



# AUSTRALIA

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE  
ELIMINATION OF RACIAL DISCRIMINATION

94<sup>TH</sup> SESSION, 20 NOVEMBER - 8 DECEMBER 2017

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# CONTENTS

<b>1. INTRODUCTION</b>	<b>4</b>
<b>2. LEGISLATIVE MEASURES AND INADEQUATE LEGAL FRAMEWORK</b>	<b>5</b>
2.1. PROBLEMATIC SECTIONS OF THE AUSTRALIAN CONSTITUTION	5
2.2. AN AUSTRALIAN HUMAN RIGHTS ACT	8
2.3. RACIAL DISCRIMINATION AND INDIGENOUS PEOPLES	9
<b>3. RACIAL DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM</b>	<b>12</b>
3.1. OVERREPRESENTATION OF INDIGENOUS PEOPLE	12
3.2. JUSTICE REINVESTMENT	14
3.3. ACCESS TO LEGAL SERVICES	15
3.4. MANDATORY SENTENCING	16
3.5. AGE OF CRIMINAL RESPONSIBILITY	18
<b>4. RACIAL DISCRIMINATION, RACIAL VILIFICATION AND FREEDOM OF SPEECH</b>	<b>20</b>
<b>5. RACIAL DISCRIMINATION, MIGRANTS AND PEOPLE SEEKING ASYLUM</b>	<b>22</b>
5.1. MANDATORY DETENTION	23
5.2. CHILDREN IN DETENTION	24
5.3. GENDER BASED VIOLENCE	25

# 1. INTRODUCTION

Amnesty International welcomes the opportunity to submit this document to the United Nations (UN) Committee on the Elimination of Racial Discrimination (the Committee) in advance of the consideration of Australia's periodic report at the 94th session of the Committee in Geneva in November 2017.

This submission contains up-to-date information, current at October 2017, and focuses on racial discrimination in Australia, particularly in regards to the rights of Indigenous peoples and asylum seekers. It is not an exhaustive analysis of Australia's compliance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention).

Amnesty International notes a number of positive developments since Australia last reported to the Committee in 2010 including:

- the establishment of the National Children's Commissioner in February 2013, whose role it is to promote the rights, wellbeing and development of children and young people in Australia, and ensure their voices, including those of the most vulnerable, are heard at the national level;<sup>1</sup> and
- the establishment of a Parliamentary Committee to scrutinise new legislation for compliance with Australia's human rights obligations.<sup>2</sup>

However, Amnesty International regrets that Australia is continuing to fail to honour its obligations under the Convention in a number of fundamental respects:

- there is still no entrenched protection for rights;
- racially discriminatory provisions remain in the Australian Constitution;
- the Australian Government has attempted on two occasions since the last review to wind back protections against racial hatred;
- with regard to Indigenous people, many laws, and in particular those relating to the criminal justice system continue to disproportionately impact on Indigenous people, particularly children; and
- with regard to refugees, Australia's policy of mandatory, indefinite detention for asylum seekers is leading to prolonged and arbitrary detention and can deny access to justice.

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<sup>1</sup> Department of Social Services, 2015, *National Children's Commissioner*, available at <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/national-children-s-commissioner>.

<sup>2</sup> The Parliamentary Joint Committee on Human Rights (the committee) is established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act). The committee's main function is to examine all bills and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament on its findings. For further information see the Committee website at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights).

# 2. LEGISLATIVE MEASURES AND INADEQUATE LEGAL FRAMEWORK

Australia ratified the Convention in 1975.<sup>3</sup> ICERD prohibits any distinction on the basis of race which has either the purpose or effect of restricting the enjoyment of human rights.<sup>4</sup> Prior to that time overt discrimination on the basis of race was legal in Australia and many people suffered as a result, especially Aboriginal and Torres Strait Islander people.

The convention was implemented into domestic law through the *Racial Discrimination Act 1975* (Cth) (RDA) and the work of the Australian Human Rights Commission (AHRC). Australia's states and territories also have a variety of anti-discrimination and human rights legislation, however racial hatred is only covered by the RDA.

Amnesty International maintains its stance, outlined in its submission to the 77<sup>th</sup> Session of CERD, that there is a need for constitutional protection of the rights under the Convention. This need was demonstrated in 2007, when legislation that constitutes the Northern Territory Emergency Response (the Northern Territory Intervention) was enacted. This legislation, which necessitated overriding the RDA, led to a number of violations of the Convention and other international human rights treaties.<sup>5</sup>

## 2.1. PROBLEMATIC SECTIONS OF THE AUSTRALIAN CONSTITUTION

The Australian Constitution contains two provisions that are, *prima facie*, inconsistent with obligation to amend, rescind or nullify laws which create or perpetrate racial discrimination under Article 2.

Section 25 of the Constitution, concerning the calculation of the number of State seats in the Commonwealth Parliament, is premised on the possibility of race-based disenfranchisement by one of the States, it reads:

“...if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted.”

Section 51(xxvi) empowers the Commonwealth Parliament to “make laws for the peace, order, and good Government of the Commonwealth with respect to”, *inter alia*: “The people of any race for whom it is

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<sup>3</sup> United Nations Treaty Collection, No 2. International Convention on the Elimination of All Forms of Racial Discrimination opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>4</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (accessed 20 October 2017).

<sup>5</sup> Amnesty International, 2010, *Submission to the UN Committee on the Elimination of Racial Discrimination*, available at [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT\\_CERD\\_NGO\\_AUS\\_77\\_8050\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_77_8050_E.pdf) and see James Anaya, 2010, Special Rapporteur on the Rights of Indigenous Peoples “Observations on the Northern Territory Emergency Response In Australia” available at [http://www.ncca.org.au/files/Natsiec/NTER\\_Observations\\_FINAL\\_by\\_SR\\_Anaya\\_.pdf](http://www.ncca.org.au/files/Natsiec/NTER_Observations_FINAL_by_SR_Anaya_.pdf).

deemed necessary to make special laws”.<sup>6</sup> This provision is not accompanied by any requirement that such laws be exclusively beneficial, and jurisprudence on this issue is not settled.<sup>7</sup> The section has resulted in some confused policy development and coordination between states and territories, particularly for Aboriginal and Torres Strait Islander people. Many advocates and academics,<sup>8</sup> including this Committee have raised concerns that the section itself raises issues of racial discrimination.<sup>9</sup>

It has long been recognised that these two sections of the Australian Constitution are problematic. Since 2008 there have been a number of processes to work towards reforming the Australian Constitution to address these elements and recognise Aboriginal and Torres Strait Islander people as traditional owners of the lands and territories of Australia including the Expert Panel on Constitutional recognition (the Expert Panel)<sup>10</sup> and the Joint Select Parliamentary Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution (Joint Select Committee).<sup>11</sup>

In relation to section 25, the Joint Select Committee agreed with the Expert Panel that the section should be removed stating that the Committee, “is not convinced of any ongoing utility of section 25, or that it has any place in the constitution.”<sup>12</sup>

In relation to section 51(xxvi), the Joint Select Committee was of the view that the section should be repealed or amended in conjunction with recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

The Joint Select Committee concluded by saying, “the continued presence of these sections is at odds with modern Australia and does not represent Australian values. The committee believes that this outdated section of the Constitution must be repealed in order for constitutional recognition to occur”.<sup>13</sup>

The Expert Panel and the Joint Select Committee also considered entrenching a prohibition against racial discrimination in the Australian Constitution. The Expert Panel recommended a new section 116A, ‘Prohibition of racial discrimination’.<sup>14</sup> The Joint Select Committee considered this issue and made recommendations of three possible options, one of which included the proposed section 116A. The Committee did not make a recommendation as to which of the three options should be adopted.

Following the report of the Joint Select Committee, in December 2015 Prime Minister Malcolm Turnbull and Leader of the Opposition Bill Shorten jointly appointed a Referendum Council tasked to seek the views of Aboriginal and Torres Strait Islander peoples and advise the Government on progress and next steps towards a successful referendum.<sup>15</sup>

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<sup>6</sup> Australian Constitution, available at

[http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution.aspx](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution.aspx).

<sup>7</sup> The most recent case on the interpretation is *Kartinyeri and Anor v. The Commonwealth of Australia* (The Hindmarsh Island Bridge Case) (1998) ACA 22, 56. See summary of judgment in [1998] AILR 15 at <http://www.austlii.edu.au/au/journals/IndigLawB/1998/48.html>.

<sup>8</sup> See for example: Sarah Pritchard, 2011, *The ‘Race’ Power in Section 51[XXVI] of the Constitution*, available at <http://www.austlii.edu.au/au/journals/AUIndigLawRw/2011/18.pdf> and see Amnesty

International Australia, Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 31 January 2015, available at

<http://www.aph.gov.au/DocumentStore.ashx?id=d97e1853-6c41-4ca9-982b-7fad59c3a5bb&subId=303261>.

<sup>9</sup> UN doc. CERD/C/AUS/CO/15-17 [10], 13 September 2010, para 10 available at

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2fCO%2f15-17&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2fCO%2f15-17&Lang=en).

<sup>10</sup> See the final report of the Expert Panel, “Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution” (January 2012) available at [https://www.pmc.gov.au/sites/default/files/publications/Recognising-Aboriginal-and-Torres-Strait-Islander-Peoples-in-the-constitution-report-of-the-expert-panel\\_0.pdf](https://www.pmc.gov.au/sites/default/files/publications/Recognising-Aboriginal-and-Torres-Strait-Islander-Peoples-in-the-constitution-report-of-the-expert-panel_0.pdf).

<sup>11</sup> See the final report, “Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples” (June 2015) available at

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples/Constitutional\\_Recognition/Final\\_Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Final_Report).

<sup>12</sup> *Ibid*, para 3.16.

<sup>13</sup> *Ibid*, para 3.18.

<sup>14</sup> The proposed section read: (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin. (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.” *Supra* n 9.

<sup>15</sup> The Hon. Malcolm Turnbull and the Hon. Bill Shorten MP, 2015, *Press Release: Referendum Council*, available at <https://www.pm.gov.au/media/2015-12-07/referendum-council>.

On 30 June 2017 following the 'Uluru Meeting' which brought together 250 Aboriginal and Torres Strait Islander delegates, the Referendum Council handed down its report,<sup>16</sup> which included just two recommendations. The first was:

"That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function and monitoring of the use of heads of power in section 51(xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia."

