



Torture and cruel
treatment in Australia
Joint NGO report to the
United Nations Committee
Against Torture

October 2014

This report to the United Nations Committee Against Torture examines Australia's compliance with the *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*. The report is intended to inform the Committee's fifth review of Australia during its 53rd session in November 2014.

The report has been prepared by the Human Rights Law Centre with substantial input from a coalition of non-government organisations from across Australia. It is endorsed in whole or in part by 77 NGOs.



The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The Human Rights Law Centre would like to thank King & Wood Mallesons for administrative support in the preparation of this report.

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1. Introduction

1.1. About this report

This report to the United Nations (**UN**) Committee Against Torture (the **Committee**) examines Australia's compliance with the *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (**CAT**). It has been prepared by a coalition of non-government organisations (**NGOs**) from across Australia. The report is intended to inform the Committee's fifth review of Australia during its 53rd session in November 2014.

The principle author of this report is the Human Rights Law Centre. The report was prepared with substantial input, including drafting and review, from the 24 organisations listed as contributors in section 2. It is endorsed in whole or in part by the 77 NGOs identified in the list of supporting organisations in section 3.

This report is not a comprehensive analysis of all issues relevant to Australia's compliance with CAT. Instead, it seeks to address some of the key areas identified in the Committee's List of Issues Prior to Reporting (**LOIPR**), highlight gaps in the Australian Government's report to the Committee issued on 31 July 2013¹ (**Australian Government's Report**) and identify additional significant areas in which the Australian Government is failing to meet its obligations under CAT.

1.2. Developments since Australia's 4th report under CAT

Australia has made minimal progress towards compliance with its obligations under CAT since its last periodic review. The Committee's last Concluding Observations on Australia, dated 22 May 2008 (**last Concluding Observations on Australia**), made over 35 specific recommendations.² The Australian Government has only implemented a small number of these recommendations, most notably: the enactment of a torture offence in Commonwealth law; the expansion of trafficking offences; and the incorporation of complementary protection claims in the statutory protection framework (the Australian Government is currently seeking to repeal the complementary protection provisions (see section 9.4 of this report)).³

Whilst these limited reforms are welcome, it is notable that several of the positive aspects of the Australian Government's compliance identified in the last Concluding Observations on Australia have been reversed. For example, as of 31 July 2014 766 children were still detained in secure Australian immigration detention centres (section 9.3), offshore processing centres in Nauru and Papua New

¹ Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedures – Fourth and fifth periodic reports of States parties due in 2012: Australia*, UN Doc CAT/C/AUS/4-5 (9 January 2014).

² Committee Against Torture, *Consideration of reports submitted by States Parties under article 19 of the Convention – Concluding observations of the Committee against Torture: Australia*, 40th sess, 828th mtg, UN Doc CAT/C/AUS/CO/3, 22 May 2008.

³ Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013 (Cth).

Guinea (**PNG**) have been re-opened (section 9.2) and the Australian Government has still not ratified the *Optional Protocol on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* (section 6).

Australian NGOs are concerned by the Australian Government's failure to respect several of its obligations under CAT. The Australian Government's lack of commitment to core human rights principles under CAT is illustrated by a statement made by the Prime Minister on 15 November 2013 during a press conference in Sri Lanka concerning the use of torture. Prime Minister of Australia Tony Abbott stated that the Australian Government deplores any use of torture, but that 'we accept that sometimes in difficult circumstances, difficult things happen'.⁴ The Prime Minister's comment fails to recognise that the absolute prohibition on the use of torture is central to the protection of human rights of all people around the world, including the human rights of people in Australia.

We encourage the Australian Government to use this periodic review as an opportunity to engage in constructive dialogue with UN experts and civil society, identify gaps in human rights protections in Australia and to reaffirm its commitment to combatting the use of torture and other cruel, inhumane or degrading treatment or punishment.

1.3. Terminology

Throughout this report, Aboriginal and Torres Strait Islander peoples are referred to as 'Aboriginal peoples'. The authors acknowledge the diversity in culture, language, kinship structures and ways of life within Aboriginal and Torres Strait Islander peoples, and recognise that Aboriginal peoples and Torres Strait Islander peoples retain their distinct cultures irrespective of whether they live in urban, rural, regional or remote parts of the country. The use of the word 'peoples' also acknowledges that Aboriginal peoples and Torres Strait Islander peoples have a collective, rather than purely individual dimension to their livelihoods.

⁴ Tony Abbott, 'CHOGM; Operation Sovereign Borders' (Press Conference at Colombo, Sri Lanka, 15 November 2013) <www.pm.gov.au/media/2013-11-15/press-conference>.

2. List of contributors

The following organisations and individuals contributed to or advised on this report:*

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National Association of Community Legal Centres
People with Disability Australia (PWDA)
Refugee Advice and Casework Service
Refugee Council of Australia
Survivors Network of those Abused by Priests (SNAP) Australia
The Association for the Prevention of Torture
UNICEF Australia
Women With Disabilities Australia (WWDA)
Women with Disabilities Victoria
Women's Legal Services Australia
Women's Legal Services NSW

* A number of Aboriginal and Torres Strait Islander organisations contributed to and reviewed this Report, however were unfortunately unable to be named due to political and funding concerns.

3. List of supporting organisations

This report is endorsed, either in part or in whole, by the following NGOs:

A Gender Agenda	Federation of Community Legal Centres (Victoria) Inc
Aboriginal Family Violence Prevention & Legal Service Victoria	Housing Legal Clinic (SA)
Aboriginal Legal Service of Western Australia (Inc)	Human Rights Law Centre
AID/WATCH	Human Rights Working Group of the Federation of Community Legal Centres
Anti-Slavery Australia, University of Technology Sydney	Hume Riverina Community Legal Service
Armadale Domestic Violence Intervention Project Inc.	Inclusive Development International
Association for Services to Torture and Trauma Survivors (ASeTTS)	International Women's Development Agency Inc
Asylum Seeker Resource Centre	Justice Connect
Australian Centre for Leadership for Women (ACLW)	Justice Connect Homeless Law
Australian Federation of Graduate Women	Kingsford Legal Centre
Australian Lawyers for Human Rights	Liberty Victoria
Australian Muslim Women's Centre for Human Rights	National Association of Community Legal Centres
Australian Womensport and Recreation Association Inc	National Children's and Youth Law Centre
Capricorn Community Development Association	National Council of Jewish Women of Australia Ltd
Castan Centre for Human Rights Law	National Foundation for Australian Women
Catholic Women's League of Australia	Northern Rivers Community Legal Centre
Centre for Human Rights Education, Curtin University	Northern Suburbs Community Legal Centre Inc
Child Rights Taskforce	Oxfam Australia
Children by Choice	Peel Community Legal Services
Children with Disability Australia	Peninsula Community Legal Centre
Community Legal Centres NSW	People With Disabilities (WA) Inc
Disability Discrimination Legal Service	People with Disability Australia
Domestic Violence Legal Workers Network WA	Public Health Association of Australia
Domestic Violence NSW	QPILCH Homeless Persons' Legal Clinic
	Queensland Association of Independent Legal Services Inc
	Queensland Advocacy Incorporated

Refugee Action Coalition NSW
Refugee Advice & Casework Service (Aust)
Inc.
Refugee Council of Australia
Remedy Australia
Salvation Army Freedom Partnership
Save the Children Australia
SCALES Community Legal Centre
Sisters Inside
Soroptimist International Beenleigh Inc.
Soroptimist International Australia
Soroptimist International Club of Brisbane
Soroptimist International Moreton North Inc.
Region South Queensland Australia
Stop the Traffik (Australia)
Transgender Victoria

Union of Australian Women
UnitingJustice Australia
Victorian Gay & Lesbian Rights Lobby
Women in Adult and Vocational Education
(WAVE)
Women With Disabilities Australia (WWDA)
Women with Disabilities Victoria
Women's Legal Centre (ACT & Region)
Incorporated
Women's Legal Service Victoria
Women's Law Centre (WA)
Women's Legal Services Australia
Women's Legal Services NSW
Youthlaw
YWCA Australia

4. Executive summary

Legal and institutional protection of human rights

Human rights are not given comprehensive and consistent legal protection in Australia. Many basic rights remain unprotected and others are haphazardly covered by an assortment of laws. There are numerous examples of violations that fall through the gaps in the current regime, several of which are outlined in this report.

While the establishment and operation of the Parliamentary Joint Committee on Human Rights has improved parliamentary scrutiny of human right issues, its recommendations are unenforceable and are routinely ignored. The Australian Government has often disregarded the Views of UN treaty bodies, and has provided remedies in only six of the 34 cases where violations have been found.

On a more positive note, the Australian Government is actively working towards the recognition of Aboriginal peoples in the Australian Constitution (**Constitution**) and should be encouraged to pursue the amendments recommended by the Expert Panel on Constitutional Recognition.

Optional Protocol to CAT

Australia should be commended for signing OPCAT on 19 May 2009. However, since that time, progress on ratification and implementation has been slow. While ratification is delayed, piecemeal, inadequate and at times non-existent independent monitoring and inspection of places of detention continues to result in the ill-treatment of people in detention.

Prisons

Australia now incarcerates more people than it ever has. Overcrowding and substandard healthcare remain significant problems in many Australian prisons. To cope with swelling numbers, prisoners are sharing cells and sleeping on the floor. This increases the likelihood of physical and sexual assault and has led to prisons in the Northern Territory being described as 'third world' and prisons in South Australia and New South Wales (**NSW**) being described as 'inhumane'.

Many Australian states and territories do not have legislation articulating the basic rights of prisoners to be treated equally and with dignity, to access health services, to have time out of their prison cells, or to religious practice.

Women, and in particular Aboriginal women, are the fastest growing prisoner demographic. Further, over half of the incarcerated women in Australia have a diagnosed psychosocial disability and a history of sexual victimisation. Young people, people with psychosocial disability and transgender prisoners are also all disproportionately affected by human rights violations in the prison system.

In some jurisdictions people who are found to be unfit to plead are imprisoned indefinitely and without any meaningful prospects of release.

Aboriginal people in the criminal justice system

Aboriginal people are incarcerated at 15 times the rate of non-Aboriginal Australians, and are significantly over-represented in the Australian criminal justice system. Overrepresentation, has become more severe since Australia last reported to the Committee and is particularly acute in relation to Aboriginal women and young people. Aboriginal young people are 31 times more likely to be detained than the general youth population and the number of Aboriginal women in prison has almost doubled in the last decade. Mandatory sentencing regimes contribute to the problem, with a disproportionate number of Aboriginal peoples imprisoned under mandatory sentencing provisions.

Despite numerous government-commissioned expert reports and documents that can be drawn upon to inform policies targeted at reducing Aboriginal peoples' incarceration rates, there has been a dearth of commitment evidenced through proper implementation.

Human rights violations associated with the over-incarceration of Aboriginal people are compounded by widespread funding cuts to Aboriginal-specific legal services. In December 2013 the Government announcing a funding cut of \$43.1 million for legal assistance over four years. The cuts will effectively defund the advocacy and law reform activities and projects of Aboriginal and Torres Strait Islander Legal Services and will likely reduce access to criminal, civil and family law services. Aboriginal Family Violence Prevention Legal services are also significantly affected by funding cuts.

