and in doing so will destroy their way of life.⁸³ Some Aboriginal advocates have expressed concerns that the government's 'one scheme fits all' approach does not take into account culturally different ideas of work. The CDEP Scheme is said to have been particularly effective in communities who have only relatively recently engaged in western-style work, as it taught the ideas of working for a living, punctuality and responsibility.⁸⁴ At least one Indigenous council is concerned that there will not be enough jobs available to employ former CDEP participants.⁸⁵ Approximately 3 000 CDEP positions have been dissolved to date.⁸⁶

⁷⁹ Department of Families, Housing, Community Services and Indigenous Affairs, 'Community Development Employment Projects (CDEP)' (2009), available at http://www.facsia.gov.au/internet/facsinternet.nsf/indigenous/programs-cdep_intro.htm.

⁸⁰ Department of Families, Housing, Community Services and Indigenous Affairs, 'Community Development Employment Projects (CDEP)' (2009), available at http://www.facsia.gov.au/internet/facsinternet.nsf/indigenous/programs-cdep_intro.htm.

⁸¹ Meg Purtell, 'Aboriginal council battles govt over CDEP decision', *ABCNews* (14 April 2009), available at <http://www.abc.net.au/news/stories/2009/04/14/2542852.htm>; The Hon Jenny Macklin, 'Improving Indigenous employment services in NT' (Press Release, 19 March 2009), available at http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/improving_indigenous_employment_19mar09.htm; Department of Families, Housing, Community Services and Indigenous Affairs, 'Community Development Employment Projects (CDEP)' (2009), available at http://www.facsia.gov.au/internet/facsinternet.nsf/indigenous/programs-cdep_intro.htm.

⁸² Meg Purtell, 'Aboriginal council battles govt over CDEP decision', *ABCNews* (14 April 2009), available at <http://www.abc.net.au/news/stories/2009/04/14/2542852.htm>.

⁸³ See report in ABC Radio National's *Breakfast* programme, 21 April 2009 <http://www.abc.net.au/rn/breakfast/stories/2009/2548148.htm>.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ 'CDEP reforms to be introduced as quickly as possible: Macklin', *ABCNews* (7 March 2008), available at <http://www.abc.net.au/news/stories/2008/03/07/2183090.htm>.

E.6 Asylum Seekers

This section updates the information at page 52 of the NGO Report.

100. As stated in page 52 of the NGO Report and at section C.7A above, asylum seekers on Bridging Visas may have their right to work restricted as a condition of the visa. If they are prohibited from working under the terms of a bridging visa, the asylum seeker will also be unable to do voluntary work or to study (save in proven cases of severe financial hardship, where a bridging visa holder may seek permission to work).⁸⁷ These restrictions on their rights have detrimental impacts on the standard of living, health and well-being of asylum seekers in the community.
101. The Australian Government has indicated that it will reform the policy in this area, but to date it has not done so. The restriction on the right to work raises serious concerns about the work rights of asylum seekers on Bridging Visas.

E.7 Migrants

This section updates the information at page 53 of the NGO Report.

102. The Temporary Business (Long Stay) — Standard Business Sponsorship 457 Visa (**457 visa**) regime in Australia allows employers to sponsor overseas workers to work in Australia for a period of between three months and four years.
103. The Australian Council of Trade Unions and many community groups have repeatedly raised concerns over the failure of the former Australian Government to adequately protect workers on 457 visas from exploitation, including through forced or indentured labour.⁸⁸ The United States Department of State has also found that Australia should devote more resources to the issue of labour trafficking, particularly in relation to the 457 visa regime.⁸⁹
104. The exploitation of migrant workers through forced labour under the 457 visa regime raises concerns under Article 6 of the *ICESCR*.
105. The current Australian Government has announced a broad reform agenda for the 457 Visa program in 2008.⁹⁰ While the suggested reforms, if adopted, will enhance monitoring and investigative powers, it remains to be seen whether these reforms will be effective in improving the working conditions of 457 visa holders.

⁸⁷ Australian Human Rights Commission, 'Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights', Australian Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights, 17 April 2009, 16.

⁸⁸ See Submissions to Joint Standing Committee on Migration, Inquiry into Temporary Business Visas, Parliament of Australia, 9 February 2007 and 2 February 2007 respectively (Australian Council of Trade Union, and Uniting Church of Australia). Both submissions are available at <http://www.aph.gov.au/house/committee/mig/457visas/subs.htm>.

⁸⁹ United States Department of State, *Trafficking in Persons Report 2007*, p 57.

⁹⁰ Senator Chris Evans, 'New laws to protect overseas workers' (Press Release, 24 September 2008).

Case Study

A worker was brought to Australia on a 457 visa by an employer who owned four restaurants. The worker arrived in Australia with none of his own money, virtually no English language skills and no appreciation of his legal entitlements. During his stay in Australia, the worker was dependent upon his employer for food, money, accommodation and transportation. He was never shown a work roster and would simply be picked up from home and driven to successive restaurants to work. He worked at least 14 hours a day, seven days a week for 40 days straight. He received no wages for the seven weeks he worked and was told by his employer that he would not receive wages for a year, as his employer had paid for his airplane ticket to Australia.⁹¹

E.8 People with Disability (new section)

This is a new section that relates to Article 6.

106. The Australian Government has promised to develop a National Mental Health and Disability Employment Strategy. In December 2008, it released a guide on how it will develop and implement the strategy. The strategy promises to improve access for people with a disability to education, support and flexible arrangements for work. The Australian Government has promised to consult widely to ensure that other necessary measures are implemented.⁹²

F. FREEDOM FROM FORCED WORK

F.1 Trafficking in Human Beings

This section updates the information commencing at page 54 of the NGO Report.

107. The Australian Government has established a roundtable to discuss Australia's sex slave trade. The Australian Sex Discrimination Commissioner has commended the roundtable as an opportunity to move from an emphasis on prosecuting offenders to solving the causes of sex slavery. The Commissioner highlights the need to reform the Australian visa system to ensure the safe passage of vulnerable persons into Australia.⁹³
108. In its recent Concluding Observations, the Human Rights Committee recommended that Australia 'strengthen its measures to prevent and eradicate trafficking in human beings, including by adopting a comprehensive strategy, and provide equal assistance and protection to all victims identified regardless of their participation or otherwise in criminal proceedings against perpetrators'.⁹⁴

⁹¹ *Fryer v Yoga Tandoori House Pty Limited* [2008] FMCA 288 (Unreported, Federal Magistrates Court of Australia, Cameron FM, 13 March 2008).

⁹² Australian Government media release on boosting employment for people with a disability, 22 December 2008: http://www.deewr.gov.au/Ministers/OConnor/Media/Releases/Pages/Article_081222_101803.aspx.

⁹³ Human Rights Commission, 'Slavery in the 21st Century: A Human Rights Challenge,' 16 October 2008: http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2008/20081014_slavery.html#fnB10

⁹⁴ Human Rights Committee, *Concluding Observations: Australia*, above n 7, [22].

Article 7 — Right to Just and Favourable Conditions of Work

G RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK

G.1 Fair and Equal Remuneration

This section updates the information commencing at page 61 of the NGO Report.

109. The Fair Work Act establishes 'Fair Work Australia' as the new industrial tribunal replacing the Australian Industrial Relations Commission and the Australian Fair Pay Commission. Fair Work Australia will be responsible for reviewing minimum wages. While the existing Australian Fair Pay Commission must focus on overall economic prosperity, employment and competitiveness, Fair Work Australia must also have regard to the following social factors when setting minimum wages:
- (a) promoting social inclusion through increased workforce participation;
 - (b) relative living standards and the needs of the low paid;
 - (c) the principle of equal remuneration for work of equal or comparable value; and
 - (d) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.
110. The shift of focus from purely economic factors to both social and economic factors is a welcome change from the situation under Work Choices.

G.2 Fair and Equal Conditions

This section updates the information commencing at page 62 and 65 of the NGO Report.

111. The Fair Work Act introduces a range of measures which recognise that not everyone is on a level playing field when it comes to negotiating employment conditions. For example:
- (a) Fair Work Australia will have the power to compel parties to bargain for industrial agreements in good faith. Fair Work Australia will be able to impose fines for breaches of good faith bargaining and, where there is a serious or persistent breach, Fair Work Australia may arbitrate the bargaining dispute.
 - (b) Fair Work Australia will also be able to assist low paid workers with minimal bargaining power to make agreements with multiple employers through compulsory conferences and good faith bargaining orders. Such workers include young people, newly arrived migrants, and casual or part-time employees. As a last resort, Fair Work Australia will be able to arbitrate bargaining claims for the low paid.
 - (c) Enterprise bargaining agreements must satisfy the 'better off overall test', which requires that each employee covered by the agreement is better off overall in comparison to the relevant award and that the agreement does not contravene the National Employment Standards.
 - (d) The Fair Work Act introduces new modern awards which will begin on 1 January 2010.

112. In addition, the Fair Work Act introduces ten National Employment Standards which provide minimum standards of employment relating to, among other things, maximum weekly hours of work, the ability of parents to request flexible working arrangements, redundancy entitlements and leave (including personal, annual, long service and unpaid parental leave).
113. However, the following shortcomings in the Fair Work Act will fail to fully protect the right to fair and equal conditions of employment:
- (a) One of the National Employment Standards, the right of parents to request flexible working arrangements, lacks any enforcement mechanism. Further, this 'right' is only available to parents of pre-school aged children and children with a disability, and only then if the parent has 12 months' service with their employer. As a result, many parents are excluded from the limited protection that is provided.
 - (b) The Fair Work Act does not improve on the maximum ordinary hours test contained in Work Choices, which is outlined in paragraphs 217 and 218 of the NGO report in relation to G.5 – Working Hours. Under the Fair Work Act, employers may still require their employees to work reasonable additional hours.
 - (c) The Fair Work Act imposes significant limitations on the award-making powers of Fair Work Australia, including restricting the allowable subject matters of awards and limiting the making of new awards.
 - (d) Workers earning over \$100,000 will be excluded from award protection.

G.3 Fair and Equal Remuneration and Conditions for Women

This section updates the information commencing at page 63 of the NGO Report.

114. In June 2008, the Australian Government asked the Committee on Employment and Workplace Relations to inquire into and report on pay equity and associated issues related to increasing female participation in the workforce. While the inquiry is still in its consultation stage, it is a welcome development on the issue of fair and equal remuneration and conditions for women.
115. The Fair Work Act also includes new equal remuneration provisions that allow Fair Work Australia to ensure that there will be equal remuneration for men and women workers for work of equal or comparative value.⁹⁵
116. However, there is clearly still a significant difference in the equality of remuneration between men and women in Australia. In August 2008, Australian Bureau of Statistics data showed that women working full time were earning 83.3% in the male dollar, equating to a 16% pay gap.⁹⁶ (See also Article 3: Representation of Women above regarding the pay inequality between men and women.)

⁹⁵ Section 300.

⁹⁶ See report in Australian Human Rights Commission, 'Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights', Australian Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights, 17 April 2009, 33.

G.4 Ensuring Job Security

This section updates the information commencing at page 64 of the NGO Report.

117. The unfair dismissal provisions in the Fair Work Act improve on the very poor protection afforded to workers under Work Choices, but still fail to fully protect the right to just and favourable conditions at work. Under the Fair Work Act, employees of businesses both small and large will have access to protection against unfair dismissal. However, employees will only be eligible for protection if they earn below \$100,000 and have been employed for at least:
- (a) 12 months, if their employer has fewer than 15 employees; or
 - (b) 6 months, if their employer has 15 or more employees.
118. The time limit in which an employee may make an unfair dismissal application has been increased from the proposed 7 days after termination of employment to 14 days.
119. The Fair Work Act enables the Government to implement a Small Business Fair Dismissal Code (**Code**) which will apply to small businesses with fewer than 15 employees. If a small business employer follows the Code then the dismissal will not be unfair.⁹⁷ Of particular concern is that the current draft Code removes procedural fairness and scrutiny of dismissals for poor performance or serious misconduct.⁹⁸ For example, under the draft Code a summary dismissal will be fair if the employer has reasonable grounds to believe that the employee was guilty of theft and reports the allegation to the police. As the Senate Committee on Education, Employment and Workplace Relations stated in its report on the Fair Work Bill, 'by implication, a dismissal cannot be challenged in such a case, even if the allegation turns out to be unfounded'.⁹⁹
120. While the Fair Work Act improves on the situation under Work Choices, these restrictions may cause significant disadvantage to vulnerable employees and their realisation of their work rights under the *ICESCR*.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government ensure equal protection to employees against unfair dismissal, regardless of the size of their employer.

⁹⁷ *Replies by the Government of Australia to the List of Issues (E/C.12/AUS/Q/4)*, 11 February 2009, 60 at [306]. See also Department of Education, Employment and Workplace Relations, *A simple, fair dismissal system for small business*, available at: http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/WRfactsheet_09.pdf.

⁹⁸ *Ibid.* See also the Senate Standing Committee on Education, Employment and Workplace Relations, *Fair Work Bill 2008*, February 2008, available at: http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work/report/report.pdf, 72-74.

⁹⁹ Senate Standing Committee on Education, Employment and Workplace Relations, *Fair Work Bill 2008*, February 2008, available at: http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work/report/report.pdf, 72.

Article 8 — Freedom of Association and Right to Strike

H. FREEDOM OF ASSOCIATION

This section updates the information commencing at page 67 of the NGO Report.

121. As discussed in relation to Article 7, the Fair Work Act contains significant changes to Australia's industrial relations system, with collective bargaining and the expansion of unions' rights of entry at the heart of the proposed amendments. Fair Work Australia will facilitate and approve collective bargaining agreements and deal with workplace disputes. Importantly, the Fair Work Act enables Fair Work Australia to order an employer to take part in collective bargaining if it finds that a majority of employees want to bargain collectively.
122. The Fair Work Act also expands the right of permit holders (usually union officials) to enter workplaces to investigate suspected contraventions of industrial legislation and instruments, and to hold discussions with certain employees. Permit holders can now hold discussions with employees at any workplace that has employees whose industrial interests the permit holder's union can represent. This improves the situation under Work Choices, whereby unions could only enter a workplace to hold discussions with employees if there is an industrial award or agreement in place which is binding on the union.
123. The inspection of non-union member records by permit-holders is still restricted. However, unions can apply to Fair Work Australia for access to non-member records or documents relevant to a suspected breach.