Section 122, 'Government of Territories', gives the Commonwealth Parliament the ability to make laws for Territories, including the Northern Territory, which is particularly vulnerable because it has the highest proportion of Aboriginal people of any jurisdiction in Australia,<sup>17</sup> and because unlike the Australian Capital Territory (ACT) it does not have a Human Rights Act.

The second recommendation of the Referendum Council called for a separate declaration of recognition, outside the Constitution.<sup>18</sup> This followed a rejection from Aboriginal and Torres Strait Islander representatives at the Uluru meeting of the recognition of Aboriginal and Torres Strait Islander people in the Australian Constitution.<sup>19</sup> As a result, the Recognise campaign, which has been operating for five years with millions of dollars invested, was abandoned.<sup>20</sup>

Despite this, the Australian Government continues to promote constitutional recognition internationally as one of their priorities for Aboriginal and Torres Strait Islander people.<sup>21</sup>

The previous recommendation to delete section 25 did not feature as a recommendation in the Referendum Council's report.

The Australian Government is still considering the Referendum Council's recommendations and will either adopt or reject them, or suggest an alternative proposal.<sup>22</sup>

Amnesty International's position is that section 25 and 51(xxvi) of the Australian Constitution are inconsistent with the Convention and should be removed or amended, and that Australia should move towards a constitutionally entrenched prohibition against racial discrimination as recommended by the Expert Panel.

## RECOMMENDATIONS

Amnesty International recommends that the State party:

- responds, before the end of the year, to the recommendations of the Referendum Council;
- amends or repeals sections 25 and 51(xxvi) of the Constitution to ensure they comply with the Convention; and
- inserts into the Constitution a prohibition on discrimination on the basis of race, colour, ethnic or national origin.

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<sup>16</sup> Final Report of the Referendum Council, 30 June 2017 available from: <https://www.referendumcouncil.org.au/final-report>.

<sup>17</sup> A total of 58,248 Territorians reported having Aboriginal and Torres Strait Islander origins, an increase of 1,469 people since 2011. The Northern Territory remains the state or territory with the highest proportion of Aboriginal and Torres Strait Islander peoples (25 per cent), while NSW has the greatest count (216,176 people): Australian Bureau of Statistics, "2016 reveals the changing face of the Northern Territory" 27 June 2017, available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/C73D7CC81CA1FD2FCA258148000A4067?OpenDocument>.

<sup>18</sup> Ibid.

<sup>19</sup> See the 'Uluru Statement from the Heart' document following the Uluru meeting held between 23-26 May 2017 available at [https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart.PDF)

<sup>20</sup> SBS World News, "Recognise campaign to be abandoned" 11 August 2017, available at <http://www.sbs.com.au/news/article/2017/08/10/recognise-campaign-be-abandoned-report>.

<sup>21</sup> See for example Australia's pledge in its bid for the Human Rights Council to "work towards a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution as Australia's First Peoples" available at <http://dfat.gov.au/international-relations/international-organisations/pages/australias-candidacy-for-the-unhrc-2018-2020.aspx>.

<sup>22</sup> See Amnesty International, 'Update on Constitutional Reform', at <https://www.amnesty.org.au/constitutional-reform-august-2017/>.

## 2.2. AN AUSTRALIAN HUMAN RIGHTS ACT

Australia is the only Western country to not have a national Human Rights Act (or Bill of Rights) and within the federation of states, only the ACT and Victoria have a Human Rights Act in place.<sup>23</sup> Queensland Premier, Anastacia Palaszczuk, announced in October 2016 that her Cabinet had agreed to introduce a Human Rights Act for the state, based on the *Charter of Human Rights and Responsibilities Act 2006* (Vic) but this has not yet been implemented.<sup>24</sup>

After an extensive consultation with the Australian public in 2009<sup>25</sup> which attracted over 35,000 submissions (with about 81 per cent supporting a Human Rights Act), the Federal Government did not adopt that recommendation.

At its first Universal Periodic Review (UPR) in 2011, the Government again rejected recommendations to adopt a Human Rights Act<sup>26</sup> because it considered that "...existing mechanisms, together with new requirements under Australia's Human Rights Framework" were sufficient to provide human rights protection.<sup>27</sup>

A National Action Plan on Human Rights was announced in 2012.<sup>28</sup> Amnesty International welcomed these developments, however in the context of a change of government in 2013 and the failure to deliver most of the proposed agenda, Amnesty International considers both to be largely defunct.

In April 2010 the Government announced a "Human Rights Framework"<sup>29</sup> which included the establishment of a Parliamentary Committee (the Committee) to scrutinise new legislation for compliance with human rights obligations.<sup>30</sup> Whilst Amnesty International recognises this as a positive development, it does not provide individuals or communities with sufficient protection against racial discrimination and hatred and it provides no mechanisms to ensure that legislation enacted at a state or territory level complies with human rights.

Further, the Committee has had limited effectiveness and influence and its recommendations are unenforceable and are routinely ignored. Many Ministerial responses to the Committee's recommendations essentially disagreed with the Committee's views, and some repudiated outright the Committee's warnings, even, for example, on Bills that gave the Minister extraordinary powers to revoke citizenship and authorise the use of force against detained asylum seekers.<sup>31</sup>

In addition, the Committee's reports are too often delayed, sometimes until after the Bill has passed, by waiting for government responses. During the reporting period 2013-2014, responses from proponents of legislation were often not received until well after the Committee's deadline and, on occasion, not until after the Bill or timeframe for disallowance had passed.<sup>32</sup>

Further, the Committee cannot conduct inquiries into broader human rights issues without a reference from the Attorney-General. Since the Attorney-General is a Government Minister, this power is unlikely to be exercised in politically-controversial matters. By contrast, the equivalent parliamentary committee in the United Kingdom can and does conduct own-motion inquiries into a variety of important human rights issues.

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<sup>23</sup> Amnesty International Australia, 2016, Queensland Government commits to a Human Rights Act, available at <https://www.amnesty.org.au/qld-commits-to-human-rights-act/>

<sup>24</sup> A Human Rights Act for Queensland, 2016, *Anastacia Palaszczuk has announced a Human Rights Act for Queensland*, available at <http://www.humanrights4qld.com.au/announcements/annastacia-palaszczuk-has-announced-a-human-rights-act-for-queensland>.

<sup>25</sup> National Human Rights Consultation Committee Report, 30 September 2009, <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>, recommendation 18, p.34.

<sup>26</sup> A/HRC/17/10, recommendation 86.22 (Canada, Ukraine, Russian Federation and Norway).

<sup>27</sup> A/HRC/17/10/Add.1, recommendation 86.22, see also Attorney General's Department, Australia's formal response to the UPR Recommendations, available at <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx>, p. 2, recommendation 22.

<sup>28</sup> Attorney-General's Department, *Australia's National Human Rights Action Plan 2012*, available at <http://web.archive.org/web/20130328074804/http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx>.

<sup>29</sup> Commonwealth of Australia, "Australia's Human Rights Framework" (April 2010) available at <https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>.

<sup>30</sup> *Supra* n 2.

<sup>31</sup> See for example the responses of the Minister for Immigration and Citizenship in relation to the *Australian Citizenship and Other Legislation Amendment Bill 2014* and the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* in the Committee's Report 24 of the 44th Parliament.

<sup>32</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2013-2014* (2016) 17.



In relation to Statements of Compatibility, the human rights analysis prepared by the Australian Government is often very poor. Many Statements of Compatibility, even those which acknowledge limitations on fundamental rights, such as personal liberty and security, fail to deal with the relevant international jurisprudence.<sup>33</sup> Others engage with the jurisprudence, but implicitly confirm that it has little effect on Australian Government policy.<sup>34</sup>

At Australia's second UPR in 2015, a number of states including Indonesia, Iceland, Turkey and Canada again reflected on the absence of human rights protections in Australia especially with regard to racial discrimination and recommended that Australia develop a comprehensive Federal Human Rights Act.<sup>35</sup> Australia did not specifically respond to these recommendations in its March 2016 response to the UPR recommendations instead saying that these issues were already catered for under Australia's policy and legislative frameworks, pointing to the Racism It Stops with Me Campaign, and the RDA.<sup>36</sup>

## RECOMMENDATIONS

Amnesty International recommends that the State party, through its Federal Government:

- adopts a comprehensive, enforceable national Human Rights Act that better protects against racial discrimination and hatred – particularly those most at risk of human rights violations, including Aboriginal and Torres Strait Islander people, women, people with a disability or mental illness, LGBTI people, refugees and migrants, the elderly, the young, the socially and economically disadvantaged and members of ethnic, religious and linguistic minorities;
- investigates ways, including through parliamentary scrutiny that laws enacted by state and territory-level parliaments are measured for compliance with human rights and freedom from racial discrimination;
- ensures that the Statements of Compatibility provide a genuine critical analysis taking into account international standards and case-law, and that its responses to the findings of the Joint Parliamentary Committee on Human Rights specifically address and effectively resolve any failings identified; and
- amends section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to allow the Parliamentary Committee to conduct own-motion inquiries into human rights issues.

## 2.3. RACIAL DISCRIMINATION AND INDIGENOUS PEOPLES

The prevalence of racism against Aboriginal and Torres Strait Islander people is significant, with studies indicating as many as three in four Indigenous Australians regularly experience racism.<sup>37</sup> There are serious consequences for those experiencing racism, including poor physical and mental health.<sup>38</sup> Results of the National Australian Aboriginal and Torres Strait Islander Health Survey show:

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<sup>33</sup> See for example the Statements of Compatibility accompanying *Law Enforcement Integrity Legislation Amendment Bill 2012* (Cth) and the *Australian Sports Anti-Doping Authority Bill 2013* (Cth).

<sup>34</sup> See for example the Statement of Compatibility accompanying the *Migration Amendment Bill 2013* (Cth).

<sup>35</sup> A/HRC/31/14, Report of the Working Group on the Universal Periodic Review\* Australia, 13 January 2016, 136.70 - 136.73.

<sup>36</sup> See "Universal Periodic Review - Australia's statement to the Human Rights Council at the adoption of the Report of the UPR Working Group on Australia's UPR" available from <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx>.