Refugees and asylum seekers

Australia's current asylum seeker policies have one key aspiration – to 'stop the boats'. To achieve this goal, the Australian Government maintains a 'single-minded focus on deterrence'. The laws, policies and practices implemented by the Australian Government result in institutionalised, severe and routine violations of the prohibition on torture and ill-treatment and Australia's obligation of non-refoulement. Independent monitoring and access to information about both on and offshore detention is severely limited.

Asylum seekers who arrive in Australia by boat, including children, are subject to mandatory detention and transfer to Nauru or Papua New Guinea (**PNG**), where they are arbitrarily and indefinitely detained in what the UNHCR has called 'cruel and inhumane' conditions. As at 31 July 2014, there were 1146 asylum seekers detained in Nauru (including 183 children) and 1,127 asylum seekers detained on Manus Island, PNG. In February 2014 one asylum seeker died and 77 others were injured in violent riots at the Manus Island facility. Later in 2014 another asylum seeker detained on Manus Island died after developing septicaemia as a result of an untreated wound.

The processing of claims of offshore detainees has been extremely slow and in almost two years since the first asylum seeker was transferred to Manus Island, not one final refugee determination has been made, and no refugees have been resettled.

Many of the asylum seekers who remain in Australia, including children, are arbitrarily detained for prolonged periods – the current average being 349 days - with insufficient access to healthcare, legal assistance and other essential services.

The former director of mental health services with International Health and Medical Services (**IHMS**), the organisation contracted to provide healthcare services in immigration detention centres, remarked that the immigration detention environment is 'inherently toxic' and akin to torture. Statistics compiled by IHMS reveal that one third of people held in detention have mental health problems and establish that such problems are caused by prolonged time in detention.

Refugees who have received adverse security assessments from Australian Security Intelligence Organisation (**ASIO**) are detained indefinitely on the basis of decisions which they are not informed of and cannot challenge. Refugees who have received negative character assessments, or are being investigated in relation to alleged involvement in criminal activity (often for very minor offences), are also detained indefinitely.

The Australian Government places asylum seekers at risk of refoulement by conducting boat 'turn-backs'. Asylum seekers attempting to reach Australia by boat from Indonesia have been intercepted, loaded on to single-use lifeboats and towed back to just outside Indonesian waters. Most recently, 41 Sri Lankans were intercepted at sea and handed over to the Sri Lankan Navy after being asked a few cursory questions.

Many of those asylum seekers who do arrive in Australia are subject to non-statutory 'screening' procedures that prevent asylum seekers from having their claims for protection properly heard and considered. Since October 2012, Australia has returned 1248 Sri Lankans to their country using this process.

The Australian Government is also currently seeking to repeal the complementary protection laws introduced since the Committee's last review of Australia, or as a secondary option, to raise the threshold of risk for non-refoulement claims to the standard of 'more likely than not'.

Criminalisation of poverty

In 2006 the UN Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, conducted a visit to Australia to investigate the implementation of the right to adequate housing. In his 2007 report to the UN, the Special Rapporteur concluded that Australia had failed to implement the human right to adequate housing and was in the midst of a 'serious national housing crisis'. Since then, while the Australian Government has made notable commitments to addressing homelessness, the number of people in Australia experiencing homelessness has continued to grow and in 2011 it was estimated that there are 105,237 homeless Australians (including 26,238 young people).

The Special Rapporteur's report noted his concerns about the criminalisation of homelessness and poverty and concluded that 'enforcement of public space laws criminalizes the homeless and may violate civil rights, including the right to be free from inhuman or degrading treatment or punishment'. The Australian Government has failed to act on these and other recommendations to revise or amend laws that criminalise homelessness and poverty, including begging offences, public intoxication offences and 'move on' powers.

Trafficking

Since the Committee's last review of Australia, the Australian Government has undertaken an extensive review and expansion of laws proscribing human trafficking and related offences. Welcome amendments made to the federal *Criminal Code Act 1995* (Cth) have, among other things, expanded the definition of exploitation; introduced new offences of forced labour, forced marriage, harbouring a victim, and organ trafficking; and extended the application of servitude and deceptive recruiting offences. However, not all victims of trafficking are able to access compensation, permanent visas or government-funded support.

Violence against women

Violence against women in Australia occurs in epidemic proportions. Conservative estimates are that one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime.

Aboriginal women are 31 times more likely to be hospitalised as a result of family violence-related assault than non-Aboriginal women. Women with disability are at a higher risk of being assaulted, and experience sexual assault at twice the rate of women who do not have disability. Aboriginal women and women with disabilities are also subject to additional institutional failures to adequately prevent and respond to family violence. Culturally and linguistically diverse women, young women, older women, lesbian, gay, bisexual, transgender, intersex and queer (**LGBTIQ**) identifying people and women in prison also experience high levels of violence.

The Australian Government's *National Plan to Reduce Violence against Women and their Children 2010–2022* was released in February 2011 and represents an important development in providing a nationally-consistent and strategic approach to violence against women in Australia. However, there remains a need to ensure that the National Plan is sufficiently and sustainably resourced, implemented in a timely fashion, informed by the active participation of civil society and independently monitored and evaluated.

Counter-terrorism measures

Despite several reviews of Australia's counter-terrorism laws, aspects of those laws still violate Australia's obligations under CAT. Both ASIO and the Australian Federal Police (**AFP**) have overly-expansive powers to arrest and detain. The Australian Government is currently seeking to extend and expand counter-terrorism laws in order to facilitate the suspension or erosion of existing human rights protections.

Police use of force

All jurisdictions in Australia require substantial improvement to their systems of regulating, monitoring and investigating the use of force by law enforcement officials in order to comply with Australia's obligations under international human rights law. In particular, the models of investigation for instances of ill-treatment and excessive use of force by law enforcement officials and police-related

deaths remain wholly inadequate. Australia also lacks a nationally consistent approach to oversight of police detention.

A number of disturbing incidents and findings by coroners and oversight bodies indicate increased reliance on Tasers by police and demonstrate an urgent need for more rigorous police training and more stringent regulation of police use of force in Australia. There have been at least four recorded Taser related deaths to date in Australia. In each case, there are credible allegations that the Taser use was inappropriate or excessive.

Torture and ill treatment of people with disability

People with disability are frequently subject to treatment that may constitute torture, or cruel, inhuman or degrading treatment, including persistent and severe violence and abuse, forced sterilisation, long-term neglect of basic human needs, and painful and degrading behaviour modification techniques or 'restrictive practices'.

Many people with disability are particularly susceptible to being chemically restrained and administered medication in combinations that may pose a risk to their physical and mental health or cause actual bodily harm. Australians with psychosocial disability are subject to widespread use of non-consensual psychiatric medication, electroshock and other restrictive and coercive practices.

Rape and sexual violence against children

In 2013 the Australian Government established a Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**). The Royal Commission represents a broad national investigation aimed at providing authoritative information, identifying best practices and recommending laws, policies, practices and systems that will effectively prevent and respond to the sexual abuse of children in institutions. It is vital the Government commit to timely and thorough implementation of the Royal Commission's recommendations.

Extraterritorial obligations

The Australian Government has taken a narrow view of the scope of Australia's extraterritorial obligations under international human rights treaties. In addition to offshore detention of asylum seekers, Australia provides a range of police, military and intelligence assistance to foreign security forces in the Asia Pacific region, some of whom stand accused of serious human rights abuses including torture, rape and cruel, inhuman and degrading treatment.

There is a real risk that Australian assistance to foreign military and police amounts to aiding and assisting the commission of torture and other cruel, inhuman and degrading treatment by foreign security forces. For example, Australia works closely with Sri Lankan military and police to prevent asylum seekers from leaving the country. As the Committee has previously noted, there are concerning reports that torture is widespread in Sri Lankan custodial facilities.

Australian Government support for and regulation of Australian businesses' overseas operations also give rise to human rights obligations and violations that are not currently adequately recognised or addressed.

5. Legislative and institutional protection of human rights

Article 2

5.1. Overview

In its last Concluding Observations on Australia, the Committee recommended that Australia act to meet its obligations under article 2 of CAT by ‘continu[ing] consultations with regard to the adoption of a Bill of Rights to ensure comprehensive constitutional protection of basic human rights’.⁵ Since then, Australia has not adopted legislative or constitutional protection of human rights at the federal level. The core elements of Australia’s Human Rights Framework (section 5.2), which was introduced to better protect human rights in place of legislation, have either been abandoned, or have proven to be inadequate.

5.2. Australia’s human rights framework

“ Human rights are not given comprehensive and consistent legal protection in Australia ”

Human rights are not given comprehensive and consistent legal protection in Australia. Many basic rights remain unprotected and others are haphazardly covered by an

assortment of laws. There are numerous examples of violations which fall through the gaps in the current regime. The state of human rights for many disadvantaged groups in Australia remains precarious.

In 2009-10, the Australian Government commissioned the National Human Rights Consultation, a process designed ‘to seek a range of views from across Australia about the protection and promotion of human rights’.⁶ The adoption of a Human Rights Act was supported by over 87 per cent of a record 35,000 public submissions and was a key recommendation of the National Human Rights Consultation Committee.⁷ Nevertheless, the Australian Government decided not to introduce a Human Rights Act on the basis that ‘the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides us’.⁸

Instead of enacting a Human Rights Act, the Australian Government adopted the Australian Human Rights Framework in April 2010.⁹ Since then, most of the key elements of the Framework have been

⁵ Committee Against Torture, *Concluding observations of the Committee against Torture: Australia*, above n 2 [9].

⁶ Attorney-General’s Department, *National Human Rights Consultation Report* (2014) Commonwealth of Australia <www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>.

⁷ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009), xxiv.

⁸ Commonwealth of Australia, *Australia’s Human Rights Framework* (April 2010), 1.

⁹ *Ibid.*

terminated or suspended. For example, the Australian Government has cut funding to the Human Rights Education Grants Scheme, backed away from its commitment to simplify and strengthen Commonwealth anti-discrimination laws, and implementation of Australia's National Action Plan on Human Rights has stalled. The proposed 2014 review of the Australian Human Rights Framework has not been conducted and the Australian Government has not announced plans to conduct such a review in the future.

One element of the Australian Human Rights Framework that has been implemented relates to parliamentary scrutiny of human rights. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) came into operation in 2012 and:

- requires that each new Bill introduced into federal parliament is accompanied by a Statement of Compatibility of the proposed law's compliance with Australia's international human rights obligations; and
- establishes a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with the seven core international human rights treaties to which Australia is party (including CAT).

“ The Parliamentary Joint Committee on Human Rights should be commended for its generally robust review of the human rights compatibility of proposed legislation. However, its recommendations are unenforceable and are routinely ignored ”

The Parliamentary Joint Committee on Human Rights should be commended for its generally robust review of the human rights compatibility of proposed legislation. However, its recommendations are unenforceable and are routinely ignored. For example, the Parliamentary Joint Committee found that Australian laws providing for offshore detention and processing of asylum seekers (section 9.2) did not meet Australia's international human rights obligations, including under CAT, but the Parliamentary Joint Committee's report was overlooked by Government.¹⁰ The Parliamentary Joint Committee's Annual Report for 2012-2013 asserts that its first two years of operation have had some impact on debate and legislation,¹¹ but the fact remains that its most important warnings about potential human rights incompatibility (including in relation to matters of concern under CAT such as *refoulement* and detention powers) have not been heeded by the Australian Government.