Limitations on Freedom of Association under the Fair Work Act

124. However, the Fair Work Act still limits freedom of association by:
 - (a) limiting the content of agreements to 'permitted matters', which in turn are restricted to 'matters pertaining to the employment relationship', thereby preventing employers and employees from negotiating the engagement of contractors and labour hire workers as well as other matters of concern;
 - (b) failing to ensure that employees have an automatic right to be represented by their union in individual discussions and negotiations;
 - (c) failing to protect industrial action in support of multiple business agreements, so-called 'pattern bargaining', sympathy strikes, matters that are not 'permitted' and strike pay;
 - (d) stopping industrial action if:
 - (i) there is a risk of harm to a third party;
 - (ii) there is a risk of significant harm to both parties;
 - (iii) it is desirable to allow the dispute to 'cool off';
 - (iv) action is taken during the life of an enterprise agreement; or
 - (v) action is taken that is pattern bargaining;

- (e) imposing significant penalties on building and construction workers and their unions for any 'unprotected' industrial action, including fines of up to \$22,000 for an individual, which may deter workers from taking industrial action even if there is a genuine reason, such as an occupational health and safety concern; and
 - (f) fining other workers up to \$6,600 for taking industrial action during the life of an enterprise agreement.
125. On 20 February 2009, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) made an urgent complaint to the International Labour Organisation (**ILO**) regarding continuing and impending breaches of the right to freedom of association.¹⁰⁰ According to the CEPU, the Fair Work Act 'replicates and expands upon many of the breaches of union rights and of rights to freedom of association previously identified by the ILO' under Work Choices.¹⁰¹

Limitations on Freedom of Association under the BCII Act

126. In addition to Work Choices, the former Australian Government also introduced the *Building and Construction Industry Improvement Act 2005* (Cth) (**BCII Act**) which severely limits the freedom of association of building and construction industry workers and exposes their unions to steep penalties, including imprisonment, for conducting union business. Under the Act, workers in the building and construction industry face hefty fines of up to \$22,000 for engaging in unlawful industrial action. Such penalties are more than three times as much as those imposed on workers in other industries for the same action.
127. The objects of the BCII Act are framed in neutral terms, with the primary object being 'to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants'.¹⁰² Compliance with the BCII and Work Choices are investigated and enforced by the Australian Building and Construction Commission (**ABCC**). Under the BCII Act, the ABCC has broad and unfettered discretionary power to investigate potential contraventions and compel the giving of evidence. These powers are not subject to judicial approval or review and, in that sense, are broader than the investigatory powers of the Australian Secret Intelligence Organisation.¹⁰³ A person may be imprisoned for six months for failing to produce documents or give information to the ABCC and there is no privilege against self-incrimination or a public interest exception to compliance.

¹⁰⁰ A copy of the complaint is available at: http://www.etu.asn.au/files/pdfs/fair-work-bill-campaign/ilo_email-20_feb%202009.pdf.

¹⁰¹ Ibid.

¹⁰² *Building and Construction Industry Improvement Act 2005* (Cth), s3.

¹⁰³ Senate Standing Committee on Education, Employment and Workplace Relations, *Building and Construction Industry (Restoring Workplace Rights) Bill 2008*, 28 November 2008, available at: http://www.aph.gov.au/Senate/committee/eet_ctte/building_and_construction/report/report.pdf, 17.

128. However, the investigative and prosecutorial focus of the ABCC is far from balanced; the ABCC has overwhelmingly targeted unions and union members. Between 1 July 2007 and 30 June 2008 all of the 35 penalty proceedings conducted by the ABCC targeted unions, union members or employers which favoured union members.¹⁰⁴
129. Under the current Australian Government, the ABCC has maintained the same powers, policies and resources as it has had since its inception in October 2005. The current Australian Government has not only failed to address the problems with the BCII Act but has committed to retaining the ABCC until January 2010. After January 2010, the Government has indicated that the ABCC will be replaced by a specialist division within Fair Work Australia.¹⁰⁵
130. In a recent report on this issue, the Senate Education, Employment and Workplace Relations Committee recommended that appropriate safeguards for the use of coercive powers by the ABCC be put in place as a matter of urgency.¹⁰⁶ The ABCC and the BCII Act are also currently being reviewed by Murray Wilcox QC on behalf of the Government. Mr Wilcox was due to report to the Government by the end of March 2009, but his report has not yet been made publicly available.
131. Rather than retaining the ABCC until January 2010, it is recommended that the Commission be abolished as a matter of urgency so that building and construction workers are subject to the same legislative and regulatory treatment as other workers.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Building and Construction Commission be abolished so that building and construction workers are subject to the same legislative and regulatory treatment as other workers.

THAT in the interim and as a matter of urgency, the Australian Government implement the recommendations of the Senate Education, Employment and Workplace Relations Committee and place appropriate safeguards on the use of coercive powers by the Australian Building and Construction Commission as a matter of urgency

¹⁰⁴ Australian Building and Construction Commission, *Annual Report, 2007-2008*, available at <http://www.abcc.gov.au/NR/rdonlyres/DD705ED2-AA55-402A-9009-6F1615AE6512/0/AR0708Performance.pdf>, 41-48.

¹⁰⁵ Australian Labor Party, *Forward with Fairness - Labor's plan for fairer and more productive Australian workplaces*, August 2007, 17.

¹⁰⁶ Senate Standing Committee on Education, Employment and Workplace Relations, *Building and Construction Industry (Restoring Workplace Rights) Bill 2008*, 28 November 2008, available at: http://www.aph.gov.au/Senate/committee/eet_ctte/building_and_construction/report/report.pdf, 19.

I. RIGHT TO STRIKE

This section updates the information commencing at page 69 of the NGO Report.

132. The right to strike is undoubtedly one of the most important means by which trade unions can protect the interests of their members.¹⁰⁷ Despite the current overhaul of the workplace relations system, the right to strike remains severely constrained in Australia's domestic laws. Under the Fair Work Act, strikes may be authorised during collective bargaining negotiations, when parties are genuinely trying to negotiate. Other circumstances where employees will have the right to strike are in response to industrial action by the employer.
133. The restrictions on the right to strike outlined in paragraph 225 of the NGO Report remain. However, under the Fair Work Act there is no need for a formal bargaining period to be initiated before strike action can take place. Further, employees and employers can bargain on a multi-employer basis although protected industrial action and good faith bargaining orders are not available in these circumstances.
134. Other constraints on the right to strike imposed by the Fair Work Act are discussed at paragraphs 124(c) to 124(f) of this Addendum. In the case of industrial action that threatens the economy or significantly affects access to services, Fair Work Australia will have the power to step in and resolve industrial disputes. Fair Work Australia can also terminate protected industrial action if it may cause significant economic harm to the employer or employees.
135. As a general principle, mandatory industrial action ballots are compatible with freedom of association only to the extent that they promote autonomy of individuals within unions without unduly complicating the collective's ability to take action.¹⁰⁸ However, the Fair Work Act requires that, for a strike to be valid, at least 50 per cent of employees vote in a ballot and that more than 50 per cent of those employees vote in favour of taking industrial action.¹⁰⁹ The ILO Freedom of Association Committee has ruled (in relation to other countries) that such a requirement 'could excessively hinder the possibility of carrying out a strike, particularly in large enterprises'.¹¹⁰ The Australian 50 per cent minimum turnout requirement potentially breaches international law and should be revised.

¹⁰⁷ Nowak, M, *U.N. Covenant of Civil and Political Rights: CCPR Commentary*, (2nd ed, 2005), 503. The right to strike is expressly protected by Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights, providing that trade unions may exercise the right 'in conformity with the laws of the particular country'. The only limitations placed upon the right are those 'prescribed by law ... which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others': Article 8(1)(c).

¹⁰⁸ Nowak, above n 107, 557.

¹⁰⁹ *Fair Work Act 2009* (Cth), s. 459.

¹¹⁰ International Labour Organisation, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, (5th ed, 2006), [556]. The ILO has also ruled that 'in the case of unions which group together a large number of members, a provision requiring an absolute majority may involve the risk of seriously limiting the right to strike': *Ibid*, [557].

136. The failure to protect industrial action taken in support of so-called 'pattern bargaining' is also incompatible with the right to strike at international law. In various Individual Observations on Australia, the ILO's Committee of Experts has said that the prohibitions on taking industrial action in support of pattern bargaining contravene international conventions.¹¹¹ Such action constitutes legitimate trade union activity and should be protected.

Additional Proposed Recommendation for Concluding Observations

THAT Australia fully protect and enshrine the right to strike in legislation.

¹¹¹ Senate Standing Committee on Education, Employment and Workplace Relations, Questions on Notice: Inquiry into the Fair Work Bill.

Article 9 — Right to Social Security

J. RIGHT TO SOCIAL SECURITY

J.2 Adequacy of Social Security Payments

This section updates the information commencing at page 72 of the NGO Report.

137. The aged pension is currently inadequate to support the needs of older Australians, with the full pension ‘insufficient to maintain a basic, decent standard of living’.¹¹² According to an OECD report, Australia has the fourth highest relative income poverty rate for people aged 65 and over in western economies.¹¹³ For singles aged over 65, the income poverty rate is 50 per cent - the highest of all the countries in the OECD.¹¹⁴
138. It is expected that the government will provide an increase to the aged pension in the 2009 Federal Budget.¹¹⁵
139. The adequacy of payments to single parents and young people is below (see M.13 and M.14).

J.3 Conditionality of Social Security Payments: Welfare to Work

This section updates the information commencing at page 72 of the NGO Report.

140. The Australian Government has amended social security law to change the penalties associated with non-participation in the Welfare to Work program. The current ‘3 strikes and you’re out’ regime that applies an 8 week non-payment period penalty for 3 participation failures in a 12 month period allows no discretion as to whether the 8 week non-payment penalty is applied. The new provisions, which will come into effect on the 1 July 2009, allow some discretion and flexibility in the application of the 8 week non-payment period. The discretion and flexibility is to centre around:
- (a) reasonable excuse,
 - (b) financial hardship, and
 - (c) compliance with a serious breach requirement.

¹¹² Senate Standing Committee on Community Affairs, *A decent quality of life: Inquiry into the cost of living pressures on older Australians* (March 2008), xi, available at http://www.aph.gov.au/Senate/Committee/clac_ctte/older_austs_living_costs/report/report.pdf.

¹¹³ AAP, ‘Australian elderly singles face income poverty - OECD report’, *Herald-Sun* (Melbourne, 22 October 2008), available at <http://www.news.com.au/heraldsun/story/0,21985,24534646-662,00.html>.

¹¹⁴ *Ibid.*

¹¹⁵ AAP, ‘High earners may pay for pension reform’, *The Age* (Melbourne, 24 April 2009), available at <http://news.theage.com.au/breaking-news-national/high-earners-may-pay-for-pension-reform-20090424-ah8t.html>.

141. Increased flexibility in administering these penalties is a welcome change. Research by the Australian Council of Social Services states that 1 in 3 individuals and their families become homeless as a direct consequence of social security payments being cut off for eight weeks.¹¹⁶ The Salvation Army states that 11 per cent of individuals admit to engaging in criminal activity or prostitution as a means to survive an eight weeks non-payment period.¹¹⁷

J.4 Indigenous Australians

This section updates the information commencing at page 74 of the NGO Report.

142. The Northern Territory Intervention (discussed in the NGO Report at pages 17-20 and in this Addendum at paragraphs 8 to 18 above) introduces a regime of compulsory income quarantining by requiring 50 percent of income support and 100 percent of advances and lump sum payments¹¹⁸ to be diverted to an 'income management account'.¹¹⁹ Money in an income management account can only be spent on 'priority needs', such food, clothing, household items, household utilities, childcare and development, education and training¹²⁰ and is prohibited from being spent on items such as alcohol, tobacco, gambling and pornography.¹²¹ Welfare payments are linked directly to children's school attendance.
143. Income quarantining in the Northern Territory applies to people receiving social security entitlements on the basis of their residence in a Prescribed Area,¹²² regardless of whether the person has responsibility for children.
144. Income quarantining is mandatory and non-discretionary in respect of the persons subjected to it. By contrast, outside Prescribed Areas, income quarantining can only be triggered by factors such as risk of neglect or abuse or inadequate school attendance, which is assessed on a case by case basis.¹²³ The absence of any criteria apart from race (which in practical terms coincides with a person receiving social security in a Prescribed Area) for the application of income quarantining raises serious concerns with both Articles 2 and 9 of the *ICESCR*.

¹¹⁶ Australian National Organisation of the Unemployed, *Submission to Kevin Rudd - Response to Federal Labor's Industrial Relations policy platform*, 23 April 2007, accessed online at: <http://www.worklife.org.au/documents/ANOU%20submission%20to%20Kevin%20Rudd.doc>.

¹¹⁷ Ibid.

¹¹⁸ Division 5, Subdivision A (ss 123XA to 123XH) of the *Social Security (Administration) Act 1999* (Cth).

¹¹⁹ Division 4 and Division 5, Subdivision A of the *Social Security (Administration) Act 1999* (Cth).

¹²⁰ Section 123TH of the *Social Security (Administration) Act 1999* (Cth).

¹²¹ Section 123TI of the *Social Security (Administration) Act 1999* (Cth).

¹²² Section 123UB of the *Social Security (Administration) Act 1999* (Cth). A 'relevant Northern Territory area' includes prescribed areas under the NTNER Act and certain specified places: See s 123TD of the *Social Security (Administration) Act 1999* (Cth).

¹²³ The income management scheme also applies nationally where state or territory child protection officers refer a person to Centrelink because their child is considered to be at risk of neglect or abuse; a person's child does not meet school enrolment and attendance requirements; or a person, subject to the jurisdiction of the Queensland Commission is recommended for income management; or the person is subject to the voluntary income management agreement is in force. See ss 123UC to UFA of the *Social Security (Administration) Act 1999* (Cth). This case by case approach stands in stark contrast to the scheme as it applies to people living in prescribed areas.

145. In its review of the operation of the Northern Territory Intervention measures, the Review Board made a number of specific recommendations, including that income quarantining continue on a voluntary basis imposed only as a precise part of child protection measures or where specified by statute and that it be subject to independent review.
146. The Australian Government rejected the Review Board's recommendation and income quarantining will continue to be compulsory 'because of its demonstrated benefits for women and children'.¹²⁴

J.7 Same-Sex Couples (new section)

This is a new section.

147. As of 1 July 2009, same-sex de facto couples will be assessed as a couple and receive the same rates of social security and family assistance payments as an opposite-sex de facto couple. These laws will also allow for the recognition of children of same-sex couples. The Gay and Lesbian Rights Lobby have called for fairer introduction of the laws as the changes may disadvantage some same-sex couples by reducing or removing their entitlement to social security. This law has been criticised for not allowing a longer period to phase-in the changes and failing to include mechanisms to ease their burden which have been adopted for other changes to social security law. Whilst changes promoting equality for same-sex couples are welcome, the introduction of the laws should not be unduly harsh.

¹²⁴ Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Compulsory income management to continue as key NTER measure*, 23 October 2008 at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm.

Article 10 — Right to Family

K. RIGHT TO FAMILY

K.1 Maternity Leave and Child Care

This section updates information commencing at page 79 of the NGO Report.