<sup>37</sup> See Yin Paradies, Ricci Harris and Ian Anderson, *The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda*, Cooperative Research Centre for Aboriginal Health, Discussion Paper Series No. 4 (2008), .6. citing Forrest, Dunn & Pe-Pua 2007; Gallaher et al. 2007; Paradies & Cunningham, available at <http://www.craah.org.au/sites/default/files/docs/Racism-Report.pdf>.

<sup>38</sup> A Ferdinand, Y Paradies & M Kelaher, 'Experiencing racism in health care: the mental health impacts for Victorian Aboriginal communities' (2014) 201(1) *Med J Aust* 44-47; see also P Dudgeon, H Milroy and R Walker, 'Working together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice' (2014) Australian Government Department of The Prime Minister and Cabinet; Close the Gap Campaign Steering Committee, 'Progress and Priorities Report 2016' (2016), 22 available at [https://www.humanrights.gov.au/sites/default/files/document/publication/Progress\\_priorities\\_report\\_CTG\\_2016\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/Progress_priorities_report_CTG_2016_0.pdf); Productivity Commission 'Overcoming Indigenous Disadvantage' (2016), 5.23, available at

- 16 per cent of respondents reported being ‘treated badly because they are Aboriginal or Torres Strait Islander’ in the previous 12 months,
- of this cohort, 8 per cent reported this occurred 2–3 times per week and 5 per cent reported this was a daily occurrence, and
- the most common situation of racially discriminatory behaviour or racism was by members of the public (45 per cent).<sup>39</sup>

Indigenous people who experience discrimination are more likely to be in poor health and engage in risky health behaviours like substance abuse.<sup>40</sup> A BeyondBlue study found that over half of Indigenous people who experience discrimination also experience psychological distress, which increases the more a person is exposed to racism.<sup>41</sup>

An estimated one in five Australian children experience racial discrimination on a daily basis at school.<sup>42</sup> Exposure to racial discrimination during school years may lead to the development of symptoms of depression in children.<sup>43</sup> For Aboriginal and Torres Strait Islander children these high levels of stress lead to obesity, chronic disease, and, distressingly, self-harm.<sup>44</sup>

The Australian Reconciliation Barometer findings reveal that the majority of Australians maintain positive attitudes towards reconciliation. However, disappointingly, there is significant evidence that these positive attitudes have yet to translate into improved behaviours across a wide range of sectors in Australian society, including the workplace, law-enforcement agencies, and the education and community sectors.<sup>45</sup>

It has been 10 years since the Australian Government set Closing the Gap targets to eliminate the stark disparity between Indigenous and non-Indigenous people in Australia in life expectancy, health, education and employment indicators.<sup>46</sup> While some important gains have been made in this time in areas of Indigenous health and education, the 2017 Prime Minister’s report showed that just one of the seven targets was on track.<sup>47</sup> The Special Rapporteur on the Rights of Indigenous Peoples recently described this lack of progress as “woefully inadequate”.<sup>48</sup>

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<http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf>.

<sup>39</sup> Australian Bureau of Statistics, ‘Australian Aboriginal and Torres Strait Islander Health Survey: First Results Australia, 2012-13’ (2013) as cited in Close the Gap Campaign Steering Committee, ‘Progress and Priorities Report 2016’ (2016) 22, available at

[https://www.humanrights.gov.au/sites/default/files/document/publication/Progress\\_priorities\\_report\\_CTG\\_2016\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/Progress_priorities_report_CTG_2016_0.pdf).

<sup>40</sup> Productivity Commission, ‘Overcoming Indigenous Disadvantage’ (2016), 5.4, available at

<http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf>; AIHW, ‘The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples’ (2015), 77.

<sup>41</sup> Beyondblue, ‘Stop, Think, Respect: Racial Discrimination and Mental Health’ (2014), available at

[https://www.beyondblue.org.au/docs/default-source/default-document-library/bw0249\\_bl1328\\_stop\\_think\\_respect.pdf](https://www.beyondblue.org.au/docs/default-source/default-document-library/bw0249_bl1328_stop_think_respect.pdf); A Ferdinand, Y Paradies & M Kelaher, ‘Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: the Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey’, *The Lowitja Institute* (2013), [https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB\\_0.pdf](https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB_0.pdf).

<sup>42</sup> See N. Priest, R Perry, A Ferdinand, Y Paradies, M Kelaher, ‘Experiences of racism, racial/ethnic attitudes, motivated fairness and mental health outcomes among primary and secondary school students’ (2014) 43 *Journal of Youth and Adolescence* 10,1672-87 available at <https://www.ncbi.nlm.nih.gov/pubmed/24903675>.

<sup>43</sup> Australian Government, ‘Aboriginal and Torres Strait Islander Health Performance Framework’ (2014), 8 available at [https://www.dpnc.gov.au/sites/default/files/publications/Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_HPF\\_2014%20-%20edited%2016%20June2015.pdf](https://www.dpnc.gov.au/sites/default/files/publications/Aboriginal_and_Torres_Strait_Islander_HPF_2014%20-%20edited%2016%20June2015.pdf).

<sup>44</sup> Australian Government, ‘Aboriginal and Torres Strait Islander Health Performance Framework’ (2014), 15 available at [https://www.dpnc.gov.au/sites/default/files/publications/Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_HPF\\_2014%20-%20edited%2016%20June2015.pdf](https://www.dpnc.gov.au/sites/default/files/publications/Aboriginal_and_Torres_Strait_Islander_HPF_2014%20-%20edited%2016%20June2015.pdf); N Priest, Y Paradies, W Gunthorpe, S J Cairney & S M Sayers, ‘Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth’ (2011) 194 *Medical Journal of Australia* 10, 546-550.

<sup>45</sup> Reconciliation Australia (2016) ‘2016 Australian Reconciliation Barometer’ available at

[https://www.reconciliation.org.au/wp-content/uploads/2017/02/RA\\_ARB-2016\\_Overview-brochure\\_web.pdf](https://www.reconciliation.org.au/wp-content/uploads/2017/02/RA_ARB-2016_Overview-brochure_web.pdf).

<sup>46</sup> Council of Australian Governments, Closing the Gap on Indigenous Disadvantage (2009), available from:

<https://www.indigenousjustice.gov.au/resources/closing-the-gap-on-indigenous-disadvantage-the-challenge-for-australia/>.

<sup>47</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet (2007), ‘Closing the Gap Prime Minister’s Report 2017’ available at <http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf>.

<sup>48</sup> Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, UN doc. UNGA A/HRC/36/46/Add.2, 8 August 2017, paras 46-47 available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/36/46/Add.2](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46/Add.2).

Amnesty International maintains that successive governments have failed to effectively ameliorate past discrimination, or address existing inequalities, disadvantage and discrimination suffered by Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander people still face discrimination in areas such as access to adequate housing, education, health care and in the criminal justice system.

Australia officially announced its support for the *Declaration on the Rights of Indigenous Peoples*<sup>49</sup> in 2009. The Declaration gives effect to many existing human rights as they specifically relate to Indigenous peoples including the right to live free from racial discrimination and hatred. At the World Conference on the Rights of Indigenous Peoples in 2014, a key recommendation was for each nation to develop a National Action Plan to implement the Declaration.<sup>50</sup> Although Australia has stated in its pledges relating to its bid to become a member of the Human Rights Council that, “Australia will continue to give practical effect to the United Nations Declaration on the Rights of Indigenous Peoples and the World Conference on Indigenous Peoples Outcome Document”,<sup>51</sup> it has never announced a commitment to draw up a plan of action.

## RECOMMENDATIONS

In addition to the recommendations in 1.1.1 above, Amnesty International recommends that the State party, through the Federal Government:

- develops, in consultation with Aboriginal and Torres Strait Islander peak organizations, a national action plan to implement the Declaration on the Rights of Indigenous Peoples.

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<sup>49</sup> United Nations General Assembly, ‘United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly’, UN Doc A/RES/61/295 (2 October 2007) available at [https://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>50</sup> United Nations General Assembly, ‘Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples’, 69<sup>th</sup> sess, UN Doc A/69/L.1, (15 September 2014) available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/69/L.1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/69/L.1).

<sup>51</sup> Department of foreign affairs and trade, ‘Australia’s candidacy for the United Nations Human Rights Council 2018-2020’, (2007) available at <http://dfat.gov.au/international-relations/international-organisations/Pages/australias-candidacy-for-the-unhrc-2018-2020.aspx>.

# 3. RACIAL DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

## 3.1. OVERREPRESENTATION OF INDIGENOUS PEOPLE

Amnesty International contends that racial discrimination and vilification of Indigenous people in Australia is a contributing factor to the significant over-representation and abuse of Aboriginal and Torres Strait Islander children in the justice system.

This section draws on Amnesty International research, since 2013, on the over-representation of Aboriginal and Torres Strait Islander children in the Australian justice system. Our research has focussed on the jurisdictions where over-representation of Aboriginal children in the justice system is most stark - Western Australia, Queensland and the Northern Territory.

Amnesty International published a National Overview of this issue, *A brighter tomorrow*,<sup>52</sup> and a research report on the youth justice system in Western Australia, *There is always a brighter future*, in June 2015.<sup>53</sup> In September 2016, Amnesty International released *Heads Held High: Keeping Queensland kids out of detention, strong in culture and community*,<sup>54</sup> which raised serious concerns about the treatment of children in Queensland detention centres and prisons. In this report it was noted that, in cases where young people came into contact with the justice system in Western Australia, the more lenient option of cautioning was used at a significantly lower rate for Aboriginal young people than for non-Aboriginal young people, and that Aboriginal young people were much more likely to have contact with the criminal justice system and be in custody. Amnesty International recommended that the Western Australian Government conduct an investigation into the lower rate of cautions to Aboriginal children and that the police manual be amended to require police to document why cautions were not given, but these recommendations have not been adopted.

These three reports include recommendations for developing policies at a national, state and territory levels to reduce and ultimately end the over-representation of Aboriginal children in the criminal justice system, and to improve youth justice policies Australia-wide.

Indigenous people continue to be significantly overrepresented in Australia's criminal justice system, comprising 27.4 per cent of adults in prisons and 57.2 per cent of juveniles in detention, despite accounting

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<sup>52</sup> Amnesty International Australia, 2015, *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*, viewed 14 September 2017, available at [https://static.amnesty.org.au/wp-content/uploads/2016/09/A\\_brighter\\_future\\_National\\_report.pdf](https://static.amnesty.org.au/wp-content/uploads/2016/09/A_brighter_future_National_report.pdf). (Amnesty International Australia, *A brighter tomorrow*).