¹⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation* (2013).

¹¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2012-2013* (2013) 9-10.

In relation to the Parliamentary Joint Committee, it is also of concern that inquiries into broader human rights issues may only be conducted on 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.

The human rights analysis contained in Statements of Compatibility prepared by the Australian Government is often very poor. For example, the Statement of Compatibility accompanying the *Migration Amendment (Protection and Other Measures) Bill 2014* (Cth) which increases the threshold for determining whether a person satisfies the test for eligibility for complementary protection (section 9.4), provided inadequate analysis of the human rights implications of the Bill, particularly in relation to non-refoulement obligations under CAT and the *International Covenant on Civil and Political Rights (ICCPR)*.¹² The Parliamentary Joint Committee on Human Rights commented that the Statement of Compatibility failed to identify and provide reasoned and evidence-based explanations of limitations on rights.¹³ Many other 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.¹⁴ Others engage with the jurisprudence, but implicitly confirm that it has little effect on Australian Government policy.¹⁵

Proposed recommendations:

That the Australian Government

- fully incorporate its international human rights obligations into domestic law by introducing a comprehensive, judicially-enforceable Human Rights Act;
- improve the quality of Statements of Compatibility and its responses to the findings of the Joint Parliamentary Committee on Human Rights; and
- amend s 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.

¹² Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) sch 2 item 4.

¹³ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 23-26 June 2014, Legislative Instruments received 7-20 June 2014* (2014) [1.225]-[1.231].

¹⁴ See eg Statements of Compatibility accompanying Law Enforcement Integrity Legislation Amendment Bill 2012 (Cth) and Australian Sports Anti-Doping Authority Bill 2013 (Cth).

¹⁵ See eg Statement of Compatibility accompanying *Migration Amendment Bill 2013* (Cth).

5.3. Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples¹⁶

The Australian Government is actively working towards the recognition of Aboriginal peoples in the Constitution, and should be commended for its ongoing commitment to recognising the distinct identity and existence of Aboriginal peoples in Australia's founding document.¹⁷

By way of background, in 2010 an Expert Panel on Constitutional Recognition was appointed, and in 2012 the Panel concluded its nation-wide consultations and reported to the Prime Minister.¹⁸ The Panel's report made a suite of recommendations in relation to amendments and additions to the Constitution, including recommending:¹⁹

- the removal of provisions that allow for racial discrimination;
- the inclusion of a provision guaranteeing non-discrimination;
- the inclusion of a provision that recognises Indigenous languages; and
- the inclusion of a provision that facilitates recognition through allowing Indigenous-specific laws which benefit the community.

The Government subsequently established a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, to pursue the agenda of facilitating a successful referendum.²⁰ As at the time of writing, this Committee was undertaking consultations.

There is now multi-political party support for amending the Constitution, and it is understood that the Australian Government is weighing up the most suitable time to host a national referendum on the matter.

While the complexities involved in amending the Constitution – and the importance of getting the timing and content of change right – are well understood, it is equally important that the content of any proposed changes to the Constitution be as wide-ranging in favour of recognition as possible.

¹⁶ For the purposes of this report, the term "Aboriginal" includes Torres Strait Islander people, unless the context suggests otherwise.

¹⁷ Shireen Morris, 'Indigenous constitution recognition, non-discrimination and equality before the law: Why reform is necessary' (2011) 7(26) *Indigenous Law Bulletin* 7, 7.

¹⁸ *Expert Panel Report, Recognise* <www.recognise.org.au/expert-panel-report>.

¹⁹ Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (January 2012).

²⁰ See *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, Parliament of Australia <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples>.

Proposed recommendation:

That the Australian Government pursue wide-ranging amendments based on the recommendations of the Expert Panel on Constitutional Recognition.

5.4. Implementation of treaty body views

“ Successive Australian Governments have disregarded the authority of Views issued by UN treaty bodies. ”

Successive Australian Governments have disregarded the authority of Views issued by UN treaty bodies. Since 1994,

Australia has been found to be in breach of its international obligations with respect to 34 individual communications to various human rights treaty bodies (the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination and CAT). In only six of these 34 cases (18 per cent) has the author been fully remedied in accordance with the final views of the relevant committee.²¹ With the number of pending individual communications against Australia is growing significantly,²² this undesirable trend needs to be addressed as a matter of priority.

As noted in its response to the LOIPR, the Australian Government has established a public online database of treaty body and Universal Periodic Review (UPR) recommendations.²³ This is a welcome step. However, it does not give any indication of whether and how the Australian Government plans to address the recommendations, and it has not been updated for over a year. Similarly, the maintenance of a public list of communications against Australia (along with the Australian Government's responses to Views)²⁴ is welcome, but it is no substitute for effective remedies.

Proposed recommendation

That the Australian Government give full and proper consideration to the adverse Views of the UN treaty bodies and implement them in good faith.

²¹ Remedy Australia, 'Follow-up Report on violations by Australia of ICERD, ICCPR & CAT in individual communications (1994-2014)' (11 April 2014).

²² At the time of writing, there are more than 40 communications pending, including five under CAT. See Attorney-General's Department, *Human rights communications*, Commonwealth of Australia <www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>.

²³ See Attorney-General's Department, *United Nations Human Rights recommendations database*, Commonwealth of Australia <www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/UnitedNationsHumanRightsrecommendationsdatabase.aspx>.

²⁴ See Attorney-General's Department, above n 22.

That the Joint Parliamentary Committee on Human Rights be tasked with monitoring and reporting on the implementation of the Concluding Observations and Views of UN treaty bodies and the recommendations of the Special Procedures and Universal Periodic Review of the UN Human Rights Council.

6. Optional Protocol to CAT

Articles 2 and 16

“ Australia signed OPCAT on 19 May 2009. Since that time, progress on ratification and implementation has been slow ”

Australia signed OPCAT on 19 May 2009. Since that time, progress on ratification and implementation has been slow,

despite considerable investment in negotiations between the state governments and the Australian Government to arrive at a model bill for implementation of detention monitoring and oversight obligations.

The Attorney-General's Department produced a 'National Interest Analysis' Report on OPCAT which recommended ratification and implementation of OPCAT²⁵ (**NIA Report**). On 21 June 2012, the federal parliament Joint Standing Committee on Treaties released its report on OPCAT (**JSCOT Report**) which recommended that Australia take 'binding treaty action'.²⁶ The Australian Government announced it would ratify with a declaration under Article 24 of the treaty stating it would postpone obligations under Part IV of OPCAT to establish a National Preventive Mechanism for 3 years.

Many of the benefits associated with ratifying and implementing OPCAT have been identified in the NIA Report and JSCOT Report. These include:

- minimising instances giving rise to concerns about the treatment and welfare of people detained in places of detention in Australia;
- saving the costs of litigation and compensation payments, and healthcare system costs which have been a consequence of ill-treatment in detention;
- improving workplace conditions and environment for staff and management in places of detention which in turn further contributes to a better environment for detainees;
- maintaining Australia's leadership on human rights outcomes and credibility in calling on other countries to adhere to internationally-accepted standards; and

²⁵ Attorney-General's Department, *National Interest Analysis [2012] ATNIA 6 with attachment on consultation, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002, [2009] ATNIF 10* (2012) Commonwealth of Australia <www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jscot/28february2012/treaties/torture_nia.pdf>.

²⁶ Joint Standing Committee on Treaties, Parliament of Australia, *Review into Treaties tabled on 7 and 28 February 2012* (2012) ch 6.

- the social benefits to the broader community of ensuring that detainees are treated with dignity and respect in all places of detention, which can enhance rehabilitation and reintegration of detainees into the community.

National model legislation has been developed to establish in each jurisdiction the necessary legislative arrangements to allow for inspection of places of detention in Australia following ratification of OPCAT. This legislation was developed by an inter-jurisdictional working group led by NSW and overseen by the Standing Council of Law and Justice.²⁷ To date, implementing Bills have been introduced in Tasmania, the Northern Territory and the ACT.²⁸ As a large amount of consultative and preparatory work has been completed to ensure that Australia will be compliant with OPCAT, the Australian Government should complete the last steps in the process by ratifying OPCAT and providing leadership on necessary implementing legislation in each jurisdiction.

Proposed recommendation:

That the Australian Government ratify OPCAT without delay.

7. Prisons

Articles 2, 11, 12, 14 and 16

7.1. Overview

In Australia, the administration of adult and youth prison systems is the responsibility of state and territory governments. There are no federal prisons. Prisons are either government operated or privately run. Variations in prison numbers and detention practices reflect differing demographics as well as differences in legislation, policy, and approaches to the administration of justice. For example, some jurisdictions have diverse community-based sentencing options; targeted, therapeutic court processes; liberal approaches to parole; and more established diversionary practices; whereas other jurisdictions adopt more punitive approaches.

The Committee's last Concluding Comments on Australia made a number of recommendations to the Australian Government on measures to improve the arrangements for persons deprived of their liberty, including:²⁹

- reduce the overcrowding in prisons, including by giving consideration to non-custodial measures and ensuring detention is a matter of last resort in all youth justice matters;

²⁷ Tasmania, *Parliamentary Debates*, Legislative Council, 24 September 2014, part 2 pages 36-92 (Brian Wightman).

²⁸ Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013 (Tas); Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013 (NT); Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013 (ACT).

²⁹ Committee Against Torture, *Concluding observations of the Committee against Torture: Australia*, above n 2.

- provide adequate mental health care to all prisoners;
- abolish mandatory sentencing;
- prevent and investigate all deaths in custody, and facilitate the ongoing implementation of the Royal Commission into Aboriginal Deaths in Custody (**Royal Commission**);
- review the practice of prolonged isolation; and
- ensure deaths in detention are investigated, promptly, independently and impartially – with due consideration given to prosecutions and sanctions.

While prison conditions vary between state and territories, overcrowding and substandard healthcare remains a significant problem in many Australian prisons. Equally, Aboriginal peoples, including children and young peoples, continue to be disproportionately represented in all states' and territories' prison systems and therefore, poor conditions disproportionately impact Aboriginal people. Women, and in particular Aboriginal women, are the fastest growing prison demographic, and over half of the incarcerated women have a diagnosed mental illness and a history of sexual victimisation.³⁰ Overall, since Australia last reported to the Committee the number of disadvantaged people incarcerated has increased, and the general conditions in prisons around Australia have worsened.

7.2. Overcrowding

“ Australia now incarcerates more people than it ever has ”

Australia now incarcerates more people than it ever has. Over 30,000 people (sentenced and un-sentenced) are in prison,

a five per cent increase in the past twelve months.³¹ This swelling in prison numbers has generally occurred faster than growth in prison capacity,³² and has therefore resulted in most states and territories having overcrowded prisons.³³

Many states and territories do not have legislation articulating the basic rights of prisoners to be treated equally and with dignity, to access health services, to have time out of their prison cells, or to religious practice.³⁴ Without a national Human Rights Act, and with overcrowded prisons, prisoners are particularly vulnerable to having their rights abused.