148. As identified at paragraph 250 of the NGO Report, Australia lags behind most industrialised nations in the provision of paid parental leave. In 2008, the Australian Government asked the Productivity Commission to inquire into the introduction of a parental leave scheme.
149. The Productivity Commission's inquiry considered the economic, productivity and social costs and benefits of government-provided paid maternity, paternity and parental leave. The inquiry also identified potential models for providing parental support and assessed the current extent of employer-funded parental leave.¹²⁵
150. In September 2008, the Productivity Commission released a draft report for comment, entitled *Paid Parental Leave: Support for Parents with Newborn Children*. The final report was delivered to the government in February 2009 but at time of writing has not yet been made public.¹²⁶
151. The draft report recommends the introduction of a taxpayer-funded paid parental leave scheme. The scheme would incorporate paid postnatal leave for a total of 18 weeks, able to be shared by eligible parents, with an additional two weeks of paternity leave reserved for the father (or same sex partner). The adult minimum wage would be provided for each week of leave (currently \$543.78). To be eligible, parents would need to meet a work test of 12 months continuous employment, on an average of at least ten hours a week. A broad range of family types would be eligible, including conventional couples, lone parents, adoptive parents and same sex couples.
152. Persons eligible for the taxpayer-funded paid parental leave would not receive the baby bonus. The Productivity Commission recommends that the 'baby bonus' be replaced with an equivalently-valued non-income tested maternity allowance for people who are ineligible for the parental leave scheme (ie people not in work).¹²⁷
153. The Productivity Commission stated that the proposed parental leave scheme would have the advantages of increasing child and maternal health and wellbeing, stimulating female lifetime employment rates, increasing retention rates for business and promoting work/life balance.¹²⁸

¹²⁵ Productivity Commission, 'Paid Maternity, Paternity and Parental Leave' (2009), available at <http://www.pc.gov.au/projects/inquiry/parentalsupport>.

¹²⁶ Updates on the status of the inquiry are available at: <http://www.pc.gov.au/projects/inquiry/parentalsupport>.

¹²⁷ Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children*, Draft Inquiry Report (2008), p xi, available at http://www.pc.gov.au/__data/assets/pdf_file/0004/83425/parentalsupport.pdf.

¹²⁸ Ibid.

Clearly a paid parental scheme also has great value in achieving broader social objectives such as gender equity in the home and the workplace.¹²⁹

154. The Australian Government is currently considering whether to implement the proposed parental leave scheme in the 2009 Federal Budget, in light of the economic downturn.¹³⁰ In April 2009, Finance Minister Lindsay Tanner suggested that the scheme may be significantly scaled back.¹³¹ Elizabeth Broderick, Australia's Sex Discrimination Commissioner, has urged the government not to abandon the scheme.¹³² The Australian Council of Trade Unions (ACTU) and a number of Members of Parliament and Senators also believe the scheme should be included in the Budget.¹³³

K.3 Immigration

This section updates information commencing at page 81 of the NGO Report.

(a) Asylum Seekers

155. As stated in section C.7A above, on 9 August 2008, the Australian Government abolished temporary protection visas for asylum seekers, which improved the rights of many asylum seekers to live with their family.¹³⁴ People engaging the protection obligations of Australia are now either placed on permanent protection visas or Resolution of Status visas, both of which include the ability to sponsor family through the Offshore Humanitarian program.
156. On 18 March 2009, the Minister for Immigration Chris Evans introduced a bill to abolish the policy of immigration detainees being liable for the costs of their immigration detention.¹³⁵ All current detention debts would also be waived. The proposed changes are likely to reduce

¹²⁹ This is supported by a range of submissions to the Productivity Commission, see *Ibid* 6.7-6.12.

¹³⁰ Susanna Dunkerley, 'Labor MPs lobby for paid maternity leave', *The Age* (Melbourne, 6 March 2009), available at <http://news.theage.com.au/breaking-news-national/labor-mps-lobby-for-paid-maternity-leave-20090307-8rld.html>.

¹³¹ Gerard McManus, 'New mums by passed by Budget maternity leave scheme', *The Herald-Sun* (Melbourne, 6 April 2009), available at <http://www.news.com.au/heraldsun/story/0,21985,25294101-661,00.html>.

¹³² Elizabeth Broderick, 'Maternity Leave is a Must', *The Australian Women and Leadership Forum* (2008), available at <http://www.womensforum.com.au/server/index.php?id=69,450,0,0,1,0>.

¹³³ Australian Council of Trade Unions, 'Paid Maternity Leave', available at <http://www.actu.asn.au/Campaigns/CurrentCampaigns/default.aspx>; Susanna Dunkerley, 'Labor MPs lobby for paid maternity leave', *The Age* (Melbourne, 6 March 2009), available at <http://news.theage.com.au/breaking-news-national/labor-mps-lobby-for-paid-maternity-leave-20090307-8rld.html>.

¹³⁴ Department of Immigration and Citizenship, 'Fact Sheet 68 - Abolition of Temporary Protection visas (TPVs) and Temporary Humanitarian visa (THVs), and the Resolution of Status (subclass 851) visa' (2008), available at http://www.immi.gov.au/media/fact-sheets/68tpv_further.htm; Senator Evans, 'Budget 2008-09 – Rudd Government scraps Temporary Protection Visas' (Press Release, 31 May 2008), available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce05-buget-08.htm>.

¹³⁵ *The Migration Amendment (Abolishing Detention Debt) Bill 2009*; Senator Evans, 'Detention debt regime to be scrapped' (Press Release, 18 March 2009), available at <http://www.minister.immi.gov.au/media/media-releases/2009/ce09031.htm>.

'stress, anxiety and financial hardship' for many families.¹³⁶ At the time of writing, the bill had not been passed by the Australian Parliament.

157. These are both welcome reforms that improve the protection of asylum seekers and their families.

(b) Family members with disabilities

158. Australia's migration law, policy and practice still have discriminatory aspects that impact adversely on families. For example, decisions made under the *Migration Act* are not subject to Australia's disability discrimination laws.¹³⁷ This means that decisions on immigration can be made on the basis of the disability or health condition of a family member (see case study below).
159. In November 2008, as a result of the circumstances of the case study below, the Minister for Immigration announced a review of the Australian Government's policy on migration and disability.¹³⁸ Senator Evans stated that he had: '...concerns that ... there are cases where families currently living in Australia who have a family member with a disability require Ministerial intervention to resolve their application for permanent residency'.¹³⁹

Case Study: Dr Bernhard Moeller¹⁴⁰

Dr Moeller, a German migrant doctor, has been working in a Victorian country town for nearly three years as a much-needed specialist physician. Despite his service and enormous contribution to the town's population, he had twice earlier been refused permanent residency. His applications were refused because his son Lukas, aged 13, who suffers from Down Syndrome, was considered too much of a burden on taxpayers.

In 2008, the Department of Immigration again refused the family permanent residency status and their appeal was rejected by the Migration Review Tribunal. However, in November 2008, following significant public pressure, the Minister for Immigration approved Dr Moeller's application for ministerial intervention and granted his family permanent residency status.

¹³⁶ Commonwealth Ombudsman, *Department of Immigration and Citizenship: Administration of detention debt waiver and write-off* (2008), 2.

¹³⁷ See section 52 of the *Disability Discrimination Act* 1992 (Cth), which in effect exempts migration laws, regulations, policies and practices from the operation of the Act.

¹³⁸ Senator Evans, 'Parliamentary Committee to investigate migration and disability' (Press Release, 26 November 2008), available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08115.htm>.

¹³⁹ Ibid.

¹⁴⁰ Senator Evans, 'Statement on Dr Bernhard Moeller' (Press Release, 26 November 2008), available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08113.htm>.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government enact the Migration Amendment (Abolishing Detention Debt) Bill 2009 to waive the detention debts of asylum seekers and remove detainees' liability for costs of immigration detention.

THAT the *Migration Act 1958* and the *Disability Discrimination Act 1992* be amended to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice.

K.4 Same-Sex Couples

This section updates information commencing at page 84 of the NGO Report.

160. As stated in paragraph 55 above, the Australian Government has introduced significant reforms to federal laws that discriminated against same sex couples.
161. Despite these improvements, the right of same-sex couples to have their families protected and assisted continues to be infringed. Australian federal law prohibits formal recognition of the relationship between same-sex couples through marriage or civil unions. Adoption by same-sex couples is permitted only in the ACT and Western Australia. Only Tasmania permits adoption by a same-sex stepparent, and only New South Wales permits individual adoption by a lesbian, gay, bisexual or transgender person.¹⁴¹
162. Same sex couples also face obstacles in relation to in vitro fertilisation and Assisted Reproductive Technology, which are discussed in [Article 12: Access to IVF](#).

L. PROTECTION OF CHILDREN

L.1 Children in Immigration Detention

This section updates information commencing at page 87 of the NGO Report.

163. The Australian Government promised an end to immigration detention of children, however, that guarantee has not been supported by legislation.¹⁴² Further, although children are no longer held in 'immigration detention centres', they are still being held in other immigration detention facilities, including closed facilities, on the Australian mainland and on Christmas Island (a remote island 2,600 kilometres from the nearest capital city).¹⁴³ Further for information on Christmas Island, see discussion commencing at paragraph 66 above.

¹⁴¹ See Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements Report*, Chapter 5, available at http://www.hreoc.gov.au/Human_RightS/samesex/report/Ch_5.html.

¹⁴² In 2005, the Migration Act was amended to affirm the principle that children should only be detained as a measure of last resort: Migration Act 1958 (Cth), s 4AA. However, this is a statement of principle only and does not create legally enforceable rights.

¹⁴³ Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2008), 79.

164. Other ‘immigration detention facilities’ include immigration residential housing, immigration transit accommodation and alternative places of detention. Immigration residential housing and immigration transit accommodation are still closed detention facilities. Children and their families are not free to come and go as they please, and although children might be permitted to attend school or to go on external excursions, these must be supervised and pre-arranged.¹⁴⁴
165. Children are also held in the construction camp on Christmas Island which is classified as ‘alternative temporary detention in the community.’¹⁴⁵ However, the Australian Human Rights Commission is of the view that the construction camp is not community based accommodation; it is a facility being specifically used as a place of immigration detention and is not dissimilar to the Immigration Detention Centre located on Christmas Island.
166. Human Rights Commissioner Graeme Innes has called for government to amend Australia’s immigration laws ‘to ensure they comply with the Convention on the Rights of the Child’.¹⁴⁶

L.4 Indigenous Children (new section)

This is a new section.

(a) Northern Territory Intervention

167. As discussed under Article 1: Intervention into Northern Territory Indigenous Communities, in June 2007, the former Australian Government passed a range of extraordinary legislative measures purportedly designed to address the issue of the sexual abuse of children in Indigenous communities. Of particular concern in relation to Article 10 of the *ICESCR* is the failure of the ‘national emergency intervention’ to use a children’s rights framework to ensure that the stated purpose of the intervention is achieved; that is, the protection of children.
168. The Australian Government continues to justify extreme intervention in the lives of communities under the Northern Territory Intervention on the basis of improved protection for Indigenous children. More recent measures, discussed under Article 9, allow Federal Government agencies, including Centrelink, to impose restrictions on welfare payments if parents neglect the health and wellbeing of their children.
169. The Northern Territory Intervention has failed to recognise and respect the rights of Indigenous children, and their communities, to be consulted about appropriate and effective measures to protect Indigenous children from sexual abuse. As a result, many aspects of the measures implemented as part of the Northern Territory Intervention raise concerns in relation to both Article 1 and Article 10 of the *ICESCR*.

¹⁴⁴ See HREOC, ‘2008 Immigration detention report: Summary of observations following visits to Australia’s immigration detention facilities,’ 2008, available at http://www.hreoc.gov.au/HUMAN_RIGHTS/immigration/idc2008.html#Heading1071.

¹⁴⁵ In its weekly immigration detention statistics summaries, DIAC counts detainees being held in the construction camp facility in the category referred to as ‘Alternative Temporary Detention in the Community.’ See, for example Detention and Offshore Services Division, DIAC, *Immigration Detention Statistics Summary* (7 November 2008).

¹⁴⁶ Australian Human Rights Commission, ‘New report highlights ongoing problems in immigration detention’ (Press release, 13 January 2009).

(b) Juvenile Justice and Mandatory Sentencing

170. The juvenile justice sentencing system should be based on the principle that young offenders can and should be rehabilitated, as reflected by Article 40 of the *Convention on the Rights of the Child*. The *Convention on the Rights of the Child* also requires in Article 37(b) that children be deprived of liberty only as a last resort and for the shortest appropriate period of time.
171. Despite these principles, mandatory sentencing laws continue to operate in Western Australia. The disproportionate effect of mandatory sentencing on Indigenous Australians is reflected in the statistic that Indigenous Australians are 21 times more likely to be in prison than non-Indigenous Australians in Western Australia.¹⁴⁷ Young Indigenous people, who are a small fraction of the total youth population of Western Australia, constitute three quarters of those sentenced in mandatory sentencing cases.¹⁴⁸
172. Mandatory sentencing laws have a particular impact on young people. By imposing a compulsory detention term without any regard to alternative, less restrictive means of rehabilitation, and by ignoring whether the punishment of detention fits the actual offence, the laws do not enable the particular circumstances of young people to be taken into account. The laws remove courts' discretion to take into account a child's age and to promote rehabilitation in administering the courts' procedures.
173. Australia's mandatory sentencing laws have previously been the subject of criticism by the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination.¹⁴⁹ Indeed, in its 2000 Concluding Observations on Australia, the Committee on the Elimination of Racial Discrimination expressed concern that the laws appear to target offences that are committed disproportionately by Indigenous Australians, especially young Indigenous people, leading to a racially discriminatory impact on their rate of incarceration.¹⁵⁰
174. There is a range of other, more suitable sentencing options, such as:
- (a) conferencing schemes, which involve the offender meeting with the victim;
 - (b) probation orders as a means of providing guidance and support; and

¹⁴⁷ Australian Bureau of Statistics, *Prisoners in Australia, 2007*, ABS Catalogue No 4517.0 (2007), available at http://www.abs.gov.au/Ausstats/ABS@.nsf/Latestproducts/4517.0Main_Features22007?opendocument&tabname=Summary&prodno=4517.0&issue=2007&num=&view.

¹⁴⁸ The UN Committee on the Rights of the Child expressed its concern about the over-representation of Indigenous children in the juvenile justice system: see UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, [73]-[74], UN Doc CRC/C/15/Add.268 (2005).

¹⁴⁹ Committee on the Rights of the Child, *Concluding Observations: Australia*, [73]-[74], UN Doc CRC/C/15/Add.268 (2005); Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, [16], UN Doc CERD/C/304/Add.101 (2000).

¹⁵⁰ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, [16], UN Doc CERD/C/304/Add.101 (2000). See also Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, [20], UN Doc CERD/C/AUS/CO/14 (2005).

- (c) community service orders and other non-custodial sentencing options, which are culturally appropriate and take into account the particular needs and problems of children from different backgrounds and especially Indigenous children.