<sup>53</sup> Amnesty International Australia, 2015, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, viewed 14 September 2017, available at [https://static.amnesty.org.au/wp-content/uploads/2016/02/CIE\\_WA-Report\\_low-res.pdf](https://static.amnesty.org.au/wp-content/uploads/2016/02/CIE_WA-Report_low-res.pdf). (Amnesty International Australia, *There is always a brighter future*).

<sup>54</sup> Amnesty International Australia, 2016, *Heads held high: Keeping Queensland kids out of detention, strong in culture and community*, viewed 14 September 2017, available at [https://static.amnesty.org.au/wp-content/uploads/2016/12/Heads\\_Held\\_High\\_-\\_Queensland\\_report\\_by\\_Amnesty\\_International.pdf](https://static.amnesty.org.au/wp-content/uploads/2016/12/Heads_Held_High_-_Queensland_report_by_Amnesty_International.pdf). (Amnesty International Australia, *Heads held high*).

for just 2.3 per cent of all adults and 5.5 per cent of youth in the general population.<sup>55</sup> The most recent data, from 2013–14, shows that Indigenous young people are 26 times more likely to be in detention than non-Indigenous young people.<sup>56</sup> Aboriginal and Torres Strait Islander young people make up just over 6 per cent of the Australian population of 10–17 year-olds but more than half (54 per cent) of those in detention. The situation is bleaker still among the youngest Indigenous children, who made up more than 60 per cent of all 10-year-olds and 11-year-olds in detention in Australia in 2012–13.<sup>57</sup>

Indigenous women's imprisonment rates have risen much faster than men's in recent decades. Today, Aboriginal and Torres Strait Islander women's over imprisonment rates are nearly 2.5 times what they were at the time of the landmark 1991 report of the Royal Commission into Aboriginal Deaths in Custody.<sup>58</sup>

The COAG Prison to Work Report 2016 recognised that:

"The drivers of Indigenous incarceration are particularly acute for female Aboriginal and/or Torres Strait Islander prisoners. They are more likely to have experienced previous victimisation, sexual abuse and family violence, poor mental health and serious mental illness, substance misuse, unemployment, and low educational attainment. Aboriginal and/or Torres Strait Islander women experience much higher rates of family and domestic violence generally and past studies have found that between 80 and 100 per cent of Aboriginal and/or Torres Strait Islander women in prison report having previously experienced physical or sexual abuse, including in early childhood. This is closely linked to their offending, particularly violent offending, whether directly in response to abuse or as a result of the trauma caused by these experiences."<sup>59</sup>

Aboriginal and Torres Strait Islander women are overrepresented in Australia's prisons. In 2011, Aboriginal and Torres Strait Islander women made up 31 per cent of female prisoners in Australia, where female prisoners made up just one per cent of the prison population. Female Aboriginal and Torres Strait Islander prisoners are more likely to be imprisoned for violent offences than female non-Aboriginal and Torres Strait Islander prisoners<sup>60</sup>.

In August, the Special Rapporteur on the Rights of Indigenous Peoples (the 'Special Rapporteur') delivered the second country report on Australia and "found the routine detention of young indigenous children the most distressing aspect of her visit."

As noted in the report of the Special Rapporteur:

"Several sources, including judges, informed the Special Rapporteur that, in the majority of instances, the initial offences committed by children were minor and nonviolent. In such cases, it is wholly inappropriate to detain children in punitive, rather than rehabilitative, conditions. Aboriginal and Torres Strait Islander children are essentially being punished for being poor and, in most cases, prison will only perpetuate the cycle of violence, intergenerational trauma, poverty and crime. The Special Rapporteur was alarmed that several of the young children she spoke to detention did not see any future prospects for themselves."<sup>61</sup>

The Special Rapporteur also commented on the situation of Indigenous women in prison stating that:

"Aboriginal women and girls are the fastest growing prison population across the country. As pointed out by the Special Rapporteur on violence against women, its causes and consequences during her visit to Australia in February 2017, many incarcerated women and girls have been the victims of domestic violence and sexual abuse. Despite knowledge of such victimization, detention facilities lack support services for women who have suffered sexual assault and were in fact cut in Bandyup prison in 2016. Gender-sensitive

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<sup>55</sup> Amnesty International Australia, May 2015, *A brighter tomorrow: keeping Indigenous kids in the community and out of detention in Australia*, available at [https://www.amnesty.org.au/wp-content/uploads/2016/02/A\\_brighter\\_future\\_National\\_report.pdf](https://www.amnesty.org.au/wp-content/uploads/2016/02/A_brighter_future_National_report.pdf).

<sup>56</sup> Ibid, 5

<sup>57</sup> Ibid, 5

<sup>58</sup> Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) available at [https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented\\_online.pdf](https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf).

<sup>59</sup> Ibid, 32.

<sup>60</sup> Australian Bureau of Statistics (ABS) 'Prisoners in Australia 2016' (8 December 2016) (data tables); ABS 'Estimates of Aboriginal and Torres Strait Islander Australians, June 2011' (August 2011); ABS, Corrective Services Australia, Australia, December Quarter 2016 (16 March 2017).

<sup>61</sup> Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, UN doc. UNGA A/HRC/36/46/Add.2, 8 August 2017, paras 46–47 available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/36/46/Add.2](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46/Add.2).

measures are required to reduce rates of imprisonment of Aboriginal women and girls and should be developed based on consultations directly with them.<sup>62</sup>

The Special Rapporteur's report outlines a number of ways the Australian Government can address this crisis.

## RECOMMENDATIONS

Amnesty International recommends that the State party, through its Federal Government, before the end of the year:

- tables the report of the Special Rapporteur on the Rights of Indigenous Peoples on the situation of Australia in Federal Parliament;
- provides an official response to the report of the Special Rapporteur on the Rights of Indigenous Peoples; and
- refers the report of the Special Rapporteur on the Rights of Indigenous Peoples to the Parliamentary Joint Committee on Human Rights for further investigation.

## 3.2.JUSTICE REINVESTMENT

In 2010 the UN Committee for the Elimination of Racial Discrimination recommended that Australia “dedicate sufficient resources to address the social and economic factors underpinning indigenous contact with the criminal justice system” and encouraged Australia to adopt “a justice reinvestment strategy.”<sup>63</sup>

Justice reinvestment is an evidence-based approach to reducing incarceration rates by investing in, and supporting, communities to address the underlying social issues leading to offending. There has been growing momentum for justice reinvestment programmes throughout Australia. Amnesty International has consistently called on all jurisdictions to implement just reinvestment programmes in an effort to reduce Indigenous incarceration rates.

In New South Wales, the Maranguka Justice Reinvestment Project focuses on coordination and partnership between the community, service providers, government and police.<sup>64</sup> In the Northern Territory, Red Cross facilitates activity as guided by the Katherine Youth Justice Reinvestment Working Group.<sup>65</sup> In South Australia, the Government has committed to supporting two justice reinvestment trials.<sup>66</sup> In the Australian Capital Territory, the Community Safety Directorate (JACS) work closely with a range of government and community stakeholders, to identify drivers of crime and criminal justice costs.<sup>67</sup> The state government in Queensland will trial a discrete programme in Cherbourg. The Cherbourg trial aims to develop a culturally-specific integrated response to domestic and family violence, tailored to the needs of the local Aboriginal and Torres Strait Islander communities.<sup>68</sup>

In Australia, the national average cost per child per day in detention is approximately \$450,000 per child per year.<sup>69</sup> A justice reinvestment approach would reallocate funding to addressing the underlying causes of offending and rehabilitation, preventing children from becoming entrenched in the justice system or reoffending.

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<sup>62</sup> Ibid at para 73.

<sup>63</sup> Committee on the Elimination of Racial Discrimination, ‘Concluding Observations – Australia’ UN Doc CERD/C/AUS/CO/15-17 (80<sup>th</sup> Sess, 13 February–9 March 2012), [20].

<sup>64</sup> KPMG and Just Reinvest NSW, 2016, ‘Unlocking the Future: Maranguka Justice Reinvestment Project in Bourke’, viewed 14 September 2017, available at <http://www.justreinvest.org.au/wp-content/uploads/2016/11/KPMG-Preliminary-Assessment-Maranguka-Justice-Reinvestment-Project.pdf>.

<sup>65</sup> Northern Territory Government of Social Service (2017) ‘Justice Reinvestment Project’ viewed 14 September, available at <http://www.ntcoss.org.au/current-projects/justice-reinvestment-project/>.

<sup>66</sup> Government of South Australia Attorney General’s Department (2017) ‘Justice Reinvestment’ viewed 14 September 2017, available at <https://www.agd.sa.gov.au/projects-and-consultations/justice-reinvestment>.

<sup>67</sup> The Australian Capital Territory Government (2017) ‘Justice Reinvestment Strategy’ viewed 14 September 2017 available at <http://www.justice.act.gov.au/page/view/3829/title/justice-reinvestment-strategy>.

<sup>68</sup> Queensland Government (2017) ‘Integrated service response trials’ viewed 14 September 2017 available at <https://www.communities.qld.gov.au/gateway/end-domestic-family-violence/our-progress/enhancing-service-responses/integrated-service-response-trials>.

<sup>69</sup> Productivity Commission 2016, *Report on Government Services*, ‘Tables 16A.1, 16A.24’, viewed 14 September 2017, available at <http://www.pc.gov.au/research/ongoing/report-on-government-services>.

Amnesty International notes the importance of funding and supporting Indigenous-led justice reinvestment programmes nationally.<sup>70</sup>

## RECOMMENDATIONS

Amnesty International recommends that the State party:

- takes measures to ensure that all levels of government implement a justice reinvestment approach through consultation with Indigenous communities, effective data collection, and compliance with international obligations.

## 3.3. ACCESS TO LEGAL SERVICES

The Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Aboriginal Family Violence Prevention Legal Services (FVPLS) were set up in line with the principle of self-determination, with an understanding of the unique impact a lack of access to culturally competent legal assistance services has upon Aboriginal and Torres Strait Islander people and communities. ATSILS and FVPLS are the preferred, and in some instances, the only legal aid option for Aboriginal and Torres Strait Islander peoples. ATSILS and FVPLS provide a unique legal service that recognises and responds to cultural factors that may influence or affect Aboriginal and Torres Strait Islander people.