The increase in prisoner numbers correlates with state and territory governments' 'tough-on-crime' policies, which push for tougher sentences, and stricter bail and parole practices. While it is critical

³⁰ Australian Bureau of Statistics, *Prisoners in Australia, 2013* (ABS Catalogue No 4517.0, 5 December 2013) <www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>.

³¹ Ibid.

³² Ibid.

³³ Sean Rubinsztein-Dunlop, *Australia's Prison System Overcrowded to bursting point with more than 33,000 people in jail* (3 July 2014) ABC News <www.abc.net.au/news/2014-07-02/australian-prison-overcrowding-female-populations-growing/5567610>.

³⁴ Bronwyn Naylor, *Castan Human Rights Report 2014*, The Castan Centre for Human Rights (2014) 8 <www.law.monash.edu.au/castancentre/policywork/hr-reports/2014/human-rights-report-2014.pdf>.

that prisons be of an adequate capacity and standard, focus should equally be on reducing incarceration rates through active crime prevention and early intervention strategies, the implementation of non-custodial sentencing options, the provision of community-based dispositions, the resourcing of therapeutic court practices, resourced post-release support programs, and the commitment to addressing the underlying socioeconomic reasons for offending in the first instance. This is important to ensure governments are not continually building new prisons to accommodate exponentially-increasing prisoner numbers, but rather are addressing the social determinants – such as homelessness, drug and alcohol use, and poor school attendance – that lead to contact with the criminal justice system.

In March 2014, the Victorian Ombudsman described prisons as overcrowded, under-funded and more dangerous than they have been in a decade.³⁵ The Ombudsman found that ‘the likelihood of prisoners being physically or sexually assaulted or self-harming leading to deaths is greater now than at any time in recent years’.³⁶ Equally, the Northern Territory Prison Officers’ Association recently stated that prisoners in the Northern Territory are living in ‘third world conditions’, due to overcrowding,³⁷ while prison conditions in South Australia and NSW have also been described as ‘inhumane’ as a consequence of overcrowding.³⁸

To cope with the current swell in prisoner numbers, prisoners in Victoria are being held in demountable shipping containers, while the number of people sharing cells (often termed ‘double bunking’ – a practice which contradicts Rule 9(1) of the *Standard Minimum Rules for the Treatment of Prisoners*, and which raises safety and privacy concerns), has also increased. This is similar across a number of other Australian jurisdictions, where prisoners are sleeping on mattresses on the floor or on

³⁵ Alison Savage, *Victoria’s dangerous prisons overcrowded, underfunded: ombudsman’s report* (26 March 2014) ABC News <www.abc.net.au/news/2014-03-26/victoria27s-27dangerous27-prisons-overcrowded2c-underfunded/5346040>.

³⁶ G E Brouwer, *Investigation into deaths and harm in custody* (March 2014) Victoria Ombudsman <<https://www.ombudsman.vic.gov.au/getattachment/2998b6e6-491a-4dfe-b081-9d86fe4d4921//reports-publications/parliamentary-reports/investigation-into-deaths-and-harm-in-custody.aspx>>. The findings in this report are consistent with the statement by Juan Mendez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: ‘[o]vercrowding gives rise to other human rights violations such as poor quality and quantity of food, poor hygiene, lack of adequate sleeping accommodation, insufficient air ventilation, a high risk of contamination of diseases, as well as very limited access to medical treatment, recreational activities or work opportunities’: ‘Independent UN expert urges Ghana to re-think criminal justice, mental health practices’, *UN News Centre* (18 November 2013) <www.un.org/apps/news/story.asp?NewsID=46524>.

³⁷ Lindy Kerin, *NT prisons described as third world* (24 April 2012) ABC News <www.abc.net.au/news/2012-04-23/nt-prisons-described-as-third-world/3967114>.

³⁸ *Claims of Overcrowding in SA Prisons* (10 March 2008) ABC News <www.abc.net.au/news/2008-03-10/claims-of-overcrowding-in-sa-prisons/1067696>; Greg Kelton, ‘Overcrowding Pressures Prisons’, *The Advertiser* (online), (16 February 2008) <www.adelaidenow.com.au/news/south-australia/overcrowding-pressures-prisons/story-e6frea83-11111573713>; *Juvenile prisoners sharing one-person cells* (7 April 2008) ABC News <<http://www.abc.net.au/news/2008-04-07/juvenile-prisoners-sharing-one-person-cells/2395192>>.

fold out beds.³⁹ Overcrowding also has consequences for the health and safety of prison staff, with two major prisons in Western Australia recently being in lockdown due to staff shortages.⁴⁰

The issue of overcrowding is compounded by the physical conditions of particular prisons. For example, the Office of the Inspector of Custodial Services (**OICS**) in Western Australia has described the Roebourne Regional Prison as the 'hottest prison in Australia' and the failure to provide suitable climate control or other measures to mitigate the harsh conditions is 'intolerable and inhumane'.⁴¹

Furthermore, increases in the prisoner population directly impact pre-trial detention conditions. For example, in Victoria and the Northern Territory, as a consequence of prisons being at capacity, accused persons on remand are often kept in police watch-houses or court custody centres. These facilities are only designed for very short-term detention, and for the purposes of police investigation and determining questions of bail. Detaining remand prisoners in police watch-houses or court custody centres, as opposed to purpose built remand facilities, is not only inappropriate, but has flow-on consequences such as making it difficult for prisoners to communicate with their lawyers, to receive visits from family, to have their minimum rights met (such as time outdoors), or to be readily available for court dates. Many court custody centres and police watch-houses lack exercise yards, visitor centres, contact facilities, sufficient bathroom facilities or adequate staffing so as to allow prisoners time outside of their cells.

Equally, the use of solitary confinement as a prison management tool is concerning. Only some Australian jurisdictions explicitly preclude the use of solitary confinement as a form of punishment.

While there is scant publicly-available data documenting the number of prisoners in solitary confinement and the reasons for their isolation, anecdotally, there

“ there appears to be a link between the overcrowding of prisons and the use of solitary confinement as a security and risk management tool ”

appears to be a link between the overcrowding of prisons and the use of solitary confinement as a security and risk management tool.

Consequences of prison overcrowding⁴²

Leonard is 32 years old. He has had a heroin addiction and has been homeless since he was 16 years old. He was arrested and remanded in pre-trial detention for a number of non-violent property

³⁹ See Aboriginal Legal Service of Western Australia (Inc), Submission No 18 to the Community Development and Justice Committee, Legislative Assembly of the Parliament of Western Australia, *'Making our prisons work': An Inquiry into the efficiency and effectiveness of prisoner education, training and employment strategies*, 22 April 2010.

⁴⁰ *Packed prisons means problems* (9 July 2014) Community and Public Sector Union <www.cpsu.com.au/2014/07/packed-prisons-mean-problems>.

⁴¹ Office of the Inspector of Custodial Services, *Report of an Announced Inspection of the Roebourne Regional Prison*, Report No 89 (February 2014) viii.

⁴² Case study provided by the Human Rights Law Centre. Some details have been changed to protect identity.

offences, which mostly related to theft of bicycles. He has committed these offences a number of times in the past.

Leonard was not able to be released on bail due to having no housing. He was therefore remanded for a period of 4 weeks so that all of his different charges could be consolidated and listed on the one day for sentence. Due to prison over-crowding and there being no space at the purpose built remand facility, Leonard spent the first 14 days of his remand in the Melbourne Custody Centre – a facility beneath the court house, only designed for overnight stays to enable court appearances. Being underground, the Custody Centre has no natural light; has up to 30 men in one room, sharing a single toilet; and has no outdoor facilities so that remandees can go outside. Additionally, remandees at the Custody Centre are not provided with their pharmacotherapy replacement treatment drugs (for people overcoming heroin addiction). Accordingly, many of the remandees are detoxifying and are therefore extremely unwell and volatile.

After fourteen days, the purpose built remand facility was still full, so Leonard was transferred to a police watch house in regional Victoria, three hours' drive from his family and his lawyer. Police watch houses are built for police investigation purposes only – there are no visitor facilities; and access to the telephone is always monitored and through the general police line. Given police watch houses are not generally used for remand purposes, proper systems are not in place for remandees to talk to their lawyers in private; to receive visits; or to be transferred to court on time. Accordingly, Leonard was not taken to court on his court date, and had to spend another week on remand in a different police watch house, waiting for the court to make available another time to hear his case.

Proposed recommendation:

That states and territories commit to reducing the number of people entering the prison system and fund early-release support programs to reduce the overcrowding of prisons.

7.3. Healthcare in prisons

It is widely accepted that the prisoner population has more significant and chronic health needs than the general population.⁴³ The type of and manner in which health services are delivered in prisons

“ prisoners do not have access to Medicare, the free health service provided by the Australian Government ”

varies across Australian jurisdictions.

Across the board, prisoners do not have access to Medicare, the free health service provided by the

Australian Government, while in prison. They also do not have access to many of the prescribed, subsidised pharmaceutical drugs that are dispensed in the community. Importantly, prisoners largely do not have the freedom to choose their medical provider, are not able to obtain a second opinion free

⁴³ Australian Institute of Health and Welfare, 'Prisoner Health Services in Australia 2012' (Bulletin No 123, Australian Institute of Health and Welfare, August 2014) 3
<www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548270>.

of charge, or access an alternative provider, if they disagree or clash with the medical professionals provided by the prison.⁴⁴ This issue can be particularly acute in relation to psychiatric services.

Further, although many prisoners in Australia experience drug addiction, no prisons in Australia currently provide safe injecting equipment as a harm minimisation strategy to reduce the risks associated with sharing used and unclean needles (although the ACT has recently committed to implementing a needle and syringe program).⁴⁵ The reality of drug injecting, lack of access to sterile injecting equipment, and the rapid turnover of people through the prison system, jeopardises the health of the prisoner population and the community at large. Accordingly, prison policies preventing distribution of clean injecting equipment should be reviewed and a strategy implemented to alleviate the health risks resulting from those policies.

Further, it is crucial that prison healthcare services accommodate the special health needs of Aboriginal people, for instance by responding to higher rates of cardiovascular disease and diabetes.⁴⁶

Proposed recommendation:

That prisoners are afforded the same access to quality healthcare, including access to needle and syringe programs, as people in the general community.

7.4. Women in prison

Women, and in particular Aboriginal women, are the fastest growing group of prisoners in Australia. Since 2011, the number of women prisoners has increased at 21 times the rate of male prisoners,⁴⁷ and the number of Aboriginal women in prison has almost doubled in the past decade.⁴⁸ Aboriginal women are incarcerated at 16.5 times that of the general women's population, representing a higher degree of over-representation than that for Aboriginal men.⁴⁹ In Western Australia, for example, Aboriginal women constituted 53% of the female

“ the number of Aboriginal women in prison has almost doubled in the past decade ”

⁴⁴ Ibid 16.

⁴⁵ Michael Inman and Christopher Knaus, 'ACT Prison Needle Exchange Warning', *Canberra Times*, 7/2/2014.

⁴⁶ See for example <http://www.healthinonet.ecu.edu.au/health-facts/summary>.

⁴⁷ Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2013* (ABS Catalogue No 4512.0, 13 June 2013) 14.