175. A recent report released by the Australian Human Rights Commission's Indigenous and Torres Strait Islander Social Justice Commissioner, Tom Calma, calls for programs that divert young people from incarceration. The *Preventing crime and promoting rights for Indigenous young people with cognitive disabilities and mental health issues* report outlines the disturbing fact that young Indigenous people in juvenile justice were at least four times more likely to have an intellectual disability than the general population.¹⁵¹ The Australian Government must take further steps to divert young Indigenous people away from the criminal justice system.

Case Study

In the space of two years, one 13 year old boy from the north of Western Australia received two sets of 12 months detention, two 12 month conditional release orders, and one supervised release order of six months. The offences he had committed were a result of him stealing food from houses because he was hungry. He has had little family care.¹⁵²

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government review and implement the recommendations contained in the report of the Australian Human Rights Commission, *Preventing crime and promoting rights for Indigenous young people with cognitive disabilities and mental health issues*.

THAT the Australian Government immediately introduce the necessary laws, policies and practices to divert young Indigenous Australians from the criminal justice system.

L.5 Care and Protection (new section)

This is a new section.

176. In January 2009, the Australian Institute of Health and Welfare released its *Child Protection Australia 2007-08 Report*, which revealed that the number of children in out-of-home care in Australia has risen by almost 115 per cent over the last decade – from around 14,500 children in 1998 to 31,166 children in 2008.¹⁵³

¹⁵¹ Australian Human Rights Commission, 'Report Calls for Programs that Divert Young People from Incarceration' (Press Release, 14 November 2008), available at http://www.hreoc.gov.au/about/media/media_releases/2008/124_08.html.

¹⁵² Helen Bayes, 'Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory' [1999] UNSWLJ 54, available at <http://www.austlii.edu.au/au/journals/UNSWLJ/1999/54.html>.

¹⁵³ Australian Institute of Health and Welfare, *Child Protection Australia 2007-2008* (2009), available at <http://www.aihw.gov.au/publications/index.cfm/title/10687>.

177. The Australian Government is currently working with all levels of government and non-government groups on a National Child Protection Framework, which will outline a strategic approach to better protect children including:¹⁵⁴
- (a) a new approach to improving the safety and wellbeing of children, which does not focus solely on statutory child protection systems;
 - (b) addressing child abuse and neglect via a public health model approach, placing a stronger emphasis on the role of universal services; and
 - (c) early intervention services to prevent child abuse and neglect, and better support vulnerable families.
178. Some steps have already been taken to improve the protection of children. These include increased information sharing between various governments to help identify families where child abuse is suspected and the introduction in selected Western Australian communities of an income management trial giving state protection authorities the power to recommend the quarantining of income support and family payments to Centrelink.
179. While steps to improve the protection of children are welcome, any measures that are implemented must be compatible with human rights and, in particular, use a children's rights framework.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government ensure that all aspects of the proposed National Child Protection Framework be compatible with the *ICESCR* and the *Convention on the Rights of the Child*.

¹⁵⁴ National Child Protection Clearinghouse, *Protecting Australian Children* (2008), Australian Institute of Family Studies, available at <http://www.childsafety.qld.gov.au/child-protection/documents/national-approach-for-child-protection-factsheet.pdf>.

Article 11 — Right to an Adequate Standard of Living

M. RIGHT TO AN ADEQUATE STANDARD OF LIVING

M.1 Extent of Poverty

This section updates the information commencing at page 93 of the NGO Report.

180. A 2008 report by the Organisation for Economic Development (OECD) entitled *Growing Unequal?: Income Distribution and Poverty in OECD Countries* examined the extent of poverty, defined as living on less than half of the median income. The report found that poverty in Australia has risen since 2000 to 12 per cent, which is above the OECD average.¹⁵⁵
181. The OECD report found that the risk of poverty for Australians who are not working increased to 55 per cent in 2008, up from 46 per cent in 1995.¹⁵⁶ This is particularly concerning given the rising number of people who are unemployed. From March 2008 to March 2009, the number of unemployed people in Australia almost doubled, reaching 650,900.¹⁵⁷ The jobless rate in March 2009 was 5.7 per cent and, given the global economic climate, is expected to grow further, putting more people at risk of poverty.¹⁵⁸
182. In January 2009, a report on family joblessness in Australia prepared for the Department of Prime Minister and Cabinet drew attention to the impact of joblessness on children in Australia. It stated that joblessness among families with children in Australia is amongst the highest in the OECD. Further, joblessness is strongly associated with child poverty, and in Australia jobless families are about six times more likely to be living in poverty than working families. In Australia, 70% of all poor children live in jobless households.¹⁵⁹ The report states that in order to alleviate child poverty, Government policies need to promote and support employment for as many parents as possible and provide adequate income support for those with difficulties finding paid employment.
183. The OECD report found that the risk of poverty for Australian sole parents is also extremely high, at 70 per cent.¹⁶⁰

¹⁵⁵ OECD, 'Country Note: Australia', *Growing Unequal? : Income Distribution and Poverty in OECD Countries* (2008), 1, available at <http://www.oecd.org/dataoecd/44/47/41525263.pdf>.

¹⁵⁶ *Ibid.*, 2.

¹⁵⁷ Chris Zappone, 'Jobless rate hits 5.7%', *The Age* (Melbourne, 9 April 2009), available at <http://business.theage.com.au/business/jobless-rate-hits-57-20090409-a1g0.html>.

¹⁵⁸ *Ibid.*

¹⁵⁹ Peter Whiteford, Social Policy Research Centre, University of New South Wales, 'Family Joblessness in Australia', Prepared for the Social Inclusion Unit, Department of the Prime Minister and Cabinet, January 2009.

¹⁶⁰ OECD, 'Country Note: Australia', *Growing Unequal? : Income Distribution and Poverty in OECD Countries* (2008), 2, available at <http://www.oecd.org/dataoecd/44/47/41525263.pdf>.

184. Older Australians are also particularly affected by poverty. According to the OECD report, Australia has the fourth highest relative income poverty rate for people aged 65 and over in western economies, with an increase of 4.6 per cent since the mid-1990s.¹⁶¹ For singles aged over 65, the income poverty rate is 50 per cent - the highest of all the countries in the OECD.¹⁶² In contrast, poverty rates for seniors in many other countries have recently declined.¹⁶³ Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, commented: 'This OECD report backs up what we already know; that over the 10 years to the mid-2000s older Australians have been going backwards'.¹⁶⁴
185. The aged pension is currently inadequate to support the needs of older Australians, with the full pension 'insufficient to maintain a basic, decent standard of living'.¹⁶⁵ It is expected that the government will provide an increase to the aged pension in the 2009 budget.¹⁶⁶

M.2 Homelessness

This section updates information commencing at page 94 of the NGO Report.

186. In September 2008, the Australian Bureau of Statistics released its *Counting the Homeless 2006* report. The report considers the extent of homelessness in Australia and reveals that every night almost 105,000 Australians experience homelessness.¹⁶⁷ This shows an increase in the homelessness population of just under 5 per cent since 2001.¹⁶⁸ Between 2001 and 2006 there has also been an increase in the number of people sleeping rough, the number of homeless family households and the extent of homelessness in the Indigenous population.¹⁶⁹ While the majority of the Australian population generally enjoyed an increase in wealth and prosperity over these years, the homelessness population continued to increase. The poverty gap has continued to widen.

¹⁶¹ AAP, 'Australian elderly singles face income poverty - OECD report', *Herald-Sun* (Melbourne, 22 October 2008), available at <http://www.news.com.au/heraldsun/story/0,21985,24534646-662,00.html>.

¹⁶² Ibid.

¹⁶³ OECD, 'Income inequality and poverty rising in most OECD countries' (Press Release, 21 October 2008), available at http://www.oecd.org/document/25/0,3343,en_2649_33933_41530009_1_1_1_1,00.html.

¹⁶⁴ Aged and Community Services Western Australia, 'OECD report echoes aged care body's concerns' (Press Release, 24 October 2008), available at <http://www.acswa.org.au/default.aspx?t=21&m=10&y=2008&n=272>.

¹⁶⁵ Senate Standing Committee on Community Affairs, *A decent quality of life: Inquiry into the cost of living pressures on older Australians* (March 2008), xi, available at http://www.aph.gov.au/Senate/Committee/clac_ctte/older_austs_living_costs/report/report.pdf.

¹⁶⁶ AAP, 'High earners may pay for pension reform', *The Age* (Melbourne, 24 April 2009), available at <http://news.theage.com.au/breaking-news-national/high-earners-may-pay-for-pension-reform-20090424-ah8t.html>.

¹⁶⁷ Australian Bureau of Statistics, *Counting the Homeless 2006* (2008), viii.

¹⁶⁸ Ibid, 21. In 2001 the ABS estimated that approximately 99,900 people experience homelessness across Australia on any given night

¹⁶⁹ Ibid, viii - xii; see also Australian Bureau of Statistics, *Counting the Homeless 2001* (2003). It is important to note that the *Counting the Homeless 2006* report highlights (at page 29) that the 2006 Census may have undercounted the Indigenous population by 11.5%, and as a result the census may have undercounted the homeless Indigenous population as well.

187. The Australian Government recognises the urgent need to curb homelessness and has made it a national priority. In December 2008, the Government produced a White Paper on homelessness entitled *The Road Home*¹⁷⁰ which sets a strategic agenda until 2020 for reducing homelessness in Australia. The primary goals of the White Paper are to halve homelessness, and provide supported accommodation to all 'rough sleepers' who need it, by 2020.
188. As part of the White Paper agenda, the Government has created a new National Affordable Housing Agreement (**NAHA**), which commenced in January 2009.¹⁷¹ The NAHA promises to provide \$6.2 billion in funding over the next five years on measures including social housing, assistance to people in the private rental market, support and accommodation for people who are homeless or at risk of homelessness, and assistance with home purchasing.¹⁷²
189. As part of the NAHA, the Australian governments have committed to three significant National Partnerships: homelessness, social housing and remote Indigenous housing. Under the Homelessness National Partnership, governments have committed \$800 million towards improving the service response to homelessness, in order to prevent and reduce homelessness.¹⁷³ An additional \$400 million will be provided through the Social Housing National Partnership over two years for capital investment for social housing and homelessness.¹⁷⁴ These partnership initiatives support the implementation of the White Paper agenda, which aims to break the cycle of homelessness through improved service delivery and more housing options.
190. Despite the welcome commitments of additional funding, the White Paper fails to explicitly recognise homelessness as a human rights issue. In particular, it does not commit Australia to ensure the core minimum necessities for a dignified life, such as guaranteed access to emergency accommodation or the payment of social security or income support above the poverty line. The White Paper also fails to address existing legislation that criminalises homelessness, such as public space laws. It also fails to recommend the introduction of anti-discrimination laws that make it unlawful to discriminate on the basis of social status.
191. On 3 February 2009, the Government announced a further \$6.4 billion in funding for social housing across Australia as part of its *Nation Building and Economic Stimulus Plan* which aims 'to support jobs and invest in future long term economic growth'.¹⁷⁵ The \$6.4 billion will be distributed amongst States to build new social housing. This funding will provide States

¹⁷⁰ Department of Families, Housing, Community Services and Indigenous Affairs, 'The Australian Government's White Paper on Homelessness', (Press Release, 21 December 2008), available at http://www.facsia.gov.au/internet/facsinternet.nsf/housing/white_paper_on_homelessness.htm.

¹⁷¹ Commonwealth of Australia, *The Road Home: A National Approach to Reducing Homelessness*, White Paper, Executive Summary, available at http://www.facsia.gov.au/housing/homelessness_white_paper/execsum.htm.

¹⁷² Council of Australian Governments Meeting (28 November 2008), Canberra, 6, available at http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/docs/communique_20081129.pdf.

¹⁷³ *Ibid*, 28.

¹⁷⁴ *Ibid*, 29.

¹⁷⁵ Prime Minister of Australia Media Release, *\$42 billion nation building and jobs plan* (3 February 2009). Available at http://www.pm.gov.au/media/Release/2009/media_release_0784.cfm.

- with further assistance to improve and increase public housing stocks and tackle homelessness.
192. On 4 February 2009, following the Australian Government's stimulus package announcement, the newly appointed Special Rapporteur on Adequate Housing as a component of the Right to an Adequate Standard of Living submitted her first report to the Human Rights Council. The report considers the current global crisis in the housing and financial sectors and recommends that Governments reflect on existing housing systems and the adoption of a human rights-based approach, to introduce changes to make the system sustainable and allow the provision of adequate housing for all.
193. The Special Rapporteur's report highlights the need for the Australian government to adopt a human rights based approach to housing and homelessness policies and programs. It is important that the Government's recent social housing funding commitments are directed towards the fulfillment of the right to adequate housing for all.
194. Another challenge facing the Australian Government is determining how to deal with a dramatic increase in the number of older Australians who are homeless. Australian homelessness statistics suggest that 9.4 percent (11,300 people) of people accessing homeless services are aged 50 or over.¹⁷⁶ Leonie Green, the New South Wales Director of homeless service provider Mission Australia, believes these figures are likely to be a gross underestimation because 'older homeless people aren't accessing mainstream services in their true numbers. That's because they believe – mostly correctly – that existing homeless services don't address their complex needs. Another common reason is because they feel too proud or independent to use them... The end result is that older homeless Australians struggle on in isolation and extreme hardship and don't get the help they need.'¹⁷⁷
195. The targeted services needed to fill the void include programs to address the difficulty older Australians face in acquiring new job skills. The current support services for the elderly homeless in Australia are unlikely to meet these needs because services are 'ad hoc and spread across multiple levels of government, non-government organisations and service providers'.¹⁷⁸ Leonie Green says 'there are few organisations that specifically cater for the needs of the ageing homeless'.¹⁷⁹
196. In its recent Concluding Observations, the Human Rights Committee expressed its concern at the situation of homeless persons and recommended that Australia 'increase its efforts in order to ensure that social, economic and other conditions do not deprive homeless persons of the full enjoyment of the rights enshrined in the Covenant'.¹⁸⁰

¹⁷⁶ Mission Australia, 'Homelessness among the elderly - The hidden face of Homelessness in Australia' (Press Release, 4 August 2008), available at <http://www.missionaustralia.com.au/news/media-releases/636-homelessness-among-the-elderly>.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Human Rights Committee, *Concluding Observations: Australia*, above n 7, [18].

Supported Accommodation Assistance Program

This section updates the information commencing at page 95 of the NGO Report.

197. The number of people receiving substantial support from the Supported Accommodation Assistance Program (**SAAP**) is increasing. In 2007-08, one in every 104 Australians, or 202,500 people, received substantial support from SAAP.¹⁸¹ This is a significant increase on the 161,200 people who accessed the services in 2005-06. The people receiving support comprised of 125,600 clients and 76,900 accompanying children.¹⁸²
198. Both overall funding and direct funding to SAAP agencies increased just 1% from 2006-07 to 2007-08. This is clearly inadequate. In 2007-08, the total funding allocation to SAAP was \$400.4 million, of which \$383.9 million was direct funding to SAAP agencies.¹⁸³

M.3 Housing Stress, Affordability and Availability

This section updates information commencing at page 97 of the NGO Report.