Inadequate funding of these services, cuts and funding uncertainty are undermining the provision of culturally-sensitive legal assistance for Indigenous young people.

ATSILS focus on criminal, civil and family law needs, while the FVPLS specialise in helping victims of family violence with legal and other assistance, which most often means Indigenous women, children and young people.<sup>71</sup> They were established by Indigenous people to address the barriers Indigenous people have historically faced, and continue to face, in engaging with the Australian legal system.<sup>72</sup>

The role of the FVPLS in preventing family violence is essential to improving community safety. There is a widely recognised link between family violence, out of home care for children, homelessness and youth offending.<sup>73</sup> Through the delivery of programmes that address family violence, the FVPLS play a role in preventing risk factors for offending behaviour among young people.

Amnesty International understands that FVPLS had confirmation in March 2015 that 'after a gruelling open tender process' funding for FVPLS will be maintained for 2-3 years at 2013/14 levels. However, the future remains highly uncertain for these crucial services following the termination of the National Family Violence Prevention Program which previously provided a direct allocation of funding. On 13 May 2015, FVPLS indicated that they require, 'a further \$2 million per service, per annum to begin meeting the rise in demand and increased reporting rates of family violence in Aboriginal and Torres Strait Islander communities'.<sup>74</sup> Amnesty International understands however that the actual unmet need is unclear, and that the current funding needed to close this gap may now be different.

Numerous parliamentary inquiries have concluded that both of these Indigenous legal services are significantly underfunded.<sup>75</sup> The Productivity Commission has confirmed that there is significant unmet legal

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<sup>70</sup> Amnesty International Australia, *Heads held high*.

<sup>71</sup> Productivity Commission, 2014, *Access to Justice Arrangements, Inquiry Report*, Volume 2, p 761, viewed 14 September 2017 available at <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf>

<sup>72</sup> Productivity Commission, 2014, *Access to Justice Arrangements, Inquiry Report*, Volume 2, p 766.

<sup>73</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing Indigenous youth in the criminal justice system*, [3.17], viewed 14 September 2017 available at [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=atsia/sentencing/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm); National Family Violence Prevention Legal Services Forum, 2014, *Submission to the Senate Community Affairs References Committee Inquiry Into Out Of Home Care*, p 10.; Australian Institute of Family Studies, 2017, *Child maltreatment, homelessness and youth offending*, viewed 5 October 2017 available at <https://aifs.gov.au/cfca/2017/10/04/child-maltreatment-homelessness-and-youth-offending>.

<sup>74</sup> National Family Violence Prevention Legal Services, 2015, *Federal Budget provides no relief for FVPLSs despite escalating rates of family violence*, viewed 14 September 2017 available at [http://www.nationalfvpls.org/images/files/MR\\_13052015\\_Federal\\_Budget\\_provides\\_no\\_relief\\_for\\_FVPLSs\\_despite\\_escalating\\_rates\\_of\\_family\\_violence.pdf](http://www.nationalfvpls.org/images/files/MR_13052015_Federal_Budget_provides_no_relief_for_FVPLSs_despite_escalating_rates_of_family_violence.pdf).

<sup>75</sup> See Senate Standing Committee on Legal and Constitutional Affairs, 2013, *Value of a Justice Reinvestment approach to criminal justice in Australia*, viewed 14 September 2017 available at [http://www.aph.gov.au/parliamentary\\_business/committees/senate/legal\\_and\\_constitutional\\_affairs/completed\\_inquiries/20](http://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/20)

need among Aboriginal and Torres Strait Islander people, and that real funding per person has ‘declined by about 20 per cent between 2000–01 and 2010–11’.<sup>76</sup>

The Productivity Commission recommended an additional \$200 million per year be invested across the legal sector to both Indigenous and non-Indigenous legal aid providers to address unmet need.<sup>77</sup>

The Federal Government must address uncertainty and gaps in delivery of quality legal services to Indigenous young people.

## RECOMMENDATIONS

Amnesty International recommends that the State party, through all Australian governments, ensure sufficient and sustainable funding for the Aboriginal and Torres Strait Islander Services and the Family Violence Prevention Legal Services, including:

- reversing any planned funding cuts;
- meeting existing demand for services; and
- addressing unmet need currently experienced.

## 3.4. MANDATORY SENTENCING

Mandatory sentencing requires that individuals convicted of a particular crime are subject to a fixed penalty. Mandatory sentencing prevents a court from taking into account the individual circumstances of the offender and the offence, or considering alternative sentencing options, often leading to harsh, unjust outcomes. Further, minimum mandatory sentences disrupt employment opportunities and family connections further disrupting an opportunity of rehabilitation. Over the years numerous UN bodies and experts have called for the abolition of mandatory sentencing laws in Australia. Most recently, the Special Rapporteur on the Rights of Indigenous Peoples noted in her report about to Australia that “longstanding calls for the abolishment of mandatory sentencing laws, notably in Western Australia, continue to be ignored”,<sup>78</sup> and recommended the abolishment of mandatory sentencing.<sup>79</sup>

In Australia, mandatory sentencing regimes disproportionately affect Aboriginal and Torres Strait Islander people. Data reported by the Australian Bureau of Statistics in 2013 noted that the most common offences for Aboriginal and Torres Strait Islander people to be charged with were acts intended to cause injury, unlawful entry with intent and robbery, extortion and related offences - all of which are mandatory sentencing offences.<sup>80</sup>

Mandatory sentencing practices are of particular concern in the Northern Territory and Western Australia where the discriminatory impact on Aboriginal and Torres Strait Islander people is most apparent. In the Northern Territory there is mandatory sentencing for violent offences and in Western Australia mandatory sentencing applies to home burglary, assaulting a public officer and certain driving offences.<sup>81</sup> These two jurisdictions also have the highest rates of Indigenous incarceration.<sup>82</sup>

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[10-13/justicereinvestment/report/index](#) ; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2011, *Doing Time - Time For Doing: Indigenous youth in the criminal justice system*, viewed 14 September 2017 available at [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=atsia/sentencing/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm); Senate Legal and Constitutional References Committee, 2004, *Inquiry into Legal Aid and Access to Justice*; Senate Legal and Constitutional Affairs Committee, 2009, *Inquiry into Access to Justice*.

<sup>76</sup> Productivity Commission, 2014, *Access to Justice Arrangements, Inquiry Report*, Volume 2, p 700.

<sup>77</sup> Productivity Commission, 2014, *Access to Justice Arrangements, Inquiry Report*, Volume 2, p 703.

<sup>78</sup> United Nations Human Rights, Office of the High Commissioner, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, 8 August 2017, 12.

<sup>79</sup> United Nations Human Rights, Office of the High Commissioner, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, A/HRC/36/46/Add.2, 8 August 2017, 20.

<sup>80</sup> Australian Bureau of Statistics, *Prisoners in Australia*, 2013 Report, 5 December 2013.

<sup>81</sup> Section 78BA of the *Sentencing Act 1995* (NT); 53AE of the *Juvenile Justice Act 1983*; 2013 the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*; Criminal Code Amendment Act 2009 (WA).

<sup>82</sup> Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing, May 2014, 8: Jurisdictions vary as to the kind of offences that attract a mandatory sentence (see Attachment A for examples of state, territory and Commonwealth mandatory sentencing legislation). For instance, mandatory sentencing applies in Western Australia (WA) for repeat adult and juvenile offenders convicted of residential burglary, grievous bodily harm or serious assault to a police officer; the



Amnesty International has consistently supported the abolition of mandatory sentencing, including by recommendation in our Western Australian report and in meetings with the former and current Governments of Western Australia.<sup>83</sup>

Amnesty International recommends that the *Western Australian Criminal Code Act 1913* (WA) be prioritised for review. In its current state, contrary to the CRC, the Act requires magistrates to impose a mandatory minimum sentence on a young offender in three circumstances. The first is where a young offender already has two relevant convictions for a home burglary.<sup>84</sup> This is commonly known as the ‘three strikes’ home burglary law and mandates a minimum sentence of 12 months. The other two relate to serious assault and grievous bodily harm where the victim is a ‘public officer’ (including a police officer or a juvenile custodial officer).<sup>85</sup> The latter laws mandate a minimum sentence of three months in detention.<sup>86</sup>

In 2014 the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (WA) was passed. This law amends the counting rules for determining ‘repeat offender’ status for young people aged 16 and 17. Under the changes multiple offences dealt with in court on one day will no longer be counted as a single ‘strike’.<sup>87</sup> These changes mean that a 16-year-old appearing in court for the first time could immediately accumulate three strikes, such that they must receive a mandatory minimum sentence of 12 months detention or imprisonment, even if the offender had no prior record.<sup>88</sup> The changes also introduced mandatory minimum three year terms of detention for further violent offences committed in the course of an aggravated home burglary for 16 and 17-year-olds.<sup>89</sup> Circumstances of aggravation include committing a burglary in company with another person, being armed or pretending to be armed with a dangerous weapon, threats to injure and detaining a person.

Under these laws, the Children’s Court is prevented from ensuring that detention is a measure of last resort, that the best interests of the child are a primary consideration, and that each child is dealt with in a manner proportionate to their circumstances and the offence.<sup>90</sup>

The Australian Law Reform Commission (ALRC) found that the Western Australian ‘three strikes burglary’ laws:

violate the principle of proportionality which requires the facts of the offence and the circumstances of the offender to be taken into account, in accordance with Article 40 of [the Convention]. They also breach the requirement that, in the case of children, detention should be a last resort and for the shortest appropriate

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Northern Territory (NT) for murder, rape and offences involving violence; New South Wales (NSW) for murder of a police officer or the offence of assault by intentionally hitting a person causing death,<sup>7</sup> if committed by an adult when intoxicated (the ‘one punch’ assaults while intoxicated offence); Queensland for certain child sex offences, murder, and motorcycle gang members who assault police officers or are found in possession or trafficking in firearms or drugs; South Australia (SA) for certain serious and organized crime offences and serious violent offences; Victoria for actions of intentional or reckless gross violence; and the Commonwealth for certain people smuggling offences.