⁴⁸ Mary Stathopoulos, 'Addressing women's victimisation histories in custodial settings' (Issues Paper No 13, Australian Centre for the Study of Sexual Assault, 2012) <www.aifs.gov.au/acssa/pubs/issue/i13/i13.pdf>.

⁴⁹Anita Mackay, 'Accommodating people in cages and shipping containers: the reality of overcrowded prisons', *Regarding Rights* (31 January 2014), available at <http://asiapacific.anu.edu.au/regarding-rights/2014/01/31/accommodating-people-in-cages-and-shipping-containers-the-reality-of-overcrowded-prisons/#more-1213>.

prison population as at 26 June 2014 (in contrast, Aboriginal men constituted 38% of the male prison population at the same date).⁵⁰

The impact of custody on women's lives is significant and different to the impact custody has on the lives of men. Most incarcerated women are primary caregivers, making their removal from family a particularly traumatic experience.⁵¹ Equally, the degrading impacts of some custodial management practices, such as strip searches, are disproportionately felt by women given their previous experiences of sexual and physical victimisation.⁵²

Most research in relation to both pathways into, and out of, offending is male-centric. More recent criminological analysis suggests that incarcerated women are a particularly vulnerable group: 'when compared to male offenders, women offenders demonstrate higher levels of previous victimisation, poor mental health and serious mental illness, substance misuse, unemployment, and low educational attainment. Their time in custody is different, with shorter but more frequent periods of imprisonment'.⁵³ While the reasons for the increase in women's incarceration rates are complex, contributing factors include women's disadvantaged socioeconomic status. This is particularly pronounced in relation to Aboriginal women, the majority of whom live in areas characterised by high unemployment, high levels of poverty, high levels of drug and alcohol abuse, and high levels of both violence against children and violence against women.⁵⁴

Given the growth in women's prisoner numbers, it is critical that Australia invest more in understanding gender-specific patterns of criminalisation, and in particular, the relationship between victimisation and offending. Further, early intervention and diversionary practices specifically designed for women, and Aboriginal women in particular, must be developed. These should be implemented in regional, remote and urban communities, and at court locations. Ultimately the decision to funnel women into the criminal justice system, and subsequently into the prison system, rests with police, community corrections and judicial officers, and therefore broad-based, institutional education programs are important so that all criminal law institutions – police, courts, community corrections and prisons – operate in gender-sensitive and culturally-sensitive ways.⁵⁵

⁵⁰ Government of Western Australia, Department of Corrective Services, *Weekly Offender Statistics Report as at 26 June 2014*, <<http://www.correctiveservices.wa.gov.au/files/about-us/statistics-publications/statistics/2014/cnt140626.pdf>>.

⁵¹ Allannah Burgess and Cathi Flynn, 'Supporting imprisoned mothers and their children: a call for evidence' (2013) 60(1) *Probation Journal* 73.

⁵² Anita Mackay, above n 49.

⁵³ Stathopoulos, above n 48.

⁵⁴ For an overview of the characteristics of Aboriginal women in custody, see Lorana Bartels, 'Indigenous Women's Offending Patterns: A literature review' (Research and public policy series paper No 107, Australian Institute of Criminology, July 2010) <www.aic.gov.au/documents/F/4/0/%7bF400B08D-7ECB-43EE-BB6E-38B2C3580A46%7drpp107.pdf>.

⁵⁵ Stathopoulos, above n 48.

Proposed recommendation:

That the Australian Government work collaboratively with state and territory governments to develop a strategy to reduce women's incarceration rates, including through implementing gender-specific early intervention and diversionary programs, and other community-based solutions.

7.5. Transgender prisoners

Transgender prisoners should be housed in safe and rights-respecting prison environments.

Currently, only a handful of Australian jurisdictions have specific correctional policies protecting the rights and integrity of transgender people while they are incarcerated; these include the Australian Capital Territory (**ACT**) and Victoria, with Victoria's policy being the most comprehensive.

Australian states and territories should develop specific correctional policies that include the following minimum standards:

- Transgender prisoners should have the right to elect whether to be housed in the men's or women's sections of the prison. If safety issues arise, the prisoner should be involved in devising a sentence management plan which ensures their safety.
- Strip searching of prisoners is no longer justified in light of available technology capable of detecting contraband. However, if the practice is to occur, transgender prisoners should have a right to elect which officer, male or female, undertakes the search. The same should apply to urinalysis.
- Transgender prisoners should have a right to access medical and psychological support, akin to what they would have access to in the community. Allowing access to external support and community groups should be facilitated to the extent possible.
- The privacy of transgender prisoners should be upheld at all times, specifically in relation to access to toilet, shower and laundry facilities, and in relation to visitation rights.
- Transgender prisoners should have the right to nominate the name by which they wish to be referred, irrespective of whether this name is different to the name recorded on official documents.
- Transgender prisoners should never be held in more restrictive conditions, such as protective custody or solitary confinement, as a consequence of their gender identity.

Proposed recommendation:

That the human rights issues that arise from the incarceration of transgender people should be the subject of a thorough consultation process with affected communities. Subsequently, the Australian Government should commit to devising best practice standards so as to guide state and territory practice.

7.6. Psychosocial disability

People with psychosocial disability continue to be over-represented in Australian prison systems. It is estimated that, at discharge, 46 per cent of prisoners identify as having a mental health issue,⁵⁶ and that mental health issues are 2.5 times higher in the prisoner population than in the general community.⁵⁷

Despite the prevalence of psychosocial disability in the prisoner population, the provision of mental health treatment and management services in Australian prisons is minimal and it is required by legislation in only some of the states and territories. Where it is provided, it is often under-resourced: there are limited forensic mental health beds available, resulting in only the most acute of cases receiving any form of intervention; there are long waiting times for accessing psychological services; and there is limited government funding for external treatment and care.

The principal provider of forensic mental health services in Victoria gave evidence in 2006 to a Senate Inquiry, concluding that, ‘[c]urrently in Australia the provision of care to mentally ill prisoners is rudimentary at best. Rarely are proper provisions made, and even more rarely is the transition back to the community managed with even minimal adequacy’.⁵⁸ This largely remains the status quo. In relation to Aboriginal prisoners, the Special Rapporteur on the Right to Health has noted that despite the fact that Aboriginal peoples are overrepresented in the Australian prison system, ‘forensic mental health services [in prisons] nevertheless systematically fail to meet [the needs of Aboriginal and Torres Strait Islander peoples]’.⁵⁹

“ in Australia the provision of care to mentally ill prisoners is rudimentary at best ”

Inferior access to mental healthcare and treatment constitutes discrimination. Notably, the European Court of Human Rights has determined that scarce resources or logistical difficulties are not legitimate excuses for failing to provide adequate medical treatment in prison.⁶⁰

⁵⁶ *The health of Australia's prisoners 2012* (2013) Australian Institute of Health and Welfare <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129543945>.

⁵⁷ Australian Institute of Health and Welfare, ‘The mental health of prison entrants in Australia 2010 (Bulletin No 104, Australian Institute of Health and Welfare, June 2012) 2 <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422198&libID=10737422198>.

⁵⁸ Victorian Institute of Forensic Mental Health, Submission No 306 to Senate Select Committee on Mental Health, May 2005, 20 <www.aph.gov.au/~media/wopapub/senate/committee/mentalhealth_ctte/submissions/sub306_pdf.ashx>.

⁵⁹ Anand Grover, Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest standard of physical and mental health – Mission to Australia*, 14th sess, Agenda Item 3, UN Doc A/HRC/14/20/Add.4 (3 June 2010) [64].

⁶⁰ *Holomiov v Moldova* (European Court of Human Rights, Chamber, Application No 30649/05, 7 November 2006); see also *Istratii and Others v Moldova* (European Court of Human Rights, Chamber, Application Nos 8721/05, 7805/05 and 8742/05, 27 March 2007).

The over-representation of prisoners with psychosocial disability may also reflect the lack of mental health diversionary programs, which aim to divert people with mental health issues away from the criminal justice system.⁶¹ While some jurisdictions, such as Victoria, have more developed programs, others, such as the Northern Territory, have none.

Proposed recommendations:

That state and territory governments commit to increasing the provision of mental health services to prisoners, (including culturally appropriate mental health services for Aboriginal prisoners). Mental health services in prisons should be at least equivalent to those available in the community.

That all states and territories introduce evidence-based, early intervention and diversion strategies to reduce the over-incarceration of people with mental health issues.

7.7. People found unfit to stand trial

People found unfit to stand trial by reason of mental impairment are dealt with differently in each state and territory in Australia. In Western Australia the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* means that people found unfit to plead in Western Australia are currently held in prison, indefinitely, without trial, in breach of Article 14 of the Convention of the Rights of Persons with Disability (**CRPD**), liberty and security of the person. Most people held in prison as a result being unfit to stand trial in Western Australia are Aboriginal.⁶²

“ people found unfit to plead in Western Australia are currently held in prison, indefinitely, without trial ”

As such, the introduction of the *Declared Places (Mentally Impaired Accused) Bill 2013* was to be welcomed as it provides for the establishment of ‘declared places’ other than prison where people found unfit to plead can be detained. However, the Bill’s focus on security compromises the human rights of the person with a disability. There are also inadequate safeguards in the Bill and not enough focus on rehabilitation so that people can return home.⁶³

In 2014 the Australian Law Reform Commission has proposed that:⁶⁴

State and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention (for example, by reference to

⁶¹ Australian Institute of Health and Welfare, above n 57, 3.

⁶² People With Disabilities (WA) and Centre for Human Rights Education, Curtin University, Submission to the Australian Law Reform Commission’s Discussion Paper, *Inquiry into Equality, Capacity and Disability in Commonwealth Laws*, 5.

⁶³ Ibid.

⁶⁴ Australian Law Reform Commission *Discussion Paper, Inquiry into Equality, Capacity and Disability in Commonwealth Laws*, (2014).

the maximum period of imprisonment that could have been imposed if the person had been convicted) and for regular periodic review of detention orders.

It is also important that community based alternatives to detention are used as far as possible as recommended by the Western Australia Office of the Inspector of Custodial Services.⁶⁵

Marlon Noble held without trial for 10 years⁶⁶

Marlon Noble is an Aboriginal man with an intellectual disability. In 2002, he was charged with sexually assaulting two girls but was found unfit to stand trial. He was imprisoned in Western Australia without being tried or convicted before being conditionally released ten years later.

The alleged victims have since said Marlon Noble did not assault them in 2002.

7.8. Young people

Over the four year period between June 2009 and June 2013, the national youth incarceration rate remained stable.⁶⁷ The Australian Government should be generally congratulated for this. Specifically, youth detention rates declined in NSW, Victoria and Tasmania, increased substantially in the Northern Territory and moderately in Queensland, and remained relatively stable in the remaining states and territories.⁶⁸

While the overall rate of detention of non-Aboriginal young people declined or remained stable, the rate of detention of Aboriginal young people increased. Half of the young people in detention in Australia are Aboriginal.⁶⁹ Aboriginal young people are 31 times more likely to be detained,⁷⁰ and are 4.5 times more likely to have contact with the criminal justice system, than the general youth population.⁷¹

⁶⁵ Government of Western Australia, Office of the Inspector of Custodial Services, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, (2014)

⁶⁶ Allan Clarke *Marlon Noble Seeks Justice* (26 August 2013) <<http://www.sbs.com.au/news/article/2012/05/21/marlon-noble-seeks-justice>>

⁶⁷ Australian Institute of Health and Welfare, 'Youth detention population in Australia 2013' (Juvenile Justice Series No 13, 2013) <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393>.