199. In May 2008, the Australian Government pledged \$2.2 billion to tackle housing availability, affordability and homelessness.¹⁸⁴ The housing package aims to boost rental housing, help people save for their first home by increasing the first homeowners allowance, lower housing construction costs and build new homes for the homeless. The promises include:
- (a) a \$6,000 Commonwealth tax credit or grant to construct new affordable rental properties and rent them at 80 per cent of prevailing market rents. Low income earners will have priority access to these new homes;
 - (b) creating the Housing Affordability Fund to invest up to \$512 million over five years to lower the cost of building new homes; and
 - (c) spending \$150 million over the next five years to build 600 new homes for the homeless across the nation, as part of the *A Place to Call Home* strategy.¹⁸⁵
200. Commencing in January 2009, the Government has also committed further funds to build new social housing under both the Social Housing National Partnership and the Nation Building and Economic Stimulus Plan (discussed further in M.2 above).
201. However, as discussed in M.2 above, the Australian Government should ensure that it uses a human rights-based approach to addressing the housing needs of Australians, to ensure that the approach accords with the fulfilment of the right to adequate housing for all.

¹⁸¹ Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2007-08* (2009), vii.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Jenny Macklin – Minister for Families, Housing Community Services and Indigenous Affairs, ‘\$2.2 Billion to Tackle Housing Squeeze and Homelessness’ (Press Release, 13 May 2008), available at http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/budget08_housing_homelessness_13may08.htm.

¹⁸⁵ *A Place to Call Home* was an initiative set out in the May 2008 budget: see details at http://www.fahcsia.gov.au/internet/facsinternet.nsf/aboutfacs/budget/budget2008-08_fs-12.htm.

M.8 Right to Water

This section updates information commencing at page 105 of the NGO Report.

202. In April 2008, the Government unveiled details of its *Water for the Future* plan, which establishes a \$12.9 billion water investment program over ten years.¹⁸⁶ It was billed as the first nationwide plan to address both urban and rural water.¹⁸⁷ The plan is designed to help secure water supplies for Australian households, businesses and farmers, as well as provide water to restore the health of Australia's river systems. The plan is built on four priorities: taking action on climate change, using water wisely, securing water supplies and healthy rivers and waterways.
203. The *Water for the Future* plan provides \$1.5 billion to help secure urban water supplies, through providing funding for:
- (a) the National Urban Water and Desalination Plan;
 - (b) the National Water Security Plan for Cities and Towns;
 - (c) the National Rainwater and Greywater Initiative.¹⁸⁸
204. The plan also provides:
- (a) \$3.1 billion to purchase water to place back into Murray Darling Basin waterways;
 - (b) \$5.8 billion for the Sustainable Rural Water Use and Infrastructure program, for key rural water projects that save water;
 - (c) \$450 million for new national water accounts, including national monitoring and data collection administered by the Bureau of Meteorology.¹⁸⁹
205. Although the *Water for the Future* plan encourages water conservation, the Australian Greens have raised concerns that it does 'not go far enough or move fast enough to make the changes to water use needed to save the Murray Darling system'.¹⁹⁰ Concerns have also been raised that the right to water is still not enshrined in legislation.¹⁹¹ Further, the Australian Human Rights Commission has criticised the *Water for the Future* plan for failing to use a human rights-based approach, which would have had the benefit of requiring that

¹⁸⁶ 'Government action – Water for the Future', Department of the Environment, Water, Heritage and the Arts (March 2008), available at <http://www.environment.gov.au/water/action/index.html>.

¹⁸⁷ Australian Government, 'Water for the Future' (2008), available at <http://www.environment.gov.au/water/publications/action/pubs/water-future.pdf>.

¹⁸⁸ Senator Penny Wong, 'Rudd Government to Invest \$12.9 billion in water' (Press Release, 29 April 2008), available at <http://www.environment.gov.au/minister/wong/2008/pubs/mr20080429.pdf>.

¹⁸⁹ Chris Hammer and Peter Ker, 'Rudd's 'me-to' \$3bn buyback', *The Age* (Melbourne, 29 April 2008), available at <http://www.theage.com.au/news/environment/rudds-metoo-3bn-buyback/2008/04/28/1209234762202.html?page=fullpage>.

¹⁹⁰ Rachel Siewert, 'Greens dub Wong's plan - 'Water for the (distant) Future' (Press Release, 30 April 2008), available at <http://rachel-siewert.greensmps.org.au/content/media-release/greens-dub-wongs-plan-water-distant-future>.

¹⁹¹ Janice Gray, 'Implementing the human right to water in Australia' (2008) 17 *Human Rights Defender* 1, available at http://www.ahrcentre.org/documents/Publications/HRD_Vol17_1_webextract.pdf.

decision makers ‘be guided by the core minimum human rights standards when weighing competing demands on limited resources’.¹⁹²

206. In April 2009, Maude Barlow, Senior Advisor on Water to the United Nations, accused the Government of having ‘no overall plan’ to save Australia’s water heritage.¹⁹³ Speaking at a water industry summit, she said industries such as mining, bottled water suppliers and non-sustainable agriculture ventures had contributed to a ‘national water emergency’. Ms Barlow said: ‘The destruction of aquifers and heavy metal pollution of ground and surface water is nationwide, and a disgrace.’¹⁹⁴ She also criticised the state and federal governments’ emphasis on building desalination plants and pipelines.
207. The Australian Government should use a human rights-based approach in its water policy and immediately put necessary law and policy in place to ensure that all Australians have continuing access to affordable water, an essential aspect of the guarantee of an adequate standard of living and of life itself.
208. See also Article 11: Climate Change below.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government use a human rights-based approach in its water policy and immediately put necessary law and policy in place to ensure that all Australians have continuing access to affordable water, an essential aspect of the guarantee of an adequate standard of living and of life itself.

¹⁹² Human Rights and Equal Opportunity Commission, *Background Paper: Human Rights and Climate Change* (2008), 14, available at http://www.hreoc.gov.au/pdf/about/media/papers/hrandclimate_change.pdf.

¹⁹³ Michael Owen, ‘Failure of vision’ on water crisis’, *The Australian* (Sydney, 2 April 2009), available at <http://www.theaustralian.news.com.au/story/0,25197,25277261-5006789,00.html>.

¹⁹⁴ *Ibid.*

M.9 Indigenous Peoples

Indigenous Housing and Homelessness

This section updates information commencing at page 110 of the NGO Report.

209. The third significant Australian Government commitment under the NAHA (outlined above in M.2) is the Remote Indigenous Housing National Partnership. This National Partnership provides for \$1.94 billion over 10 years to reform housing and infrastructure arrangements in remote Indigenous communities and is part of the Australian Government's 'Close the Gap' initiative.¹⁹⁵ It aims to improve the living standards of Indigenous Australians living in remote areas by reducing overcrowding, homelessness, poor housing conditions and severe housing shortages.¹⁹⁶
210. Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma welcomed the National Partnership, saying: 'This commitment to deliver new houses and upgrades to homes in remote communities is a major milestone in closing the gap in life expectancy outcomes for Indigenous people... Investment of this magnitude in real bricks and mortar will impact positively on the health, education and life outcomes of remote Indigenous people.'¹⁹⁷
211. Whilst the improvements in Indigenous housing are welcome, the Human Rights Commission has emphasised the importance of consultation with Indigenous people in order to ensure that housing is culturally appropriate.¹⁹⁸ In the absence of any national Indigenous representative body, the ability to conduct this type of consultation is compromised.
212. Direct consultation with members of remote Indigenous communities will be vital in ensuring that housing and infrastructure improvements made under the National Partnership are culturally appropriate and adequate.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government ensure that Indigenous communities are appropriately and adequately consulted on any Indigenous housing policies to ensure culturally appropriate housing policies are developed.

¹⁹⁵ Australian Government, 'Closing the gap on Indigenous disadvantage: The challenge for Australia' (February 2009), 21, available at http://www.fahcsia.gov.au/indigenous/closing_the_gap/closing_the_gap.pdf.

¹⁹⁶ Council of Australian Governments, 'National Partnership Agreement on Remote Indigenous Housing' (2008), 1, available at http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/docs/20081129_remote_indigenous_housing_factsheet.pdf.

¹⁹⁷ Human Rights Commission, 'Funding for housing a major step forward to close the gap' (Press Release, 24 March 2009), available at http://www.hreoc.gov.au/about/media/media_releases/2009/18_09.html.

¹⁹⁸ Australian Human Rights Commission, 'Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights', Australian Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights, 17 April 2009, 40.

M.10 Asylum Seekers

This section updates information commencing at page 111 of the NGO Report.

213. As stated in section C.7A above, on 9 August 2008 the Australian Government abolished temporary protection visas for refugees.¹⁹⁹ People engaging the protection obligations of Australia are now either placed on permanent protection visas or Resolution of Status visas, both of which provide immediate access to social security allowances and health care benefits. This is a welcome improvement to the right of asylum seekers to an adequate standard of living.
214. Despite these welcome reforms, as stated in C.7A above, there are still asylum seekers on Bridging Visas who cannot access work, welfare benefits or healthcare.²⁰⁰ As the Australian Human Rights Commission has stated, these restrictions result in many asylum seekers and refugees facing poverty and homelessness. The Commission states that ‘without the ability to support themselves through work or social security, asylum seekers are entirely dependent on community services for their basic subsistence.’²⁰¹
215. More information about the services provided to asylum seekers living in the community in Australia can be found in Article 12: Asylum Seekers.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government ensures that all asylum seekers, irrespective of their visa status, have access to essential services required for an adequate standard of living.

M.13 Women

This section updates information commencing at page 112 of the NGO Report.

216. A 2008 report by the Organisation for Economic Development (OECD) found that the risk of poverty for Australian single parents is 70 per cent.²⁰² As most sole parents in Australia are women, the risk of poverty affects them the most.

¹⁹⁹ Department of Immigration and Citizenship, ‘Fact Sheet 68 - Abolition of Temporary Protection visas (TPVs) and Temporary Humanitarian visa (THVs), and the Resolution of Status (subclass 851) visa’ (2008), available at http://www.immi.gov.au/media/fact-sheets/68tpv_further.htm; Senator Evans, ‘Budget 2008-09 – Rudd Government scraps Temporary Protection Visas’ (Press Release, 31 May 2008), available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce05-buget-08.htm>.

²⁰⁰ Department of Immigration and Citizenship, ‘Fact Sheet 62 – Assistance for Asylum Seekers in Australia’ (2008), available at <http://www.immi.gov.au/media/fact-sheets/62assistance.htm>.

²⁰¹ Australian Human Rights Commission, ‘Review of Australia’s Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights’, Australian Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights, 17 April 2009, 16.

²⁰² OECD, ‘Country Note: Australia’, *Growing Unequal? : Income Distribution and Poverty in OECD Countries* (2008), 2, available at <http://www.oecd.org/dataoecd/44/47/41525263.pdf>.

217. Parenting payments are still inadequate in supporting the needs of women and sole parents. In April 2009, the maximum a sole parent can receive is only \$569.80 per fortnight, while a partnered parent can receive \$409 per fortnight with the benefit of a second income in the family.²⁰³ The Australian Government must address this disadvantage suffered by women in their enjoyment of the right to an adequate standard of living, and also of their right to social security under Article 9.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government provide adequate support for sole parents, who are predominantly women, to alleviate the disadvantage suffered by women in their enjoyment of the right to an adequate standard of living, and also of their right to social security under Article 9.

M.14 Children and Young People

This section updates information commencing at page 113 of the NGO Report.

218. Young people receiving social security payments are still at an increased risk of poverty due to the lower rate of payments to which they are entitled. Youth Allowance is the payment for full time students aged between 16-24 or people looking for work aged under 21. In April 2009, the maximum rate payable for young people on Youth Allowance is \$371.40 per fortnight.²⁰⁴ In contrast, single adults looking for work receive \$453.30 per fortnight.²⁰⁵
219. The Australian Government must address this disadvantage suffered by young people, which is a diminution of their enjoyment of their right to an adequate standard of living, and also of the right to social security under Article 9.

M.15 Climate Change (new section)

The following section sets out the impact of climate change on enjoyment of the right to an adequate standard of living.

220. Climate change is likely to have significant human rights implications for Australia, the Asia Pacific region and the world. Within Australia, climate change is predicted to threaten the right to an adequate standard of living (Article 11), in particular the right to adequate food and water, and the right to health (Article 12).²⁰⁶

²⁰³ Centrelink, 'How much parenting payment do I get?' (2009), available at http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_pp.htm.

²⁰⁴ Centrelink, 'About payments' (2009), available at <http://myaccount.centrelink.gov.au/individuals/payments>.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

(a) Impact of Climate Change

221. The primary impact of climate change is expected to be disruptions in the Earth's weather patterns and a melting of polar ice, in turn resulting in a rise in the sea level.²⁰⁷ The changed weather patterns are predicted to include altered rainfall distribution patterns²⁰⁸ and severe weather events, including droughts and cyclones.²⁰⁹
222. However, these changed weather patterns are likely to lead to secondary impacts of climate change, which may include bushfires,²¹⁰ the spread of the distribution of infectious disease,²¹¹ increases in the number and distribution of 'pest' species,²¹² diminished food production requiring changes to traditional agricultural practices,²¹³ increases in air pollution²¹⁴ and mental health consequences of social, economic and demographic dislocation.²¹⁵

(b) Human Rights Impact of Climate Change

223. The consequences of climate change have been described as 'calamitous'²¹⁶ and as a 'human rights tragedy in the making'²¹⁷ which, if allowed to manifest, would constitute 'a systemic violation of the human rights of the poor and of future generations'.²¹⁸ Thus, climate change necessitates putting in place appropriate programs to protect more directly the right to an adequate standard of living, 'including providing safe housing, ensuring good sanitation and water-drinking supplies, and making sure citizens have access to information and legal redress and take part in decision making'.²¹⁹
224. Within Australia, the rights to an adequate standard of living and to health may be diminished in a number of ways, including by 'climate change induced disasters' such as flooding, cyclones or droughts that diminish the availability of safe drinking water; or changed climatic

²⁰⁷ Ross Garnaut, *Garnaut Climate Change Review: Final Report*, Cambridge University Press (September 2008) (**Garnaut Report**).

²⁰⁸ Ibid 117–18, 262–4.

²⁰⁹ Ibid 71–2.

²¹⁰ Ibid 179.

²¹¹ Ibid.

²¹² Ibid 182.

²¹³ Ibid 179.

²¹⁴ Ibid.

²¹⁵ Ibid. See also comments of Dr Kyung-Wha Kang, UN Deputy High Commissioner for Human Rights, cited in Andreas Sandre von Warburg, 'Human Rights Council Addresses Climate Change as a Global Threat', *The Gstaad Project*, 1 April 2008, available at <http://gstaadblog.wordpress.com>; Laura MacInnis, 'Climate Change Threatens Human Rights of Millions — UN', *Reuters* (Geneva), 20 February 2008, available at <http://www.reuters.com/article/environmentNews/idUSL1912377820080219>.