<sup>83</sup> Amnesty International Australia, 2015, *There is always a brighter future*, recommendation 18.9 available at [https://www.amnesty.org.au/wp-content/uploads/2016/02/A\\_brighter\\_future\\_National\\_report.pdf](https://www.amnesty.org.au/wp-content/uploads/2016/02/A_brighter_future_National_report.pdf).

<sup>84</sup> A dwelling, or home, is defined in the *Criminal Code Act Compilation Act 1913* (WA) Part 1, as a place ordinarily used for human habitation.

<sup>85</sup> *Criminal Code Act Compilation Act 1913* (WA), sections 297(5) and 318(2).

<sup>86</sup> In relation to young offenders, the court maintains the limited ability to order a Conditional Release Order. This is a suspended order of detention served in the community with intensive supervision. For a third strike, it must be imposed for a minimum of 12 months, and, if breached “usually results in a sentence of at least 12 months immediate detention.” President of the Western Australian Children’s Court Dennis Reynolds, 2014, ‘Youth Justice in Western Australia – Contemporary Issues and its future direction’ *Eminent Speakers Series*, The University of Notre Dame, 19.

<sup>87</sup> Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA), clause 20.

<sup>88</sup> Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA), clause 20.

<sup>89</sup> Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (WA). These include Murder (clause 5), Manslaughter (clause 6), Unlawful Assault Causing Death (clause 7), Attempt to unlawfully kill (clause 8), Acts intended to cause grievous bodily harm or prevent arrest (clause 9), Grievous bodily harm (clause 10), Sexual offences (clauses 11 and 12), Aggravated indecent assault (clause 13), Sexual penetration without consent (clause 14), Aggravated sexual penetration without consent (clause 15), Sexual Coercion (clause 16), Aggravated sexual coercion (clause 17), Incapable person, sexual offences against (clause 18).

<sup>90</sup> In February 1997 the Children’s Court decided that the three strikes laws permitted the imposition of a Conditional Release Order for a third strike as an alternative to immediate detention. A Conditional Release Order (CRO) is a suspended order of detention served in the community with intensive supervision. Such an order must be imposed for a minimum of 12 months for a third strike. If a CRO is breached, this usually results in a sentence of at least 12 months immediate detention. See Amnesty International Australia, *There is always a brighter future* for more details in relation to these laws.

period ... [The Convention requires] that sentences should be reviewable by a higher or appellate court. By definition, a mandatory sentence cannot be reviewed.<sup>91</sup>

Amnesty International supports the ALRC's previous finding that these violations of international law to be so serious that the Australian Government must override the three strikes burglary laws.<sup>92</sup> The recommendation was not acted on by the Federal Government.

Since the ALRC made this recommendation the Western Australian Government has enacted two further mandatory sentencing provisions applicable to young people. The last publicly available data on the impact of three strikes burglary laws is the Western Australia Department of Justice's 2001 review of the legislation. The review found that 81 per cent of the 119 young people sentenced under the three strikes burglary laws were Indigenous.<sup>93</sup> In 2001 the Aboriginal Justice Council described the three strikes burglary laws as "profoundly discriminatory in their impact on Aboriginal Youth."<sup>94</sup> Amnesty International has sought further information from the Western Australian Department of Justice regarding the full impact of these laws on Indigenous children.

In 2012, the Committee on the Rights of the Child recommended that the Australian Government "take measures with a view to abrogating mandatory sentencing in the criminal law system of Western Australia."<sup>95</sup>

In its Concluding Observations in 2014, the Committee against Torture also reiterated its previous concern about over-representation of Indigenous young people in the detention and that mandatory sentencing continues to disproportionately affect Indigenous people.<sup>96</sup>

The Committee against Torture recommended that Australia "should also review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances."<sup>97</sup>

## RECOMMENDATIONS

Amnesty International recommends that the State party, including the Federal and Western Australian Governments, take measures to ensure:

- that the Western Australian Government immediately prioritise for review the *Western Australian Criminal Code Act 1913* (WA) with a view to the abolition of all mandatory sentencing; and
- that the Federal Government invalidates any new or expanded mandatory sentencing or presumptive sentencing provisions in any Australian jurisdiction.

## 3.5. AGE OF CRIMINAL RESPONSIBILITY

The current age of criminal responsibility in all Australian jurisdictions is 10 years with a rebuttable presumption (known as *doli incapax*) that applies to children aged between 10 and 14 years. This doctrine of presumption requires the prosecution to prove that at the time of the offence, the child had the capacity to know that he or she ought not to have done the act or made the omission constituting the offence.

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<sup>91</sup> Australian Law Reform Commission, 1997, *Seen and Heard: Priority for Children in the Legal Process*, Report 84, paragraph 19.55 views 14 September 2017, available at [www.alrc.gov.au/publications/19-sentencing/sentencing-options](http://www.alrc.gov.au/publications/19-sentencing/sentencing-options) (Australian Law Reform Commission, *Seen and Heard*).

<sup>92</sup> Australian Law Reform Commission, *Seen and Heard*, para 19.64.

<sup>93</sup> Department of Justice (WA), Review of section 401 of the Criminal Code, (2001), 24.

<sup>94</sup> N Morgan, H Blagg and V Williams for the Aboriginal Justice Council, 2001, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth*, viewed 2 January 2015 available at [www.aph.gov.au/~/media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2002\\_04/hra\\_mandsent/submissions/sub89\\_pdf.ashx](http://www.aph.gov.au/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2002_04/hra_mandsent/submissions/sub89_pdf.ashx), 3.

<sup>95</sup> United Nations Committee on the Rights of the Child, 'Concluding Observations – Australia', UN Doc CRC/C/AUS/CO/4, [82], (60<sup>th</sup> session, May–15 June 2012) available [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf).

<sup>96</sup> United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Concluding observations on the fourth and fifth periodic reports of Australia*, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014), [12] available <http://alhr.org.au/wp/wp-content/uploads/2015/01/UNCAT-Concluding-Observations.pdf>.

<sup>97</sup> Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5, [12].

Amnesty International notes that the rate of overrepresentation of Aboriginal and Torres Strait Islander children is particularly bleak for 10 and 11-year-olds, who made up more than 60 per cent of all 10 and 11 year-olds in detention in Australia in 2012-13 and 74 per cent in 2014-15.<sup>98</sup>

It is often the most disadvantaged children who are coming into contact with the justice system at primary school age,<sup>99</sup> and as noted above, children with FASD or cognitive impairment. The vast majority - about 70 per cent - of charges laid against these primary school aged children are for low level offences that involved property like theft, unlawful entry and property damage.<sup>100</sup>

If children enter the system at this young age they are highly likely to become entrenched in it.<sup>101</sup> Criminologists have identified that contact with the youth justice system increases the likelihood of offending in adulthood, and the more intensive and restrictive the justice intervention, such as sending a child into detention, the greater the likelihood of offending in adulthood and ongoing contact with the criminal justice system.<sup>102</sup>

The Committee on the Rights of the Child have concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility. In its concluding observations in 2005<sup>103</sup> and 2012<sup>104</sup> the Committee said that the age in Australia is 'too low'.

The recommendation to increase the age of criminal responsibility to 12 years was also reflected in the Report of the Special Rapporteur who said: "The application of criminal responsibility as low as at the age of 10 years across the country is deeply troubling and below international standards".<sup>105</sup> The Special Rapporteur has called on the Government to increase the age of criminal responsibility from 10 years to at least 12 years, in accordance with international standards.

Regarding the doctrine of *doli incapax*, the Committee on the Rights of the Child acknowledged the doctrine but noted that "the assessment of this maturity is left to the court or judge, often without the requirement of involving a psychologist expert, and results in practice in the use of lower minimum age in cases of serious crime."<sup>106</sup>

In the context of Western Australia, this is particularly important. In May 2017 the Telethon Institute conducted research in the state's only juvenile prison, Banksia Juvenile Detention Centre, which showed that one in three children had Fetal Alcohol Spectrum Disorder (FASD) and that nine out of 10 of the children detained had some form of cognitive disability.<sup>107</sup> It is often difficult to diagnose these conditions, especially in younger children, so there is a likelihood that many children charged with offences may have had a mental age lower than their actual age at the time of the offences and that the court or judge would not have been aware of their conditions.

Due to the high numbers of children presenting in the criminal justice system with cognitive disabilities including FASD, it would be worthwhile considering extending the age of *doli incapax* to 17 years.

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<sup>98</sup>AIHW, Youth Justice in Australia 2014-15 'Table S78b'.

<sup>99</sup> Jesuit Social Services: Too much too young: Raise the age of criminal responsibility to 12, page 3: In Victoria, "78% of children aged 10 to 12 years with youth justice orders in 2010, or those who had experienced remand at this age, were known to child protection."

<sup>100</sup> In 2010-11 2,132 ten and 11 year olds were proceeded against by police. The top three offences for these 10 and 11 year olds, accounting for nearly 70 per cent of all offences, were unlawful entry with intent, theft and property damage. There were no 10 or 11 year olds proceeded against for homicide.

<sup>101</sup> Australian Institute of Health and Welfare 2015, 'Young people returning to sentenced youth justice supervision 2015' Juvenile Justice series no. 18. Cat. no. JUV 63. Canberra: AIHW: A staggering 83% for those children aged 10-12 who served a sentence of detention returned to sentenced supervision within 6 months.' 'Young people aged 10-12 when they were released from sentenced community-based supervision were 1.8 times as likely to return to some form of sentenced supervision within 12 months as those who were aged 16 when they were released.'

<sup>102</sup> K Richards, 2011, 'What makes juvenile offenders different from adult offenders? Trends and issues in crime and criminal justice', No.409, February 2011, Australian Institute of Criminology, 7.

<sup>103</sup> CRC/C/15/ADD.268, Consideration of reports submitted by states parties under article 44 of the convention, concluding observations: Australia, 20 October 2005.

<sup>104</sup> CRC/C/AUS/CO/4, "Consideration of reports submitted by States parties under article 44 of the Convention Concluding observations: Australia" 28 Aug 2012, available at [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf).

<sup>105</sup> United Nations Human Rights, Office of the High Commissioner, End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia, 3 April 2017, 13.

<sup>106</sup> Ibid.

<sup>107</sup> Telethon Kids Institute, 2017, *Banksia Hill FASD Project*, available at <https://www.telethonkids.org.au/our-research/brain-and-behaviour/disability/alcohol-and-pregnancy-and-fasd-research/banksia-hill-fasd-project/>.