⁶⁸ Ibid vii.

⁶⁹ This figure varies across jurisdictions, with Western Australia having the highest rate of Aboriginal juvenile detention in the nation (a staggering 77% of young people in detention in Western Australia on 26 June 2014 were Aboriginal: Government of Western Australia, Department of Corrective Services, *Weekly Offender Statistics Report as at 26 June 2014*, <<http://www.correctiveservices.wa.gov.au/files/about-us/statistics-publications/statistics/2014/cnt140626.pdf>>.

⁷⁰ Ibid 9-10.

⁷¹ Troy Allard et al, 'Police diversion of young offenders and Indigenous over-representation' (Trends and Issues in Crime and Criminal Justice No 390, Australian Institute of Criminology, March 2010) <www.aic.gov.au/media_library/publications/tandi_pdf/tandi390.pdf>.

Children with disability are also overrepresented in the juvenile justice system in Australia. For example, nearly half the young people in New South Wales juvenile detention centres have an intellectual or 'borderline' intellectual disability,⁷² and in one study, the majority of young people were found to have a 'psychological condition' (85 per cent), with two thirds (73 per cent) reporting two or more 'psychological conditions'.

Approximately half of the young people in detention nationally are unsentenced and in pre-trial detention (remand) – and over half of the young people on remand are Aboriginal,⁷³ with the Northern Territory having the highest rate of young people on remand.⁷⁴ These high rates of youth remand contrast with the adult jurisdiction, where approximately 24 per cent of the total prisoner population is

“ bail systems are either not operating effectively for young people, or are being used for punitive purposes ”

on remand. The fact that so many young people are remanded suggests that bail systems are either not operating effectively for young people, or are being used for punitive purposes.

Remand should not be used for punishment or deterrent purposes: it should only be used to protect the community from further offending and to guard the integrity of the trial process.⁷⁵ Pre-trial detention practices should reflect the presumption of innocence and the important weight given to the right to liberty. This is particularly important because the consequences of early exposure to detention can be adverse: removal of liberty without having been found guilty through a due process trial, removal from family and community life, exposure to criminogenic factors in custody, and disruption to school attendance.⁷⁶

Equally, children and young people who are in State care should not be remanded in custody because of failures by relevant government agencies charged with their care to discharge their responsibilities. Anecdotally, in Western Australia, children under the formal care of the Department for Child Protection and Family Support frequently remain in detention on remand, even after having been granted conditional bail by a court. This occurs where the court makes it a condition of bail that the Department determine where the child is to live while on bail. However, the child remains in custody because the Department either fails or is unable to locate suitable accommodation options for the child.

Young people on remand do not receive many of the therapeutic or educational programs that sentenced prisoners receive, and are often housed in worse conditions. Further, they are often

⁷² Adele Horin, 'Report Finds Disability and Disadvantage Common in Young Offenders', *Sydney Morning Herald* (Sydney), 27 February 2010 <www.smh.com.au/nsw/report-finds-disability-and-disadvantage-common-in-young-offenders-20100226-p95r.html>.

⁷³ Australian Institute of Health and Welfare, above n 67.

⁷⁴ *Ibid.*

⁷⁵ New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) xvii.

⁷⁶ *Ibid* xviii.

remanded due to unrealistic and onerous bail conditions which prove very difficult for young people to comply with. For example, curfew conditions requiring a young person to remain within the home throughout the night do not allow for young people who are exposed to problematic home environments to take protective measures, such as leaving the house at night when there is fighting or alcoholism present.

In all Australian jurisdictions the minimum age for criminal responsibility is 10 years. In all jurisdictions, a young person is defined as being a person aged between 10 and 17 years, except in Queensland where a young person is defined as a person aged between 10 and 16 years.⁷⁷ The nature and characteristics of youth offending are different to that of adult offending, and therefore young people should not be exposed to the less-rehabilitative adult jurisdiction earlier than is necessary.⁷⁸

Additionally, Queensland, Western Australia and the Northern Territory allow for the 'naming and shaming' of young people: that is, media outlets are permitted to publish the names of accused and convicted young people. Naming and shaming offends young people's internationally established rights to privacy at all stages of youth justice proceedings.⁷⁹ Further, the naming and shaming of young offenders is likely to undermine their rehabilitative efforts and taint young people with criminality.

Critically, Queensland has recently removed the provision in the *Youth Justice Act 1992* (Qld) which requires detention to only be considered as a matter of last resort. In Queensland, Aboriginal young people are 15 times more likely to be in detention than non-Aboriginal young people.⁸⁰ Accordingly, these amendments have a disproportionate impact on Aboriginal young people, and are in direct contradiction to the Committee's last Concluding Observations on Australia.

There is also concern about juvenile detainees in Western Australia being subject to individual and 'regression' management regimes. Anecdotally, these management regimes at Banksia Hill Detention Centre (**BHDC**) have seen juveniles placed in solitary confinement for months at a time.⁸¹ The OICS

⁷⁷ Kelly Richards, 'What makes juvenile offenders different from adult offenders' (Trends and Issues in Crime and Criminal Justice No 409, Australian Institute of Criminology, February 2011) <www.aic.gov.au/media_library/publications/tandi_pdf/tandi409.pdf>

⁷⁸ Ibid.

⁷⁹ See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2)(b)(vii) and *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, GA Res 33, UN GAOR, 3rd Comm, 40th sess, 96th plen mtg, Agenda Item 98, UN Doc A/RES/40/33 (29 November 1985) annex r 8.1. See also Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 2320.

⁸⁰ Commission for Children and Young People and Child Guardian, *Snapshot 2012: Children and Young People in Queensland* (2012).

⁸¹ In 2011 a detainee at BHDC spent over 90 days straight in solitary confinement, while subject to a combination of individual and regression management regimes.

in a 2012 report⁸² expressed concern over the use of such management regimes as an additional curial measure beyond detention centre offences legislated for by the *Young Offenders Act 1994* (WA). The report noted that of the 241 initiating regressions they analysed over 22% were held for more than 48 hours, 10% were held for more than 72 hours and 2% spent more than a week subject to a regression management regime.⁸³ The OICS recommended that detainees should never have been placed in confinement for more than 24 hours (the period allowed under the legislation as punishment for formal detention offences).⁸⁴

The UN Special Rapporteur on Torture has previously stated that solitary confinement, when used as a punishment on juveniles 'can amount to cruel, inhuman or degrading treatment or punishment and even torture.'⁸⁵ The Committee on the Rights of the Child, in its General Comment No. 10 (2007) emphasised that disciplinary measures such as solitary confinement or other punishment that may compromise the physical or mental health of a child are in contravention of Article 37 on the Convention on the Rights of the Child⁸⁶ and has urged states to prohibit and abolish the use of solitary confinement against children.⁸⁷

Children remanded in custody because of no suitable accommodation⁸⁸

T is 15 years old. He was charged with wilfully lighting a fire likely to injure or damage. The circumstances of the offence were that he lit several matches and threw them onto a grassed area of an oval causing a fire to start. T had been under the influence of cannabis at the time and threw the matches out of boredom. He did not intend to cause damage. T had no prior criminal history and had been under the care of the Department for Child Protection and Family Support since he was six years old. When T appeared in court for the charge he was remanded in custody because there was no responsible person willing to sign a bail undertaking for him (including the Department for Child Protection and Family Support). T spent a total of 55 days in custody before he was sentenced for the offence.

⁸² Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Banksia Hill Juvenile Detention Centre*, Report Number 76, January 2012

⁸³ *Ibid* at [5.30]

⁸⁴ *Ibid* Recommendation 14.

⁸⁵ *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 66th Session, Provision Agenda Item 69(b), UN Doc A/66/268, (5 August 2011) [81] <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>

⁸⁶ CRC/C/GC/10, para. 89

⁸⁷ CRC/C/15/Add.151, para. 41; CRC/C/15/Add.220, para. 45 (d).

⁸⁸ Case study provided by the Aboriginal Legal Service of Western Australia (Inc).

Proposed recommendations:

That the state and territory governments commit to reducing the number of young people in pre-trial detention by modifying current bail and remand practices.

That the Queensland Government reinstate the principle that custody be a matter of last resort, and change the definition of a young person so that the age is extended to 17 years.

That the Queensland, Western Australia and Northern Territory Governments repeal their naming and shaming laws.

8. Over-representation of Aboriginal Peoples in the Criminal Justice System

Articles 11, 12, 13, 14 and 16

8.1. Overview

Aboriginal peoples continue to be one of the most highly incarcerated peoples in the world, and continue to be significantly over-represented in the Australian criminal justice system. Indeed, over-

“ Aboriginal people are incarcerated at 15 times the rate of non-Aboriginal Australians ”

representation has become more severe since Australia last reported to the Committee.

Aboriginal people are incarcerated at 15 times the rate of non-Aboriginal Australians, representing over one quarter (27 per cent) of the total prisoner population,⁸⁹ but between two and three per cent of the general population. In Western Australia Aboriginal people are 23 times more likely than non-Aboriginal people to be incarcerated. In the Northern Territory 86 per cent of the adult, and 98 per cent of the youth prisoner population being Aboriginal. Aboriginal women are the fastest growing incarcerated demographic in Australia – they comprise two per cent of the general population, yet almost one third of the women’s prisoner population and the rate at which Aboriginal and Torres Strait Islander women are incarcerated has increased from 2000 – 2010 by almost 59 per cent.⁹⁰

⁸⁹ Australian Bureau of Statistics, above n 30.

⁹⁰ Chris Uhlmann, *Doubling of female imprisonment rate almost entirely due to Aboriginal women being locked up* (14 August 2014) Australian Broadcasting Corporation <www.abc.net.au/am/content/2014/s4066806.htm>; Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators 2011*(2011) 4.12.1.

Aboriginal children are 22 times more likely to be in detention than non-Aboriginal children,⁹¹ a situation which has been deemed a 'national crisis' by the Australian House of Representatives inquiry into Aboriginal and Torres Strait Islander youth and the criminal justice system.⁹²

The factors contributing to high levels of imprisonment for Aboriginal peoples are varied and complex.⁹³ These include: high rates of victimisation; poor access to social and economic rights; punitive 'tough on crime' campaigns adopted by state and territory governments; the lack of appropriate non-custodial sentencing options in rural and remote areas;⁹⁴ and the disproportionate impact of certain criminal laws on Aboriginal peoples. Given Aboriginal peoples' overrepresentation in the prison system, overcrowding and other cruel, inhuman and degrading practices (such as strip searches and poor mental health facilities) disproportionately impact Aboriginal peoples.

There are numerous government-commissioned expert reports and documents that can be drawn upon to inform policies targeted at reducing Aboriginal incarceration rates. These include the report of the Royal Commission,⁹⁵ the National Indigenous Law and Justice Framework,⁹⁶ and the 'Doing Time – Time for Doing' report.⁹⁷ While these reports and their associated aims and recommendations have been broadly supported, there has been a dearth of tangible commitment evidenced through proper implementation.