²¹⁶ von Warburg, above n 215, citing the UN Deputy High Commissioner for Human Rights.

²¹⁷ Human Rights and Equal Opportunity Commission, *Background Paper — Human Rights and Climate Change*, above n 220, 24 (emphasis in original).

²¹⁸ Ibid, citing the United Nations Development Programme, *Human Development Report 2007/2008 — Fighting Climate Change: Human Solidarity in a Divided World* (2007) 4.

²¹⁹ MacInnis, above n 215.

conditions that promote the spread of disease.²²⁰ One manifestation of climate change is predicted to be an increase in the number of heatwaves and hot days which could lead to approximately 4,000 more deaths in Queensland annually.²²¹

225. Climate change is also likely to result in a decline in regional food production, for example as increased temperatures accelerate grain sterility, or as previously productive land is rendered infertile through erosion and desertification or as extreme weather events disrupt agriculture.²²² This could impact on the standard as well as the availability of food.
226. The Australian Human Rights Commission predicts that climate change has the potential to exacerbate existing threats to human rights and regional stability in the Asia-Pacific region. In a background paper, the Commission stated:

Rising global temperatures will jeopardise many people's livelihoods, increasing their vulnerability to poverty and social deprivation. This is particularly problematic in weak states with poorly performing institutions and systems of government that are unable to manage competition over diminishing resources. In these conditions change is likely to overwhelm local capacities to adapt, which will reinforce the trend towards general instability in these countries.²²³

(c) The Australian Government's Response to Climate Change

227. The current Australian Government has recognised that, climate change, is a global problem requiring a global solution.²²⁴ As a result of this it has pledged to take action to reduce Australia's greenhouse gas emissions, adapt to climate change which cannot be avoided and help shape a global solution to climate change 'that both protects the planet and advances Australia's long-term interests'.²²⁵
228. The current Australian Government took the first key step to addressing climate change by ratifying the Kyoto Protocol on 3 December 2007. Additionally, the current Australian Government (whilst in Opposition) commissioned a review of the implications of climate change on Australia's economy which resulted in the publication of the *Garnaut Climate Change Review: Final Report* in September 2008.²²⁶
229. When in office, the current Australian Government released the Carbon Pollution Reduction Scheme Green Paper in July 2008 (**Green Paper**).²²⁷ The Green Paper outlines the

²²⁰ Human Rights and Equal Opportunity Commission, *Background Paper — Human Rights and Climate Change* (2008) 4, referring to comments of the UN Deputy High Commissioner of Human Rights.

²²¹ Garnaut Report, above n 207.

²²² See Human Rights and Equal Opportunity Commission, above n 223, 5.

²²³ Human Rights and Equal Opportunity Commission, *Background Paper — Human Rights and Climate Change* (2008) 8.

²²⁴ See Garnaut Report, above n 207. See also *Resolution on Human Rights and Climate Change*, UN HRC Res 7/23, 7th sess, 41st mtg, UN Doc A/HRC/RES/7/23 (2008).

²²⁵ Department of Climate Change, Australian Government, *Carbon Pollution Reduction Scheme: Green Paper* (2008) 8.

²²⁶ See Garnaut Report, above n 207.

²²⁷ See Department of Climate Change, above n 225.

Government's preferred approach to implementing the Kyoto Protocol and to implementing a Carbon Pollution Reduction Scheme to reduce greenhouse gas emissions in Australia.

230. In December 2008, the Australian Government released a White Paper on climate change which outlines the Australian Government's policy and proposed design of a 'Carbon Pollution Reduction Scheme' and its medium-term target range for reducing carbon pollution into the future. This paper follows on from the July 2008 Green Paper. It takes into account the outcomes of a broad public consultation and includes input from more than 1,000 submissions.²²⁸
231. The White Paper provides for a mandatory national target and strategy to reduce greenhouse gas emissions. The Australian Government has committed Australia to reducing greenhouse gas emissions by 5 per cent (compared to 1990 emissions) by 2020, but has left open the possibility that a more aggressive target of up to 15 per cent would be considered in the event that an international agreement could be reached in relation to carbon pollution reduction.
232. The Australian Government has come under significant criticism for its 5 per cent target, with various groups calling for a more aggressive target.²²⁹ Given the potential impact of climate change on the human rights of all Australians and on the Asia-Pacific region, the Australian Government should be encouraged to increase its overall commitment to the issues of climate change and carbon reduction schemes.
233. The Australian Government should also directly address the human rights issues associated with climate change, including particularly with respect to access to water, food and the spread of disease. See also discussion of health impacts of climate change in [Article 12](#).

Additional Proposed Recommendation for Concluding Observations

THAT Australia's policy and practice in relation to climate change respond to the human rights issues and obligations associated with climate change, including particularly with respect to access to water, food and the spread of disease.

²²⁸ Commonwealth, Carbon Pollution Reduction Scheme: Australia's Low Pollution Future, White Paper (2008), available at <http://www.climatechange.gov.au/whitepaper/>.

²²⁹ See eg, 'More hot air needed', *The Australian* (National) 25 February 2009, available at <http://www.theaustralian.news.com.au/story/0,25197,25102239-16741,00.html>.

Article 12 — Right to Highest Attainable Standard of Physical and Mental Health

N. RIGHT TO HIGHEST ATTAINABLE STANDARD OF HEALTH

N.1 Public Health

This section updates the information commencing at page 116 of the NGO Report.

234. As discussed at page 115 of the NGO report, provision of public health care in Australia is suffering from chronic underfunding, a decaying public hospital system, rising medical costs, inadequate coverage and inaccessibility, particularly for marginalised and disadvantaged people. Recent cases show problems associated with public funding of hospitals in rural areas and also mismanagement of patients.
235. These case studies indicate serious problems regarding the lack of public funding and, in some circumstances, the competency of the health sector, raising concerns with Australia's compliance with Article 12.

Case Study: Australian maternity care

In January 2009, Ms Campbell died in a regional country town from an ectopic pregnancy. In normal circumstances she could have survived, but she reportedly waited two hours for an ambulance to transfer her to a larger hospital some 60 kms away where she could have had the appropriate life-saving surgery in the maternity ward.²³⁰

Case Study: Australian maternity care

In January 2009, Ms Whiteside arrived at Maitland Hospital's emergency department, suffering the early stages of miscarriage. She was directed to a toilet cubicle where she miscarried and disposed of the 14-week-old foetus.²³¹

²³⁰ Lucy Battersby, 'Town mourns loss of woman caught out in small hospital', *The Age* (Melbourne), 10 January 2008, available at <http://www.theage.com.au/national/town-mourns-loss-of-woman-caught-out-in-small-hospital-20090109-7dp7.html>.

²³¹ Kate Benson and Erik Jensen, 'Bloodied woman sent to hospital toilet to miscarry', *The Sydney Morning Herald* (Sydney), 10 January 2009, available at <http://www.smh.com.au/articles/2009/01/09/1231004286931.html>.

N.2 Indigenous Health

This section updates the information commencing at page 118 of the NGO Report.

236. In November 2008, the Federal government and State governments committed a joint \$1.6 billion to improve Indigenous health. This constitutes the biggest single injection of new funding by an Australian government to improve Indigenous health outcomes.²³² The Australian Government, through the Council of Australian Governments (**COAG**) is coordinating a range of strategies to address key issues of Indigenous Disadvantage through an initiative known as Closing the Gap. In February 2009, a Government Report entitled *Closing the Gap on Indigenous Disadvantage: The Challenge for Australia* stated that National Partnerships on Indigenous Health Outcomes (partnerships between state and federal governments) would commit \$1.57 billion over four years ‘to reduce the biggest health risk factors such as smoking, to improve chronic disease management and follow up and to expand the capacity of the health workforce to tackle chronic disease in the Indigenous population.’²³³
237. However, whilst the significant commitment of funding is to be welcomed, reports from bodies such as the Australian Medical Association (**AMA**) suggest these funds are inadequate. In November 2008, the AMA released its annual report card presenting a snapshot of the health of Indigenous children.²³⁴ Dr Capolingua, President of the AMA, said the AMA report ‘presents a disturbing picture of health conditions and outcomes more commonly associated with the Third World than with a wealthy nation such as ours’.²³⁵ Indigenous children are:
- (a) more likely to be stillborn, to be born pre-term, to have low birth weight, or die in the first month of life;
 - (b) two to three times more likely to die in the first year of life;
 - (c) eleven times more likely to die from respiratory causes;
 - (d) at a much higher risk of suffering from infectious and parasitic diseases, respiratory and circulatory problems, hearing loss, rheumatic fever, dental cavities, injuries and clinically-significant emotional and behavioural difficulties;
 - (e) nearly 30 times more likely to suffer from nutritional anaemia and malnutrition up to four years of age; and

²³² Human Rights Commission, ‘Health equality for Indigenous Australians a step closer: Close the Gap Coalition welcomes COAG funding’ (Press release, 30 November 2008).

²³³ Australian Government, ‘Closing the Gap on Indigenous Disadvantage: The Challenge for Australia’, February 2009, 20 at http://www.fahcsia.gov.au/sa/indigenous/pubs/general/Documents/closing_gap_indigenous_disadvantage/closing_the_gap.pdf.

²³⁴ Australian Medical Association, *AMA Report Card Series 2008 – Indigenous and Torres Strait Islander Health, Ending the Cycle of Vulnerability: The Health of Indigenous Children* (2008), available at <http://www.ama.com.au/system/files/node/4335/AMA+Indigenous+Health+Report+Card+2008.pdf>.

²³⁵ Australian Medical Association, ‘Ending the Cycle of Vulnerability - AMA Indigenous Health Report Card 2008’ (Press release, 27 November 2008).

- (f) cared for by substantially fewer adults, who had serious health risks themselves.²³⁶
238. The report emphasised that rectifying the health gap in children can only be done by comprehensively addressing the broader contextual factors and intergenerational health influences that affect Indigenous children. The report recommends:
- (a) the establishment of a national network of Aboriginal community-controlled primary health care services specifically for Indigenous mothers and children;
 - (b) the establishment of culturally appropriate services to address mental health and social wellbeing;
 - (c) the development of strategies to increase the number of people in the Indigenous health and medical workforce;
 - (d) a national audit of the living conditions of Aboriginal people;
 - (e) improved data management of Indigenous health information; and
 - (f) capacity building to support the development of local initiatives to improve health outcomes.²³⁷
239. Dr Capolingua said that the solutions proposed in the report were neither cheap nor easy but 'but they are essential. Ending the cycle of vulnerability for Australia's Indigenous children is a national priority'.²³⁸

Additional Proposed Recommendation for Concluding Observations

THAT the Australian government implement the recommendations in the Australian Medical Association's 2008 report card on Indigenous health.

N.3 Mental Health Services

This section updates the information commencing at page 120 of the NGO Report.

240. Within mental health services, there is still too great a use of aversive treatments with harmful side effects and reliance on involuntary treatment regimes.²³⁹ Many people are stigmatised, distressed and debilitated by harmful side effects of treatment such as weight gain, lethargy, loss of sexual function, involuntary movements and tremors, dry mouth, vision problems, inability to focus or concentrate and dulled mental functioning or emotional experience.

²³⁶ Australian Medical Association, *AMA Report Card Series 2008 – Indigenous and Torres Strait Islander Health, Ending the Cycle of Vulnerability: The Health of Indigenous Children* (2008), 1, available at <http://www.ama.com.au/system/files/node/4335/AMA+Indigenous+Health+Report+Card+2008.pdf>.

²³⁷ *Ibid.*, 6.

²³⁸ Australian Medical Association, 'Ending the Cycle of Vulnerability - AMA Indigenous Health Report Card 2008' (Press release, 27 November 2008).

²³⁹ In its 2008 Consultation Paper 'Because Mental Health Matters' Victoria's Department of Human Services acknowledged the need to create a more "consumer-focused, voluntary treatment system"- see pages 79 and 83.

241. The compatibility of involuntary treatment regimes and the right to adequate and appropriate healthcare may be improved through the availability of legally recognised Advance Directives. Advance Directives are prepared by people when they are well and allow that person to articulate their treatment preferences or nominate another person to make particular decisions.²⁴⁰ They provide for appropriate and individualised healthcare.
242. In 2006, a Senate Committee inquiry into the mental health sector in Australia reported that, as a matter of priority, state and territory governments consider making advance directives available to people who suffer from mental illness. To date, advance directives have not been granted legal recognition in any Australian jurisdictions.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian government grant legal recognition to Advanced Directives from mental health patients in all Australian jurisdictions to ensure that appropriate and individualised health care treatment is provided to persons with mental health issues.

N.4 Asylum Seekers

This section updates the information commencing at page 121 of the NGO Report.

243. As stated in new section C.7A above, on 9 August 2008 the Australian Government abolished temporary protection visas for refugees.²⁴¹ This is a welcome improvement to the right of many asylum seekers in the community to access appropriate healthcare. People seeking protection in Australia are now placed on either permanent protection visas or Resolution of Status visas, both of which provide immediate access to health care benefits, among other things.
244. Despite these welcome reforms, further changes are needed to ensure that all asylum seekers in the community receive adequate nutrition and healthcare while their immigration status is waiting to be resolved. As discussed at C.7A above, many asylum seekers on Bridging Visas still cannot access work, welfare benefits or healthcare.²⁴² Bridging visa holders who are not allowed to work are also ineligible for healthcare entitlements under Medicare and the Pharmaceutical Benefits Scheme, leaving them without the support of Australia's public health system.

²⁴⁰ Vivienne Topp and Martin Thomas, 'Advance Directive for Mental Health', (2008) *New Paradigm*.

²⁴¹ Department of Immigration and Citizenship, 'Fact Sheet 68 - Abolition of Temporary Protection visas (TPVs) and Temporary Humanitarian visa (THVs), and the Resolution of Status (subclass 851) visa' (2008), available at http://www.immi.gov.au/media/fact-sheets/68tpv_further.htm; Senator Evans, 'Budget 2008-09 – Rudd Government scraps Temporary Protection Visas' (Press Release, 31 May 2008), available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce05-buget-08.htm>.

²⁴² Department of Immigration and Citizenship, 'Fact Sheet 62 – Assistance for Asylum Seekers in Australia' (2008), available at <http://www.immi.gov.au/media/fact-sheets/62assistance.htm>.