## RECOMMENDATIONS

Amnesty Australia recommends that the State party, and all Australian Governments:

- increase the minimum age of criminal responsibility to at least 12 years; and
- retain the presumption of *doli incapax* for children aged 12 and 13 years of age and consider extending the doctrine to all children.

# 4. RACIAL DISCRIMINATION, RACIAL VILIFICATION AND FREEDOM OF SPEECH

In 2015, an estimated 15 per cent of people living in Australia experienced racial discrimination, with most reporting experiencing racist verbal abuse.<sup>108</sup> The latest Scanlon Foundation Social Cohesion Survey revealed an increase in reported experiences of discrimination based on skin colour, ethnicity or religion (20 per cent of respondents).<sup>109</sup>

Australia's obligations to prevent discrimination include the obligation to address intersectional discrimination, since those who face discrimination on the basis of race, colour or national or ethnic origin are often likely also to face discrimination on the basis of other factors such as sex and gender, sexual orientation and gender identity, religion or belief, health, status, age, or other factors. States must recognise such intersecting forms of discrimination and their compounded negative impact on the individuals concerned, such as women, and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences.<sup>110</sup>

Rather than move towards protections that strengthen freedom from racial discrimination and hatred and intersecting forms of discrimination, in the years since Australia's last review by CERD, there have been attempts by the Australian Government to weaken racial hatred laws, and in particular section 18C of the Racial Discrimination Act because, it has been argued, that they interfere with freedom of speech.

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<sup>108</sup> Andrew Markus, Mapping Social Cohesion: The Scanlon Foundation surveys 2015, p23 and 25: Of the respondents to the survey who said they had been racially discriminated against in the past 12 months, 61% said they had been verbally abused available at <http://scanlonfoundation.org.au/wp-content/uploads/2015/10/2015-Mapping-Social-Cohesion-Report.pdf>.

<sup>109</sup> Andrew Markus, 'Mapping Social Cohesion: Scanlon Foundation Surveys 2016' (2016), <<http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf>>.

<sup>110</sup> See for example: CEDAW Committee, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, para. 18.

Amnesty International made submissions to the Australian Government regarding these attempts to wind back section 18C in 2014<sup>111</sup> and 2016<sup>112</sup> and were relieved when the amendments were defeated in the Senate earlier this year, after being released on the anniversary of the Convention, which is also celebrated as Harmony Day in Australia. This was well summarised by the Special Rapporteur on the Rights of Indigenous Peoples in her August report when she wrote:

“During the visit, the Government regretfully decided for the second time since 2014 to pursue a bill to amend section 18C of the Racial Discrimination Act. The Parliamentary Joint Committee on Human Rights reviewed the Act in its comprehensive inquiry and report, presented in February 2017, on whether it imposes unreasonable restrictions on freedom of speech.

The Special Rapporteur was further disheartened by the fact that the Government had chosen to launch the bill on 21 March, the International Day for the Elimination of Racial Discrimination. The proposed changes to the provisions would replace the terms “offend, insult, humiliate” with the term “harass”, and would include the notion of the “reasonable member of the Australian community” as the standard by which any acts would be judged, rather than by members of the affected community. Indigenous organizations were excluded from participating during the Senate debate on the draft bill. The draft bill was defeated in the Senate, which hopefully marks the end of the matter.”<sup>113</sup>

Amnesty International remains concerned about the public debate and messages that were sent to the Australian public about racism being acceptable through these attempted amendments.

Amnesty International further notes that restricting expression, in isolation, is an ineffective means to combat discrimination. Effective protection and social inclusion of marginalised groups requires broader interventions. Any restrictions on freedom of expression in this regard should only take place within a context of broad ranging public policy measures to tackle the root causes of intolerance. The policy measures needed to tackle the root causes of intolerance should include “education on pluralism and diversity, and policies empowering minorities and Indigenous people to exercise their right to freedom of expression.”<sup>114</sup>

## RECOMMENDATIONS

Amnesty International recommends that the State party:

- refrains from further attempts to amend Part IIA of the Racial Discrimination Act;
- adequately resources the Australian Human Rights Commission to conciliate complaints of racial hatred and conduct activities and education to promote social harmony.

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<sup>111</sup> Amnesty International, Submission to Attorney-General’s Department Proposed Amendments to the Racial Discrimination Act 1975, 24 April 2014, available at <https://www.amnesty.org.au/wp-content/uploads/2016/09/Submission-on-RDA-24-Apr-2014.pdf>.

<sup>112</sup> Amnesty International, Submission to Parliamentary Joint Committee on Human Rights inquiry into Freedom of Speech in Australia, 22 December 2016, available at <https://www.amnesty.org.au/wp-content/uploads/2017/01/161222-AIA-Submission-to-Freedom-of-Speech-Inquiry.pdf?x85233>.

<sup>113</sup> United Nations Human Rights, Office of the High Commissioner, ‘Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia’, 8 August 2017, 6.

<sup>114</sup> Human Rights Council, *Addendum to Annual report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, UN Doc. A/HRC/22/17/Add.4, para. 37.

# 5. RACIAL DISCRIMINATION, MIGRANTS AND PEOPLE SEEKING ASYLUM

Amnesty International is deeply concerned by the systematic erosion of human rights protection for asylum seekers and refugees that has occurred under successive Australian governments. Use of mandatory indefinite detention of asylum seekers and the offshore detention of all asylum seekers who arrive by boat, continue to have a devastating effect on the physical and mental health of detainees. Many of these mental health and physical impacts have also been experienced by young children. The impact of being indefinitely detained in appalling conditions is further exacerbated by the subsequent denial of adequate physical and mental health care, services and support.

Of particular concern is the Government's treatment of asylum seekers and refugees. The Government's Operation Sovereign Borders is Australia's military-led border control operation<sup>115</sup> and has been widely criticised by human rights organizations. In August 2012, Australia reintroduced an offshore detention regime for everyone arriving by boat to an external Australian territory (such as Christmas Island) and requiring them to be detained in a Refugee Processing Centre on Nauru or Papua New Guinea (PNG). In mid-2013, Australia enacted further legislation that meant anyone who arrived by boat anywhere in Australia – including the mainland – would be barred from seeking asylum in Australia and instead transferred to an offshore centre.

The UN Special Rapporteur noted:

“The Australian authorities have put in place a very punitive approach to unauthorised maritime arrivals, with the explicit intention to deter other potential candidates. Unauthorised maritime arrivals are treated very differently from unauthorised air arrivals, especially when these arrivals result in protection claims. This distinction is unjustifiable in international refugee and human rights law and amounts to discrimination based on a criterion – mode of arrival – which has no connection with the protection claim. At all levels, unauthorised maritime arrivals face obstacles that other refugees do not face, including mandatory and prolonged detention periods, transfer to RPCs in foreign countries (Papua New Guinea and Nauru), indefinite separation from their family, restrictions in the social services and no-access to citizenship.”<sup>116</sup>

Australia's policy regarding all asylum seekers who endeavour to arrive by boat is to either: return them to Indonesia (by boat, in 'turnbacks' at sea); send them back to their country of departure ("takebacks"); or transfer them to offshore immigration detention centres in the Republic of Nauru or on Manus Island in PNG. This is despite a 2016 PNG Supreme Court decision which found the Manus Island detention centre

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<sup>115</sup> See Amnesty International's report, Australia, *'Hook or by Crook: Australia's Abuse of Asylum-Seekers at Sea'* examined the legality and human rights impact of Operation Sovereign Border turnbacks, based on testimonies from people who had been on board boats that Australian officials intercepted between 2013 and 2015.

<sup>116</sup> *End of mission Statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia* (1-18 November 2016) available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E>.

was illegal and unconstitutional and the Australian and PNG Governments agreeing that it will be closed by the end of October 2017.<sup>117</sup>

As of 31 August 2017, there were 369 people living in the detention facilities on Nauru (including 43 children) and 773 adult males in detention on Manus Island.<sup>118</sup>

There are approximately a further 820 refugees living on Nauru in the community, who also face serious security risks and have inadequate access to healthcare, educational and employment opportunity.

In November 2016 an agreement was reached between the Governments of Australia and the United States (US) for the US to accept an undisclosed number of asylum seekers. The deal is understood to relate to up to 1,250 refugees held in Australia's offshore detention camps on Nauru and Manus Island.<sup>119</sup> To date 54 people have departed Nauru and PNG to the USA.<sup>120</sup>

## 5.1.MANDATORY DETENTION

*Australia's Migration Act 1958* requires all "unlawful non-citizens" (that is, people who are not Australian citizens and do not have a valid visa) to be detained, regardless of circumstances, until they are granted a visa or leave the country. This policy was introduced in 1992 and has been maintained by successive governments. Mandatory detention applies to many groups, including people who overstay their visas or breach their visa conditions. However, the policy disproportionately affects asylum seekers who arrive in Australia without authorisation. These policies are of particular concern to Amnesty International as the Committee has explained the limits on permissible distinctions against non-citizens under the CERD.<sup>121</sup>

As of 30 June 2017 there were 1400 people in immigration detention on the Australian mainland (including Christmas Island). While 38.6% had been detained for under 90 days, over 22% had been detained for over 730 days – that is, more than two years.<sup>122</sup>

The Australian Human Rights Commission March 2017 Snapshot Report "Asylum Seekers, Refugees and Human Rights",<sup>123</sup> identifies the ways in which Australia's mandatory detention policy breaches the Covenant. These include the rights under the Covenant "not to subject anyone to arbitrary detention" (article 9(1)), the right of people who are detained "to challenge the legality of their detention" in the court (article 9(4)), to treat people in detention with "humanity and respect" (article 10(1) not to subject anyone to "torture and cruel, inhuman or degrading treatment or punishment" (article 7) and not to be subject to discrimination (articles 2 and 26).<sup>124</sup>

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<sup>117</sup> Ben Doherty, Helen Davidson and Paul Karp, 'Papua New Guinea court rules detention of asylum seekers on Manus Island illegal', *The Guardian*, 26 April 2016 available at <https://www.theguardian.com/australia-news/2016/apr/26/papua-new-guinea-court-rules-detention-asylum-seekers-manus-unconstitutional>; Ben Doherty, 'Australia confirms Manus Island Detention Centre will close', *The Guardian*, 17 August 2016 available at <https://www.theguardian.com/australia-news/2016/aug/17/manus-island-detention-centre-to-close-australia-and-papua-new-guinea-agree>; Recent statements by the PNG Attorney General cast some doubt on the timing however SBS World News, 25 August 2017 available at <http://www.sbs.com.au/news/article/2017/08/25/new-png-attorney-general-roadblocks-manus-detention-centre-closure>.