Most recently, a Senate Committee undertook an inquiry into the value of a justice reinvestment approach to criminal justice in Australia.⁹⁸ The Committee made nine recommendations for the

⁹¹ Australian Institute of Criminology, *Australian Crime: Facts and figures* (2009), 113.

⁹² House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011), 7.

⁹³ See Aboriginal and Torres Strait Islander Social Justice Commissioner, *2009 Social Justice Report* (2010) Australian Human Rights Commission [2.3]-[2.4] <www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf>.

⁹⁴ See Department of Justice, *Correctional Services Annual Statistics – 2008-2009* (2009) Northern Territory Government 4 <www.nt.gov.au/justice/policycoord/documents/statistics/NTCS%20Annual%20Statistics%202008-09_EBook.pdf>; Evidence to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, Darwin, 6 May 2010, 41-52 (Suzanne Oliver, Youth Magistrate, Youth Justice Court, Northern Territory).

⁹⁵ Commonwealth, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991) vols 1-5.

⁹⁶ Standing Committee of Attorneys-General, *National Indigenous Law and Justice Framework 2009-2015* (2010) Commonwealth of Australia <www.ag.gov.au/LegalSystem/IndigenousLaw/Indigenousjusticepolicy/Documents/National%20Indigenous%20Law%20and%20Justice%20Framework.pdf>.

⁹⁷ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011).

⁹⁸ Senate Legal and Constitutional Affairs Committee, 'Value of a justice reinvestment approach to criminal justice in Australia', June 2013, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index).

Federal Government to work with state and territory governments to progress a justice reinvestment approach to crime in Australia. Given the significant over-representation of Aboriginal peoples in the criminal justice system, the recommendations included that an Aboriginal community be included as a trial site for justice reinvestment.⁹⁹

Proposed recommendations:

That state and territory governments commit to funding early intervention programs and specialist, therapeutic and diversionary courts, including Aboriginal Courts, with the goal of diverting Aboriginal peoples away from the criminal justice system.

That the Federal Government take a leading role in the implementation of justice reinvestment approaches in Aboriginal communities, as well as setting 'justice targets' to monitor and reduce the number of Aboriginal peoples in the prison system.

8.2. Access to justice

The Australian Government is responsible for funding a range of legal assistance services, all of which provide assistance to Aboriginal peoples, including Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, Family Violence Prevention Legal Services and Legal Aid. The key providers of legal assistance to Aboriginal and Torres Strait Islander peoples are the general Aboriginal and Torres Strait Islander Legal Services (**ATSILS**), which provide culturally-relevant representation in criminal, civil and family law matters, and Family Violence Prevention Legal Services (**FVPLS**), which provide legal assistance and educate and assist Aboriginal victim/survivors of family violence and sexual assault (predominantly women and children) in a range of areas of law.

Aboriginal-specific legal services were established for a number of public policy reasons, including:

- to recognise the disproportionate impact that laws have on Aboriginal people;
- to promote self-determination;
- to address the gap in access to justice by providing culturally specific legal services; and
- to advocate for and protect the interests of Aboriginal peoples.

In December 2013, the Commonwealth Government announced a funding cut of \$43.1 million for legal assistance services over four years from 2013-14.¹⁰⁰ The funding cuts are proposed despite Australian parliamentary and governmental inquiries, and the UN Human Rights and CERD Committees, urging the Australian Government to increase funding to specialist Aboriginal-specific services, and to work collaboratively with service providers and Aboriginal communities to ensure that funding is appropriate and strategically-directed.¹⁰¹

⁹⁹ Ibid, Recommendation 6, para 8.50.

¹⁰⁰ Mid-year Economic and Fiscal Outlook 2013-14, December 2013.

¹⁰¹ See Aboriginal and Torres Strait Islander Social Justice Commissioner, *2008 Social Justice Report* (2009) Australian Human Rights Commission, app 2
<www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport08/downloads/SJR_2008_full

Aboriginal-specific services are already chronically underfunded, and are unable to meet the civil and family law needs of many of their

“ Aboriginal-specific services are already chronically underfunded, and are unable to meet the civil and family law needs of many of their constituents ”

constituents. Ensuring Aboriginal peoples have access to justice means meeting their criminal, civil and family law legal needs in a culturally-relevant way. The Government’s failure to adequately fund civil and family law services, particularly in regional and remote areas, directly impacts Aboriginal peoples’ ability to access justice in key areas such as housing, credit and debt, discrimination, employment and consumer rights.¹⁰²

The cuts will also effectively defund the advocacy and law reform activities and projects of each of the jurisdiction’s ATSILS, and will also defund the national ATSILS peak body, which is responsible for sharing best practice, supporting strong governance practices and coordinating advocacy and law reform across Australia.¹⁰³ In addition, Community Legal Centres are no longer able to use Commonwealth funding for law reform and policy and advocacy work;¹⁰⁴ Legal Aid Commissions are prevented from using Commonwealth funding for the purpose of lobbying government or elected representatives, or to engage in public campaigns; and FVPLS’ entire Commonwealth funding has been directed to frontline service provision only and is now uncertain under the Indigenous Advancement Strategy (section 12.4).

.pdf>; Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Australia*, 95th sess, 2624th mtg, UN Doc CCPR/C/AUS/CO/5 (7 May 2009); Access to Justice Taskforce, Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: A guide for future action* (September 2009) Commonwealth of Australia

<www.ag.gov.au/LegalSystem/Documents/A%20guide%20for%20future%20action.pdf>; Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal aid and access to justice* (2004) [4.123], [5.128]. Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention – Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 77th sess, 2043rd mtg, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010)

¹⁰² Melanie Schwartz and Chris Cunneen, ‘From Crisis to Crime: The Escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities in NSW’ (2009) 7(15) *Indigenous Law Bulletin* 18.

¹⁰³ National Aboriginal & Torres Strait Islander Legal Services, *Productivity Commission: Inquiry into Access to Justice Arrangements – Draft Report* (May 2014) <www.natsils.org.au/portals/natsils/submission/NATSILS%20Submission%20-%20Draft%20Report%20Productivity%20Commission%20Inquiry%20into%20Access%20to%20Justice%20Arrangements.pdf>.

¹⁰⁴ ‘Brandis restrictions starting tomorrow seek to silence community legal centres speaking out on unfair laws, policies and practices’, Community Law Media Release, 30 June 2014.

Proposed recommendation:

That the Australian Government commit to adequately funding community-controlled, culturally-specific legal services, to allow them to provide assistance in criminal, family and civil law matters. These services should be supported to engage in and contribute to law reform and advocacy work.

8.3. Aboriginal deaths in custody

Aboriginal deaths in custody remain a significant community concern, given the impact deaths in custody have on communities, and the historical legacy of over-incarceration and associated deaths in custody. The Royal Commission into Aboriginal Deaths in Custody was held in response to a growing public concern that Aboriginal deaths in custody were occurring too frequently and without sufficient explanation. The Royal Commission made 339 recommendations relating to improvements in the criminal justice system to reduce the number of Aboriginal peoples in the Australian prison system. Its principal thrust was directed towards the elimination of disadvantage and the empowerment of Aboriginal people. However, many of the recommendations have never been implemented and all jurisdictions continue to record concerning rates of Aboriginal deaths in custody, with the Northern Territory recording the highest.¹⁰⁵

Whereas statistics for the decade preceding 2011 indicated that Aboriginal prisoners were less likely to die in prison when compared with non-Aboriginal prisoners, and that rates of Aboriginal peoples dying in custody were either steady or declining,¹⁰⁶ since 2011, rates have again increased. This increase correlates with the increasing incarceration of Aboriginal peoples.¹⁰⁷

Further, there is limited follow up and reporting on the 'hidden toll' of post-release deaths. The number of people dying from unnatural causes after being released from custody is said to be in excess of the number who die whilst in custody. This issue is connected to poor prison repatriation and post-release support practices, which are compounded in regional and remote areas, and therefore disproportionately affect Aboriginal people.

Deaths in police custody

The Committee has asked Australia to specifically report on the Western Australian death in custody of Mr Ward. A coronial inquest was held,¹⁰⁸ and four prosecutions eventuated: the Western Australia

¹⁰⁵ Martin Cuddihy, *Aboriginal deaths in custody numbers rise sharply over past five years* (24 May 2013) ABC News <www.abc.net.au/news/2013-05-24/sharp-rise-in-number-of-aboriginal-deaths-in-custody/4711764>; Gail Liston, *NT Indigenous deaths in custody worst in nation* (24 May 2013) ABC News <www.abc.net.au/news/2013-05-24/nt-highest-indigenous-deaths-in-custody-in-australia/4711316>.

¹⁰⁶ Mathew Lyneham and Andy Chan, 'Deaths in custody in Australia to 30 June 2011: Twenty years of monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody' (Monitoring Report No 20, Australian Institute of Criminology, May 2013) <www.aic.gov.au/media_library/publications/mr/20/mr20.pdf>.

¹⁰⁷ Cuddihy, above n 105.

¹⁰⁸ For a human rights perspective on the coronial inquest relating to the death in custody of Mr Ward, see Human Rights and Equal Opportunity Commission, Submission to Coroner's Court of Western Australia, *Inquest*

Department of Corrective Services; transport contractor G4S Australia Pty Ltd; and the two prisoner transport officers were prosecuted under WorkSafe laws. Each received a substantial fine for their role in Mr Ward's death.

The State Coroner commented in his decision in relation to the investigation of Mr Ward's death in 2008 that from the time he was transferred from police custody into the custody of the Department of Corrective Services, 'the quality of his supervision, treatment and care was disgracefully bad'.¹⁰⁹ It was found that Mr Ward died of heatstroke after he being transported in the rear pod of a prisoner transport van for almost four hours over 360 km without air-conditioning or ventilation. The Coroner also stated that he was satisfied that Mr Ward was subjected to degrading treatment in breach of the ICCPR.¹¹⁰

Western Australia continues to have concerning custodial practices. In July 2014, a 22-year-old Aboriginal woman died in police custody in regional Western Australia. She was in police custody for unpaid fines. The Director of the Aboriginal Legal Service of Western Australia has stated that: 'Locking Aboriginal people up for not paying their fines is not only inhumane, it is grossly inappropriate and if what occurred here is anything to go by, life threatening.'¹¹¹

At the time of writing, the death is the subject of a police investigation, conducted on behalf of the WA State Coroner. This fails to meet the requirement for an independent, comprehensive, transparent and objective investigation into the circumstances of the death.

Proposed recommendations:

That states and territories actively commit to implementing the Royal Commission's recommendations, and report to the Australian Government on tangible improvements.

That all state and territory governments develop effective prisoner repatriation and post-release support programs, and monitor the rates of post-release deaths.

That a properly resourced, professional and transparent agency in each State and Territory be tasked with conducting objective, thorough and independent investigations into all deaths in custody, including police-related deaths.

into the death of Mr Ward (28 May 2009)

<www.humanrights.gov.au/sites/default/files/content/legal/submissions_court/intervention/2009/Ward_final20090528.pdf>.