245. Further, the Australian Human Rights Commission has stated that the restrictions on work and study themselves can have a negative impact on the physical and social well-being of asylum seekers, including anxiety, depression, mental health issues and family breakdown.²⁴³
246. For asylum seekers in detention, their right to health is compromised by their ability to access health services as well as by the fact of detention itself.
247. As stated in section C.7A above, despite the Government's promise that immigration detention will only be used as a last resort, it remains – in law and practice – the first resort for irregular asylum seeker arrivals. The fact of detention, particularly detention in remote locations, makes the provision of basic health services more difficult.
248. The Australian government has continued to detain and process applications for asylum on Christmas Island, 2600km from the nearest Australian capital city.²⁴⁴ Commissioner Innes emphasised that 'the island's isolation makes it difficult for external groups from the mainland to monitor what is going on there, and the island community is so small that detainees find it very hard to access basic services'.²⁴⁵
249. The health prospects of asylum seekers detained on mainland Australia are also of concern. Although some detainees were satisfied with the health services provided in detention centres, the Australian Human Rights Commission found that a few detainees 'expressed frustrations about instances where they felt they had to wait too long to see a GP or a specialist, or where they felt they were not provided with a correct diagnosis or adequate medical treatment'.²⁴⁶ More information can be found at [Article 11: Asylum Seekers](#).
250. The Australian Human Rights Commission has consistently noted that the prolonged and indefinite detention of asylum seekers, who are kept in a state of uncertainty as to when they will be released or indeed whether they will be allowed to stay in Australia, has a detrimental effect on the mental health of detainees.²⁴⁷

²⁴³ Australian Human Rights Commission, 'Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights', Australian Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights, 17 April 2009, 16.

²⁴⁴ Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2008), p 70.

²⁴⁵ Australian Human Rights Commission, 'New report highlights ongoing problems in immigration detention' (Press release, 13 January 2009).

²⁴⁶ Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2008), pp 23-24.

²⁴⁷ Australian Human Rights Commission, 'Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights', Australian Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights, 17 April 2009, 141.

Case Study: Effective health care relies on accessible information

The recent Victorian Human Rights and Equal Opportunity Commission report into the integration of the Sudanese-Australian community found that Australian-Sudanese young people experience a range of barriers to accessing health services, including lack of awareness of services available, poor understanding of the health system, communication difficulties, a lack of culturally appropriate services, difficulties communicating with doctors, and mistrust of confidentiality. The report recommends, inter alia, "systematic and on-going training and education for nurses and doctors in hospitals on culturally appropriate service provision".²⁴⁸

Additional Proposed Recommendations for Concluding Observations

THAT the Australian Government immediately end mandatory detention and detention on Christmas Island.

THAT the Australian Government provide all persons on Bridging Visas with access to Australia's public health system.

THAT the Australian Government provide all detainees with appropriate health and medical care.

N.6 Homeless People

This section updates the information commencing at page 123 of the NGO Report.

251. In December 2008, the Australian government released a White Paper on homelessness.²⁴⁹ The paper set out an action plan to halve homelessness by 2020 and improve housing affordability for vulnerable Australians. The White Paper commits the Australian Government to provide \$800 million over five years to fund a range of initiatives, including delivering community based mental health services to 1,000 difficult to reach Australians, including people who are homeless.²⁵⁰
252. The White Paper also commits to increasing 'the supply of affordable housing and specialist housing models that link accommodation and support'.²⁵¹ In this regard, the White Paper proposes that housing services be complemented with 'wrap-around support that addresses' people's complex needs.²⁵² In recognition that 'rough sleepers and people who are chronically homeless are more likely to have complex needs such as mental health issues, substance abuse and disabilities', it is essential that the proposed wrap-around support services, and

²⁴⁸ Victorian Equal Opportunity & Human Rights Commission, *Rights of passage: The experiences of Australian-Sudanese Young People* (2008), p 11, available at http://www.humanrightscommission.vic.gov.au/pdf/rights_of_passage.pdf.

²⁴⁹ Commonwealth of Australia, *The Road Home* (2008), available at http://www.facs.gov.au/housing/homelessness_white_paper/the_road_home.pdf.

²⁵⁰ Ibid, x.

²⁵¹ Ibid, xi.

²⁵² Ibid.

housing models that link accommodation and support, incorporate the provision of adequate health services. These health services must respond to the particular health concerns of people experiencing homelessness.

253. Despite this significant commitment, the White Paper fails to explicitly recognise homelessness as a human rights issue or commit Australia to ensure the core minimum necessities for a dignified life.

N.7 Prisoners

This section updates the information commencing at page 124 of the NGO Report.

(a) Mental Health Care in Prisons

254. Rates of major mental illnesses are between three and five times higher in the prison population than in the general Australian community.²⁵³
255. In the Northern Territory, people with mental health issues who have committed minor offences are often placed in jail due to insufficient mental health housing facilities. As indicated in the Case Study below, a number of offenders with mental health issues are not receiving proper support for their health needs. The Chief Justice of the Northern Territory Supreme Court has said that it is “utterly unacceptable that there is no support or housing facilities for mentally ill people who commit minor offences, other than jail”.²⁵⁴ In Darwin, there are only 26 beds at the Royal Darwin Hospital which can provide care for only the most critical of mentally ill prisoners. The shortage of beds results in many severely mentally ill prisoners being locked in isolation blocks in Darwin's overflowing prisons.²⁵⁵

Case Study: Christopher Leo²⁵⁶

In December 2008, Chief Justice Martin of the Northern Territory's Supreme Court sentenced a 28 year old mentally ill Indigenous man to 12 months in jail because “he had no choice but to keep Leo behind bars...as there was no support or housing facilities in the Territory to make him safe outside of prison”.

Mr Leo had already spent 16 months in Alice Springs prison for the aggravated assault of a woman in August 2007. He was found unfit to stand trial but was later found guilty in a special jury hearing. Mr Leo suffered tremendously in maximum security, including attempting to harm himself.

²⁵³ J P R Ogloff et al, ‘The Identification of Mental Disorders in the Criminal Justice System’, *Trends and Issues in Crime and Criminal Justice* (No 334, Australian Institute of Criminology, 2007) 1.

²⁵⁴ ‘Judge “forced” to keep mentally ill man in jail’, *ABC News Online*, 22 December 2008, available at <http://www.abc.net.au/news/stories/2008/12/22/2453306.htm>.

²⁵⁵ Natasha Robinson, ‘Hopeless Days of Man, Adrian Faulton, Lost in the Legal System’, *The Australian* 20 December 2008, available at <http://www.theaustralian.news.com.au/story/0,25197,24826238-5006790,00.html>.

²⁵⁶ ‘Judge “forced” to keep mentally ill man in jail’, *ABC News Online*, 22 December 2008, available at <http://www.abc.net.au/news/stories/2008/12/22/2453306.htm>.

(b) Transmission of Disease

256. A report released in December 2008 reveals that, between 2004 and 2008, only 1.5 per cent of Victorian prisoners who were believed to have Hepatitis C were treated for the virus.²⁵⁷ This is despite the virus being said to be 'out of control' in Australian prisons²⁵⁸ and the fact that treatment for Hepatitis C is readily available in most cases. The statistics were released by St Vincent's Hospital, which provides health care to prisoners in 13 of the 14 jails in Victoria. The chief executive of the Hepatitis C Council of Victoria said the extremely low treatment rate was disturbing, given the risk of prisoners infecting each other and members of the community when they leave prison.²⁵⁹ Research has shown that 75 per cent of injecting drug users continue to inject in jail, usually with crude and blunt injecting equipment.²⁶⁰

Case Study: Forensic prisoners kept in solitary confinement for 18 hours per day

In April 2008, the NSW Department of Corrective Services imposed an 18 hour per day lock down of forensic inmates housed in the prison hospital within Long Bay Correctional Facility.²⁶¹ Forensic inmates are those prisoners who have committed serious offences but suffer from mental illness. The lockdown time for these patients was moved from 9pm to 3.30pm. Patients were forced to sit alone in their cells for 18 hours per day, raising concerns that isolation would exacerbate already serious mental health problems. Prison groups reported the men were being sedated to calm them down.

The NSW Nurses Association reported that one of its members, Ray Gregory said the draconian measures were having a huge impact on nurses' ability to deliver adequate treatment: "You can't care for patients through closed doors. Locking them in for so long, when many suffer from auditory hallucinations and internal voices, is particularly cruel."²⁶²

"The lockdown has been detrimental to nurses' morale, especially on the afternoon shift when they have to sit around just watching their patients on CCTV screens, shouting through windows, banging on doors and banging their heads against the wall," Mr Gregory said. "It's the sheer frustration at being locked in for so long. It is harsh enough on the main prison population let alone somebody suffering from a mental illness." Mr Gregory said the lockdown was a part of cost cutting measures following reports that the Department of Corrective Services had cut 28 prison officer positions at the prison hospital.²⁶³

In September 2008, following substantial media attention and political lobbying, the NSW Attorney General John Hatzistergos intervened and the 18 hour lockdown was reduced to 12 hours.²⁶⁴

²⁵⁷ Julia Medew, 'Prisoners go Untreated as Hepatitis C Sweeps Jails', *The Age* (Melbourne), 29 December 2008, available at <http://www.theage.com.au/national/prisoners-go-untreated-as-hepatitis-c-sweeps-jails-20081228-767n.html?page=-1>.

²⁵⁸ Australian Hepatitis Council, Media Release (1 September 2005), available at http://www.hepatitisaustralia.com/documents/mediarelease_050901.pdf.

²⁵⁹ Medew, above n 257.

²⁶⁰ Ibid.

²⁶¹ Jordan Baker, 'Prison Staff to Lose Jobs at Hospital', *The Sydney Morning Herald* (Sydney), 25 September 2008, available at <http://www.smh.com.au/articles/2008/09/24/1222217331264.html?feed=fairfaxdigitalxml>.

(c) Women in Prison

This section updates the information in paragraph 412 of the NGO Report.

257. Women in prison present with significant health needs. Recent research conducted in New South Wales, Queensland and Western Australia indicates that more than half of the women inmates had been diagnosed with a mental health condition and that between 30 and 40 per cent had attempted suicide at some time.²⁶⁵ Women labelled with an intellectual, psychiatric or learning disability are more likely to be classified as maximum-security prisoners.²⁶⁶ Substance abuse and rates of infectious disease are also reported to be high.
258. Women in prison are not able to access adequate care and services, and prison staff are unable to ensure proper treatment for women with mental health issues.²⁶⁷
259. An additional concern is the practice of strip searching, which has a particular impact on female prisoners. Between 40 and 89 per cent of any female prison population are victims and survivors of sexual or physical violence and abuse.²⁶⁸ The practice of strip searching can reinvolve and replicate previous experiences of such abuse and the consequent trauma.²⁶⁹ In many instances, women prisoners may forego visits from family or external medical treatment in order to reduce the number of searches.²⁷⁰
260. Current policies regarding strip searching of prisoners and visitors do not require that the search be conducted in a manner that represents a permissible limitation on human rights. They do not require prison officers to seek alternatives, nor do they balance security concerns

²⁶² 'Lockdown Torments Mental Health Patients', *Union News* (NSW), 31 July 2008, available at <http://www.nswnurses.asn.au/news/14723.html>.

²⁶³ Ibid.

²⁶⁴ Justice Action, 'Victory for Mental Health Patients - Long Bay Lockdown' (Press release, 25 September 2008).

²⁶⁵ Australian Bureau of Statistics, *Crime and Justice: Women in Prison*, ABS Catalogue No 4102.0 (2004).

²⁶⁶ See Submission to the Anti-Discrimination Commissioner for the Inquiry into the Discrimination on the Basis of Sex, Race and Disability Experienced by Women Prisoners in Queensland (2004) (Sisters Inside Inc), available at <http://www.sistersinside.com.au/media/adcgsubmission.pdf>; Victorian Council of Social Service, *Request for a Systematic Review of Discrimination against Women in Victorian Prisons* (2005), available at <http://www.sistersinside.com.au/media/VICComplaint.pdf>.

²⁶⁷ Ibid.

²⁶⁸ See, eg, B A Hockings et al, Department of Corrective Services, *Queensland Women Prisoners' Health Survey* (2002) 52-3; Barbara Denton, *Dealing: Women in the Drug Economy* (2001); Department of Justice, Western Australia, *Profile of Women in Prison* (2002); Debbie Kilroy, 'When Will You See the Real Us?' Women in Prison', (2001) *Women in Prison Journal* 39. 'Sexual assault' figures here do not include strip searches.

²⁶⁹ Federation of Community Legal Centres and Victorian Council of Social Service, *Request for a Systemic Review of Discrimination against Women in Victorian Prisons* (2005), available at <http://www.vals.org.au/news/submissions/33%20ExecutiveSummaryFinal%20Discrimination%20against%20women%20in%20prison.pdf>.

²⁷⁰ Anti-Discrimination Commission Queensland, *Women in Prison: A Report by the Anti-Discrimination Commission Queensland* (2006) 52-3; Amnesty International, 'Not Part of My Sentence': *Violations of Human Rights of Women in Custody* (1999) 24-5.

with the potential harm caused by the search. Furthermore, the practice of strip searching is an ineffective tool in discovering contraband, as indicated in the Case Study below.

Case Study

At a maximum security women's prison in Victoria, 18,889 strip searches were conducted on a prison population of 203 within a 12-month period between 2001 and 2002 (an average of 93 strip searches per prisoner). Only one item of 'contraband' was found during that time.²⁷¹

This prison has since conducted a pilot program aimed at reducing strip searches on women prisoners with results finding no negative trends in terms of positive urine drug tests or contraband seizures.

N.8 Access to IVF

This section updates information commencing at paragraph 417 of the NGO Report.

261. As stated in the NGO Report, there is not currently equal access to in vitro fertilisation (**IVF**) and Assisted Reproductive Technology (**ART**) in Australia. As the laws are state-based, there is no uniform position across Australia.
262. All states and territories other than South Australia and Victoria currently allow lesbian couples access to IVF and ART, although access in Victoria will be effective from January 2010.²⁷² Only the ACT and Western Australia allow access to IVF by surrogates of gay male couples,²⁷³ while Victoria will allow it from January 2010.²⁷⁴
263. The right to access IVF and ART, are important aspects of the right to health, and should be protected by Federal legislation in Australia. Equitable access to IVF and ART also raise concerns under Articles 2 and 15 of the *ICESCR*.

N.9 Climate change (new section)

This is a new section.

264. Further to the discussion in the new section Article 11: Climate Change, it is clear that climate change is directly related to the right to health. The World Health Organisation has predicted that global warming may already be responsible for more than 160,000 deaths a year from malaria and malnutrition, and that the number could double by 2020.²⁷⁵

²⁷¹ Study carried out by the Federation of Community Legal Centres as part of the Victorian Human Rights Charter Consultation in 2005.

²⁷² *Assisted Reproductive Treatment Act 2008* (Vic).

²⁷³ See Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements Report*, Chapter 5, available at http://www.hreoc.gov.au/Human_RightS/samesex/report/Ch_5.html.

²⁷⁴ *Assisted Reproductive Treatment Act 2008* (Vic).

²⁷⁵ Shaoni Bhattacharya, 'Global Warming kills 160,000 a year', *New Scientist*, 1 October 2003.