<sup>118</sup> Australian Government, Department for Immigration and Border Protection, Immigration Detention and Community Statistics Summary, 31 August 2017 available at <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-august-2017.pdf>.

<sup>119</sup> Under the deal, the first 22 refugee men were transferred from Papua New Guinea on 26 September 2017, see ABC News, "Refugees leave Manus Island for US swap deal", 26 September 2017 available at <http://www.abc.net.au/news/2017-09-26/22-refugees-leave-manus-island-for-us-swap-deal/8988424>.

<sup>120</sup> ABC News, "Manus Island Refugees in the United States", 3 October 2017 available at <http://www.abc.net.au/news/2017-10-02/manus-island-refugees-in-the-united-states/9006460>.

<sup>121</sup> Recommendation 30 on discrimination against non-citizens, adopted at the 65th session.

<sup>122</sup> Australian Government, Department for Immigration and Border Protection, Immigration Detention and Community Statistics Summary, 31 August 2017 available at <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-august-2017.pdf>.

<sup>123</sup> Australian Human Rights Commission, "Asylum Seekers, Refugees and Human Rights: Snapshot Report (2<sup>nd</sup> edition) 2017 available at <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/asylum-seekers-refugees-and-human-rights-snapsho-0>.

<sup>124</sup> See: <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/asylum-seekers-refugees-and-human-rights-snapsho-0>. This practice was also criticised by the UN in May 2016, see Daniel Flitton, *The Sydney Morning Herald*, 16 May 2016 available at <http://www.smh.com.au/national/australia-slammed-for-locking-up-refugees-on-secret-asio-advice-20160515-govuw.html>; Australian Human Rights Commission, *The Forgotten Children: National*

## 5.2.CHILDREN IN DETENTION

Children should never be placed in immigration detention, because it is never in their best interests.<sup>125</sup> Amnesty International supports the findings and all recommendations made by the AHRC in its report, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, which found that “prolonged detention is having profoundly negative impacts on the mental and emotional health and development of children” and that “...the mandatory and prolonged detention of children breaches Australia’s obligation under article 24(1) of the Convention on the Rights of the Child.”<sup>126</sup>

Amnesty International notes that the government has made some progress transferring children and families from onshore detention facilities, by moving them into so-called ‘community detention’ arrangements, or into the community with their families on bridging visas. Serious concerns remain, however, for children remaining on Nauru (families, women and children are not taken to Manus).

Concern also remains for families and children who have been returned from Nauru to Australia for medical treatment. Having first been transferred into Community Detention, with a number of supports, a recent announcement from the Minister for Immigration is that these families will be removed from the housing they have been provided with and instead be allowed into the community on Bridging Visas (that include work rights but unlike other asylum seekers, with no access to welfare support). This includes young women who were raped on Nauru and have subsequently given birth as a result.<sup>127</sup> If they do not like this arrangement their only other choice is to return to detention on Nauru.

### RECOMMENDATIONS

Amnesty International recommends that the State party:

- ends mandatory detention;
- brings all asylum seekers and refugees on Nauru and Manus Island to Australia immediately and ensure that all those granted refugee status have the right to settle in Australia or third countries;
- ensures that the families and children who have been transferred from Nauru to Australia for medical treatment when released into the community on bridging visas receive equal support to all other asylum seekers; and, if their claims for asylum have not been determined then this be done as a matter of urgency and, once completed those found to be refugees should be granted permanent residency here or settled in another country (as part of the USA deal);
- engages in genuine search and rescue operations, conducted with full respect for international human rights law, followed by safe disembarkation in Australia;
- ends the prohibition on maritime arrivals claiming asylum; and
- ends the practice of turn backs at sea.<sup>128</sup>

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Inquiry into Children in Immigration Detention (2014), available at [https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf); CERD General Recommendation 30 on discrimination against non-citizens, adopted at the 65th session, para. 27.

<sup>125</sup> Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The rights of all children in the context of international migration (28 September 2012) [78] Available at <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> (viewed 7 December 2016). See also Global Migration Group, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations within large and/or mixed movements (2016) 29, [4] Available at <http://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf> (viewed 9 February 2017); United Nations High Commissioner for Refugees, UNHCR’s position regarding the detention of refugee and migrant children in the migration context (January 2017) available at <http://www.refworld.org/docid/5885c2434.html> (viewed 9 February 2017).

<sup>126</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, available at [https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf).

<sup>127</sup> See: Radio New Zealand, 29 October 2015 available at <http://www.radionz.co.nz/international/pacific-news/288247/pregnant-refugee-on-nauru-to-return-to-australia> and Radio New Zealand, 21 August 2017 available at <http://www.radionz.co.nz/international/pacific-news/337681/australia-halts-nauru-detainee-abortions>.

<sup>128</sup> Amnesty International, “By Hook or by Crook Australia’s Abuse of Asylum Seekers at Sea”, 2015, 38 available at [https://www.amnestyusa.org/files/australia-by\\_hook\\_or\\_by\\_crook.pdf](https://www.amnestyusa.org/files/australia-by_hook_or_by_crook.pdf).



## 5.3. GENDER BASED VIOLENCE

Public attention to the issue of violence against women in Australia has significantly increased over the past two decades, primarily due to campaigning by civil society organizations. Federal, State and Territory Governments in Australia have all stated that addressing violence against women is a high priority. The Council of Australian Governments (COAG) is currently implementing the Third Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022 (the National Plan), which was launched in October 2016 by the Prime Minister.

At the mid-point of the implementation of the National Plan, there is evidence of some modest reduction in domestic violence. However, issues such as securing long-term investment have been raised in evaluations that need to be addressed in order to ensure its long-term success.

While the National Plan is positive, there remain concerns about a number of other issues that must be addressed. In particular, Amnesty International wishes to raise the continuing high rates of violence against Indigenous women and girls, and the experiences of refugee and migrant women and girls.

For example, Aboriginal and Torres Strait Islander women are 45 times more likely to be victims of domestic and family violence and 35 times more likely to be hospitalised as a result of violence related-assault than non-Indigenous women in Australia.<sup>129</sup>

In her “End of Mission statement the United Nations Special Rapporteur on Violence against women, its causes and consequences”, Dubravka Šimonović, stated:

"The National Plan insufficiently addresses the need for adequate crisis services, shelters or refuges for women and to provide them with opportunities for empowerment. Specific National Action Plan on violence against women and gender equality should be elaborated to address the situation of indigenous women."<sup>130</sup>

Amnesty International has raised concerns about the safety of female asylum seekers and refugees detained on the island of Nauru. For vulnerable refugees and asylum seekers both inside and outside of the Refugee Processing Centre, sexual assault is a serious risk. Amnesty International received credible testimonies about numerous incidents of gender-based violence that are detailed in the 2016 report, *Island of Despair*.

Female migrants and refugees are also at risk of violence in Australia, in the community and in their homes. Of particular concern is the restricted ability of migrant and refugee women who are experiencing violence to access available services and assistance. The National Research Organisation for Women's Safety (ANROWS) ASPIRE Project<sup>131</sup> found that a lack of English and inadequate knowledge of the Australian legal system were compounded by a number of other factors which contributed to making this group particularly vulnerable to violence. The other significant factors identified included: first, their visa status, particularly when the visa sponsorship established a “dynamic of women's dependency on men, and when the conditions of temporary visas restricted women's access to employment, social security, housing, healthcare, childcare and education.”<sup>132</sup>

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<sup>129</sup> Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators (2009)*, 26 available at [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0003/90129/key-indicators-2009.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0003/90129/key-indicators-2009.pdf).

<sup>130</sup> The statement is available at <http://un.org.au/2017/02/27/end-of-mission-statement-by-dubravka-simonovic-united-nations-special-rapporteur-on-violence-against-women-its-causes-and-consequences/>. This approach is consistent with the Committee's General Recommendation 25, adopted at the 56th Session in 2000, where “The Committee notes that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.”

<sup>131</sup> Australia's National Research Organisation for Women's Safety, ‘Promoting community-led responses to violence against immigrant and refugee women in metropolitan and regional Australia.’ *Research Report 7*, (December 2016) available at [http://media.aomx.com/anrows.org.au/Aspire\\_Horizons\\_FINAL.pdf](http://media.aomx.com/anrows.org.au/Aspire_Horizons_FINAL.pdf).

<sup>132</sup> The other factors were: where social, religious and cultural practices contributed to a normalization of family violence, often compounded by threats of community ostracism and violence if those experiencing violence took action against their husband; where services are already under immense pressure to respond to family violence generally they are even further under resourced to deal with the specific needs of migrant and refugee women (with complex legal, immigration and protection matters compounded by the lack of appropriate interpreters); and finally, for women, particularly in regional areas, experiences of discrimination, racism and cultural isolation were also reported. While women in this group experienced the same types of violence as other women (including physical, sexual, emotional, psychological and financial violence) they also experienced immigration related violence, including threats of deportation (often without their children), visa cancellation, and withholding immigration documents, as methods to threaten, intimidate, isolate and control, *ibid*, PP 4 and 5.

## **RECOMMENDATIONS**

Amnesty International recommends that the State party:

- amends the National Plan to sufficiently address the need for adequate crisis services, shelters or refuges for women and to provide women and girls with opportunities for empowerment; and
- develops in close consultation with Indigenous women, a specific National Action Plan to on violence against Aboriginal and Torres Strait Islander women.

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TO ONE PERSON, IT  
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# AUSTRALIA

## SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

94<sup>TH</sup> SESSION, 20 NOVEMBER - 8 DECEMBER 2017

In this submission Amnesty International reports on the status of racial discrimination and hatred in Australia since the last review by the Committee on the Elimination of Racial Discrimination in 2010. This submission comments on the need for improved human rights protections, including in the Australian Constitution and through a Human Rights Act. The submission then comments on racial discrimination faced by Aboriginal and Torres Strait Islander people, particularly in the criminal justice system, on racial hatred and freedom of expression and on racial discrimination faced by refugees and asylum seekers and makes recommendations to the Australian authorities.