265. In Australia, there is a risk that global warming will aid the range and spread of tropical diseases. Research has suggested that warmer climatic conditions provide a more hospitable environment for disease carrying mosquitoes which will make preventing the spread of disease more difficult.²⁷⁶
266. For example, currently, dengue mosquitoes in Australia are restricted to Queensland in the northeast, however Queensland has recently experienced an outbreak of the disease outside of the usual transmission areas, which affected over 600 people. However, some research shows that climate changes predicted by 2050 will increase suitable mosquito habitat across much of Australia.²⁷⁷

Additional Proposed Recommendation for Concluding Observations

THAT the Australian government respond to climate change by addressing the serious impact that climate change will have on the right to health, including necessary investment in public health services.

²⁷⁶ See Human Rights and Equal Opportunity Commission, *Background Paper: Human Rights and Climate Change* (2008), 6, available at http://www.hreoc.gov.au/pdf/about/media/papers/hrandclimate_change.pdf.

²⁷⁷ Research reported in 'Climate changes in Australia will increase dengue fever', *Medical-Net*, 29 January 2009, <http://www.news-medical.net/?id=45364>.

Articles 13 and 14 — Right to Education

O. RIGHT TO EDUCATION

O.1 Early Childhood Education

This section updates information commencing at page 131 of the NGO Report.

267. In December 2008, the United Nations Children's Fund (**UNICEF**) ranked Australia's childcare system the third worst in the developed world.²⁷⁸ The UNICEF report found that Australia barely satisfies two of the standard benchmarks for assessing child care services:

Australia is one of the few countries where there is not yet a national plan on early childhood education and care that may clarify the vision of the government for investment in early years, and what is the funding that may be required to make sure that process moves forward in the right manner.

268. Currently there is insufficient supply of affordable quality child care options.

269. In mid-2008, Australia's largest child care provider, ABC Learning Centres, went into receivership. The private child care provider had built up an empire, owning over 1,000 child care centres across Australia. As a result of the company's financial troubles, over 100 child care centres have closed, with predictions of more closures to follow. The Australian Government was forced to spend \$22 million to prop up vital child care services. In December 2008, the Australian Government announced an additional \$34 million to keep ABC Learning Centres 'alive' at least until March 2009.²⁷⁹ Since that time the Government has announced that a further 30? Centres will close and they will invest further monies into the remaining Centres.

270. In addition to the UNICEF report, in 2006 the Organisation for Economic Cooperation and Development (**OECD**) released a report that highlighted the very low levels of investment in quality early childhood services in Australia.²⁸⁰ The OECD report, *Starting Strong II*, focused on the early childhood policies and government spending on early childhood education of 20 countries. The report shows that the Australian Government contributes to just 68 per cent of spending on early education, well below the OECD average of 80 per cent. Australia also spends less than any other first-world country on preschool, and kindergarten teachers are the worst paid and least trained of any first world country.²⁸¹

²⁷⁸ 'Australia Third Bottom in UNICEF Childcare Table' ABC News Online, 12 December 2008, available at <http://www.abc.net.au/news/stories/2008/12/12/2444436.htm>.

²⁷⁹ Annie Guest, 'Fifty-five ABC Learning Centres to Close' *ABC Radio National*, 10 December 2008, available at <http://www.abc.net.au/pm/content/2008/s2443085.htm>.

²⁸⁰ Organisation for Economic Co-operation and Development (OECD), *Starting Strong II: Early Childhood Education and Care* (2006), available at http://www.oecd.org/document/63/0,3343,en_2649_39263231_37416703_1_1_1_1.00.html.

²⁸¹ *Ibid.*

O.2 Primary and Secondary Education

This section updates information commencing at page 132 of the NGO Report.

271. As discussed in paragraph 425 of the NGO Report, there is a significant resource gap between private and public schools in Australia. The Australian Government has legislated to continue the funding model adopted by the former Australian Government until 2012.²⁸² This model perpetuates an unfair funding formula which sees students in public schools receiving less funding than their counterparts in private and non-governmental schools.²⁸³ An Australian Education union report written by Associate Professor Jim McMorrow claims that from 1996 to 2007 public schools' share of federal funding declined from 43 to 35 per cent and that it will decline further, to 33.8 percent, by 2012. Further he claims that every independent school student in the country attained 1.5 times the amount dedicated to educating children in the public system.²⁸⁴

O.4 Indigenous Education

This section updates information commencing at page 135 of the NGO Report.

272. As discussed under Article 9, the Northern Territory Intervention includes a measure to enforce school attendance by withholding welfare payments from Indigenous parents whose children do not attend school. However, it is estimated that if the participation rate of Indigenous school students in the Northern Territory was 100 per cent, at least another 660 teachers would be needed.²⁸⁵ The punitive approach to school attendance has not yet been accompanied by adequate funding of school services and communities.
273. As part of the Closing the Gap initiative, the Australian Government aims to:
- (a) halve the gap in reading, writing and numeracy achievements for Indigenous children; and
 - (b) halve the gap for Indigenous students in year 12 attainment or equivalent rates by 2020.²⁸⁶
274. In support of these aims, the Australian Government announced \$291.2 million of funding over six years to improve remote service delivery, focusing on, among other things, driving reforms to early childhood schooling and health.²⁸⁷ This initiative is strongly welcomed as advancing the early childhood and educational rights of Indigenous children. Whether the investment is sufficient is yet to be seen. Further, to be successful the implementation of these reforms

²⁸² *Schools Assistance Act 2008.*

²⁸³ Leslie Cannold, 'Private school, public sham', *The Sun-Herald*, 5 April 2009.

²⁸⁴ Leslie Cannold, 'Private school, public sham', *The Sun-Herald*, 5 April 2009.

²⁸⁵ Michaela Kronemann, *Education is the Key: An Education Future for Indigenous Communities in the Northern Territory* (2007) 33. This estimation was based on all Indigenous persons aged 3–17 attending schools, with a teacher ratio of 1:10 for bilingual schools.

²⁸⁶ Australian Government, 'Closing the Gap on Indigenous Disadvantage: The Challenge for Australia', February 2009, 5 at http://www.fahcsia.gov.au/sa/indigenous/pubs/general/Documents/closing_gap_indigenous_disadvantage/closing_the_gap.pdf.

²⁸⁷ *Ibid*, 21.

must be done in consultation with Indigenous people, highlighting again the need for an Indigenous representative body.

O.5 Education for prisoners (new section)

This is a new section.

275. Currently access to proper educational services for prisoners are inadequate. While the rehabilitative reasons for imprisoning people are quoted in sentencing, in reality there are very few programs which prisoners can access. Additionally those prisoners who are enrolled in TAFE and University programs have very limited access to computers.

Case Study

Mr Middleton was studying a degree course in Queensland and had only one year to complete. He was transferred to NSW where the Commissioner of Corrective Services decided that he could no longer have extended access to a computer in his cell. This meant he had to withdraw from his course.²⁸⁸

²⁸⁸ *Commissioner of Corrective Services of NSW* [2004] NSWCA 492; *Ors v Middleton* [2004] NSWCA 156.

Article 15 — Cultural and Scientific Progress Rights

P. CULTURAL RIGHTS

P.1 Native Title

This section updates the information commencing at page 141 of the NGO Report.

(a) Proposed Reforms of Native Title (new section)

276. In October 2008, the Australian Government introduced the Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008, which proposes a range of reforms to improve the way that Australia's federal courts and tribunals deal with native title claims. The reforms are aimed at reducing the cost and length of trials and will benefit native title claimants by providing a more centralised and flexible system.
277. In December 2008, the Commonwealth Attorney-General also released a discussion paper on possible minor amendments to the *Native Title Act 1993* (Cth) (**Native Title Act**) to encourage more negotiated settlements of native title claims. These amendments are aimed at complementing the institutional reform referred to above and include welcome proposals to reduce evidentiary burdens and obstacles for claimants and to make it easier for a court to hear evidence of Indigenous traditional laws and customs.²⁸⁹
278. While these proposed developments are welcome, the fact remains that the standard and burden of proof currently required under the native system places particular burdens on Indigenous people seeking to gain recognition and protection of their native title, raising concerns with Articles 1 and 15 of the *ICESCR*. The Human Rights Committee in its recent Concluding Observations recommended that Australia 'continue its efforts to improve the operation of the Native Title system' and that it do so 'in consultation with Aboriginal and Torres Strait Islander Peoples'.²⁹⁰

(b) Northern Territory Intervention

279. The compulsory acquisition of Indigenous land remains a significant concern with the Northern Territory Intervention. The three main measures by which the Australian Government has weakened Indigenous native title rights are:
- (a) the acquisition of Indigenous land and community living areas through the statutory imposition of compulsory five year leases of that land to the Commonwealth;
 - (b) broad discretionary statutory powers in relation to Indigenous town camps; and
 - (c) the suspension of the future act provisions of the *Native Title Act*, thereby effectively suspending the operation of any native title rights inconsistent with the five year lease regime.

²⁸⁹ *Native title reform*, Attorney-General's Department (2009), available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Native_title_Native_title_reform.

²⁹⁰ Human Rights Committee, *Concluding Observations: Australia*, above n 7, [16].

Five year leases over Aboriginal freehold land

280. The Northern Territory Intervention provides for the compulsory acquisition of leases by the Australian Government over townships on Aboriginal land held by Aboriginal Land Trusts or Land Councils and 'Aboriginal community living areas' held by Aboriginal associations and other specified areas.²⁹¹
281. Although the relationship in the five year lease regime is that of lessee and lessor, Aboriginal land owners do not possess the rights ordinarily enjoyed by lessors. The terms and conditions of the compulsory five year leases are able to be determined by the Australian Government. The present terms include:
- (a) no clearly expressed liability to pay rent on the improved value of the land²⁹² (although the Government now has signalled its intention to pay rent on the unimproved value²⁹³);
 - (b) the ability to vary or terminate the lease without reference to the Aboriginal landholders,²⁹⁴ while the Aboriginal land owners are explicitly precluded from doing so;²⁹⁵ and
 - (c) the ability to terminate the underlying right, title or interest,²⁹⁶ by giving notice in writing.²⁹⁷

Powers over Aboriginal town camps

282. Under the Northern Territory Intervention, the Commonwealth Government has the same powers as the Northern Territory Minister to administer, forfeit or resume town camp leases that are held by Aboriginal associations.²⁹⁸

Suspension of the Native Title Act

283. Given that native title applications may take many years to resolve, the future act regime under the Native Title Act was devised to facilitate negotiations between native title claimants and project proponents, so that native title rights and interests can be protected.

²⁹¹ Section 31(1) of the NTNER Act. 'Aboriginal land' is land granted to Aboriginal Land Trusts in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Aboriginal community living areas are created by grant to associations in fee simple under the *Lands Acquisition Act (NT)*.

²⁹² Section 35(2) of the NTNER Act.

²⁹³ *Government's response to the NTER review*, ABC Radio National, 24 October 2008 at http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/interview_fran_kelley_24oct08.htm (accessed 20 November 2008); Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Compulsory income management to continue as key NTER measure*, 23 October 2008 at http://www.fahcsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm (accessed 6 November 2008).

²⁹⁴ s 35(5),(6),(7) & (8) of the NTNER Act.

²⁹⁵ s 35(4) of the NTNER Act.

²⁹⁶ s 37(1) of the NTNER Act.

²⁹⁷ s 37(3) of the NTNER Act.

²⁹⁸ ss 44 & 46 of the NTNER Act.

284. The Northern Territory Intervention provides that the future acts regime provided for in the Native Title Act does not apply in an expansive range of circumstances, including over:
- (a) the compulsory five year leases,²⁹⁹
 - (b) rights, titles and interests over Aboriginal town camps vested in the Commonwealth;³⁰⁰
 - (c) any acts done by, under or in accordance with any other provision dealing with the acquisition of rights, titles and interests in land;³⁰¹
 - (d) acts done by the Commonwealth, the Northern Territory or an Authority on land that has been resumed or leases that have been forfeited over town camps;³⁰²
 - (e) land on which a Commonwealth interest exists;³⁰³ or
 - (f) any acts related to any of the above acts.³⁰⁴
285. The practical and legal consequence of these measures is the suspension of native title rights in so far as they may be inconsistent with the Commonwealth's rights and powers under the Northern Territory Intervention.
286. These broad ranging powers given to the Australian Government under the Northern Territory Intervention raise serious concerns in relation to the native title rights of Indigenous peoples.
287. Recently, the High Court of Australia rejected a claim brought by a group of Northern Territory land owners and upheld the constitutional validity of the compulsory five year lease regime.³⁰⁵ However, while the constitutional challenge was unsuccessful, the High Court ruling means that Indigenous people in the Northern Territory whose land has been compulsorily acquired by the Federal Government must be provided with fair compensation. To date, no compensation has been paid to affected people by either the Federal Government or the Northern Territory Government.

Additional Proposed Recommendation for Concluding Observations

THAT the Australian Government provide full and fair compensation to Indigenous individuals and communities deprived of land, property or other benefits by the operation of the Northern Territory Intervention.

²⁹⁹ s 51(1)(a) of the NTNER Act.

³⁰⁰ s 51(1)(a) of the NTNER Act.

³⁰¹ s 51(1)(b) of the NTNER Act.

³⁰² s 51(1)(c) of the NTNER Act.

³⁰³ s 51(1)(d) of the NTNER Act.

³⁰⁴ s 51(1)(e) of the NTNER Act.

³⁰⁵ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009).

P.3 Extinction of Indigenous Languages (new section)

This is a new section relating to Articles 1 and 15.

288. In October 2008, the Northern Territory Government announced a new policy requiring the first four hours of education in all Northern Territory schools to be conducted in English.³⁰⁶ In response, the Federation of Indigenous and Torres Strait Islander Languages has petitioned the Australian Government to improve measures to preserve native languages and is seeking a national inquiry into the issue.³⁰⁷
289. The United Nations Educational, Scientific and Cultural Organization has claimed that more than 100 languages in Australia are in danger of extinction.³⁰⁸ It is feared that the new Northern Territory Government policy will further endanger Indigenous languages.³⁰⁹
290. Given the central importance of language to the maintenance of Indigenous culture and customs, the policy of forcing education in schools to be conducted in English has the potential to seriously threaten the existence of many Indigenous Australian languages and raises concerns in relation to Article 15 of the *ICESCR*, as well as Articles 1, 2 and 13.

Additional Proposed Recommendation for Concluding Observations

THAT all Australian Governments take positive and necessary measures to ensure that Indigenous people, together with their communities, enjoy the right to identity and culture, including through the maintenance and use of their traditional languages.

³⁰⁶ Northern Territory Government, 'Education Restructure Includes Greater Emphasis on English,' Media Release, 14 October 2008, available at <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=4599&d=5>.

³⁰⁷ ABC News, 'Govt petitioned to preserve Indigenous languages,' 18 November, 2008, available at www.abc.net.au/news/stories/2008/11/18/2423386.htm.

³⁰⁸ ABC News, 'Indigenous languages under threat, UN finds,' 21 February 2009, available at <http://www.abc.net.au/news/stories/2009/02/21/2497718.htm>.

³⁰⁹ ABC News, 'Linguists fear Indigenous language extinctions,' 1 March 2009, available at <http://www.abc.net.au/news/stories/2009/03/01/2504357.htm>.