¹⁰⁹ State Coroner, Record of Investigation into Death, Ref No 9/09.

¹¹⁰ Ibid 130.

¹¹¹ Aboriginal Legal Service of Western Australia, *Death in Custody of a 22 Year Old Woman in South Hedland*, Media Statement (29 August 2014).

8.4. Mandatory sentencing

Mandatory sentencing continues to operate in most Australian jurisdictions, including in Western Australia and the Northern Territory. The Western Australian government proposes to expand its existing mandatory sentencing laws for home burglary offences and other offences committed in the course of a home burglary.¹¹²

Mandatory sentencing laws have a disproportionate impact on Aboriginal people. Such laws limit judicial discretion in sentencing and prevent courts from taking account of the cultural background and responsibilities of offenders, and the economic and social difficulties that they

“ Mandatory sentencing laws limit judicial discretion in sentencing and prevent courts from taking account of the cultural background and responsibilities of offenders, and the economic and social difficulties that they face ”

face. Given the cultural and socioeconomic situation faced by many Aboriginal people, this leads to a disproportionate number of Aboriginal peoples imprisoned under mandatory sentencing provisions, without being able to have their circumstances taken into account in mitigation.

Proposed recommendation:

That state and territory governments repeal mandatory sentencing laws.

9. Refugees and asylum seekers

Articles 2, 3, 11 and 16

9.1. Overview

For over a decade, the asylum seeker policies of successive Australian Governments have attracted substantial criticism from human rights treaty bodies and other UN experts.¹¹³ In the last Concluding Observations on Australia, the Committee expressed concern about:

¹¹² The *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (WA) is currently before the Western Australian Parliament.

¹¹³ See Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Australia*, 95th sess, 2624th mtg, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [23]-[24]; Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 of the Covenant – Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, 26th mtg, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [25], [30]; Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia*, 60th sess, 1725th mtg, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [31], [80]; Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict – Concluding observations: Australia*, 60th sess, 1725th mtg, UN Doc CRC/C/OPAC/AUS/CO/1 (11 July 2012) [24]; Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the*

- indefinite, mandatory immigration detention;¹¹⁴
- discrimination against asylum seekers based on their mode of arrival;¹¹⁵
- potential for asylum seekers to be removed from Australia without their claims for protection having been fully assessed and reviewed;¹¹⁶
- inadequacy of human rights training for immigration officials and personnel;¹¹⁷
- detention of children in immigration detention centres;¹¹⁸ and
- inadequate mental and physical healthcare at immigration detention centres.¹¹⁹

The Australian Government has not addressed any of these concerns. In fact, violations of the rights of asylum seekers and refugees have become more widespread and severe.

Australia's current asylum seeker policies have one key aspiration – to 'stop the boats'.¹²⁰ To achieve this goal, the Australian Government maintains a 'single-minded focus on deterrence'.¹²¹ Asylum seekers who arrive by boat are subject to mandatory detention and transfer to Nauru or Manus Island, PNG. Those seeking protection in Australia are routinely intercepted at sea and turned back.

“ Those already in Australia are detained for an average of 349 days ”

Those already in Australia are detained for an average of 349 days and have been subject to a range of measures aimed at denying them

convention – Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia, 77th sess, 2043rd mtg, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010) [24]; Anand Grover, Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest standard of physical and mental health – Mission to Australia, 14th sess, Agenda Item 3, UN Doc A/HRC/14/20/Add.4 (3 June 2010) [64]; Human Rights Council, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1: Australia, 10th sess, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) [47]-[49]; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, 17th sess, Agenda Item 6, UN Doc A/HRC/17/10 (24 March 2011) [18], [42], [78].

¹¹⁴ Committee Against Torture, *Consideration of reports submitted by States Parties under article 19 of the Convention – Concluding observations of the Committee against Torture: Australia*, 40th sess, 828th mtg, UN Doc CAT/C/AUS/CO/3, 22 May 2008 [11].

¹¹⁵ Ibid [12].

¹¹⁶ Ibid [17].

¹¹⁷ Ibid [22].

¹¹⁸ Ibid [25].

¹¹⁹ Ibid.

¹²⁰ *We'll stop asylum-seeker boats in single term of Coalition government, says Tony Abbott* (8 July 2013) News.com.au <www.news.com.au/national/we8217ll-stop-asylumseeker-boats-in-single-term-of-coalition-government-says-tony-abbott/story-fnho52ip-1226676187296>.

¹²¹ Liberal Party of Australia, 'Tony Abbott – A regional deterrence framework to combat people smuggling' (Media Release, 23 August 2013) <www.liberal.org.au/latest-news/2013/08/23/tony-abbott-regional-deterrence-framework-combat-people-smuggling>.

permanent protection visas.¹²² Asylum seekers and refugees in immigration detention are often not able to access legal and medical assistance, and are not able to challenge their detention in a court, as required under CAT.¹²³

The laws, policies and practices of the Australian Government result in institutionalised and routine violations of the prohibition on torture and ill-treatment. They also violate Australia's obligation under article 3 of CAT not to refouler a person to another State 'where there are substantial grounds for believing that he would be subject to torture.'

9.2. Offshore processing (Nauru and PNG)

Australian law now requires every asylum seeker who arrives by boat to be detained and removed to detention centres on Nauru or Manus Island, PNG as soon as reasonably practicable.¹²⁴ As at 31 July 2014, there were 1146 asylum seekers detained in Nauru (including 183 children) and 1,127 asylum seekers detained on Manus Island, PNG.¹²⁵

The UN High Commissioner for Refugees (**UNHCR**) has stated that Australia's current policies, conditions and processing arrangements in offshore centres:¹²⁶

- constitute arbitrary and mandatory detention under international law;
- do not provide a fair, efficient and expeditious system for assessing refugee claims;
- do not provide safe and humane conditions of treatment in detention; and
- do not provide for adequate and timely solutions for refugees.

The Australian Government has recently reached an agreement with the government of Cambodia to accept refugees from the processing centre on Nauru.¹²⁷

¹²² Michael Gordon, 'Scott Morrison looks to 'national interest' test to circumvent High Court ruling on permanent protection visas', *The Sydney Morning Herald* (online), 3 July 2014 <www.smh.com.au/federal-politics/political-news/scott-morrison-looks-to-national-interest-test-to-circumvent-high-court-ruling-on-permanent-protection-visas-20140703-3bbbz.html>.

¹²³ Committee Against Torture, *Convention against Torture and other cruel, inhuman or degrading treatment or punishment: General Comment No 2 – Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (24 January 2008).

¹²⁴ *Migration Act 1958* (Cth) s 198AD.

¹²⁵ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary 31 July 2014* (31 July 2014) Commonwealth of Australia <www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-july2014.pdf>.

¹²⁶ UNHCR Regional Representation, Canberra, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013* (26 November 2013) United Nations High Commissioner for Refugees <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>>.

¹²⁷ Samantha Hawley, 'Cambodia refugee deal: Protests outside Australian embassy in Phnom Penh as Scott Morrison signs agreement', 27 September 2014, <<http://www.abc.net.au/news/2014-09-26/immigration-minister-to-sign-cambodia-refugee-deal/5770468>>.

Australia's human rights obligations

Disappointingly, the Australian Government has repeatedly asserted that its human rights obligations do not extend to violations that occur within its offshore centres in Nauru and PNG.¹²⁸ The extraterritorial scope of Australia's obligations under CAT is discussed in detail in section 17.1.

The following considerations demonstrate that asylum seekers currently detained in Nauru and on Manus Island are within Australia's effective jurisdiction and control:

- upon their arrival in Australia, asylum seekers arrive and are taken by Australian authorities to Australian immigration detention;
- the decision is then taken under Australian law to transfer them offshore;
- that decision is taken by the Australian Government Minister for Immigration and Border Protection to give effect to Australian Government policy;
- once transferred offshore, transferees are detained at facilities funded by the Australian Government;
- asylum seekers are routinely transferred between Nauru and Manus Island and Australia for medical treatment at Australia's behest;
- while detained, transferees receive services pursuant to contracts between the Australian Government and, in most cases, Australian service providers; and
- Australian Government officers are involved in refugee assessments conducted in Nauru and PNG.

From the moment they arrive in Australia until they are returned to their country of origin or resettled elsewhere, transferees are effectively subject to Australia's control such that Australia retains human rights obligations to asylum seekers it transfers offshore.

Conditions inside detention centres in Nauru and on Manus Island

Conditions inside the detention centres in Nauru and on Manus Island are harsh. Reports by the

“ asylum seekers are detained arbitrarily in conditions that fail to meet international standards for humane treatment ”

UNHCR have found that asylum seekers are detained arbitrarily in conditions that fail to meet international standards for humane

treatment.¹²⁹ Following the UNHCR's first visit to the Manus Island detention centre in January 2013, the organisation concluded that conditions at the centre were 'likely to have an increasingly negative

¹²⁸ See, for example, Evidence to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 17 December 2012, 2-11 (Vicki Parker).

¹²⁹ UNHCR Regional Representation, Canberra, *UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013* (26 November 2013) <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Manus%20Island%20PNG%2023-25%20October%202013.pdf>> and UNHCR Regional Representation, Canberra, above n 126.

impact on the psycho-social and physical health of those transferred'.¹³⁰ A subsequent report by the UNHCR in November 2013 found that:¹³¹

- The numbers of asylum seekers held at the Centre had increased from 302 in June 2013 to 1,093 in October 2013 with almost no corresponding increase in the physical boundaries of the regional processing centre, resulting in significant overcrowding.
- The majority of asylum seekers were still living in cramped, oppressive conditions.
- The small amount of recreational space previously provided for asylum seekers had been built over.
- Conditions in the ablution blocks were generally unhygienic. One block in was observed to be particularly filthy, with blocked drains, dim lighting, a putrid smell and 'several inches of filthy water flooding the floor'.
- Overall conditions at the centre remained 'harsh and unsatisfactory, particularly when viewed against the mandatory detention environment, slowness of processing and lack of clarity and certainty surrounding the process as a whole'.

Concerns expressed by the UNHCR about the regional processing centre in Nauru include:¹³²

- no opportunity for solitude and very little privacy in some compounds;
- harsh, hot conditions with no fans in some tents; and
- cramped conditions for families, including children as young as four years old.

No exception to off shore mandatory detention is made for people with disability, including children. This is despite documented inadequacy of facilities, and evidence of medications and equipment including hearing aids and prosthetic limbs being removed and destroyed.¹³³

Against this backdrop, it is not surprising that there have been violent incidents inside both the Manus Island and Nauru detention centres. A key factor contributing to the ongoing unrest is the slow pace of refugee processing and uncertainty about resettlement arrangements.¹³⁴ In the 21 months since the

¹³⁰ UNHCR Regional Representation, Canberra, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 15-17 January 2013* (4 February 2013) 2 <<http://unhcr.org.au/unhcr/images/2013-02-04%20Manus%20Island%20Report%20Final.pdf>>.

¹³¹ UNHCR Regional Representation, Canberra, above n 129, [93].

¹³² UNHCR Regional Representation, Canberra, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, above n 126.

¹³³ Evidence given by Dr John-Paul Sanggaran Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014* (Public Hearing, Sydney, 31 July 2014).

¹³⁴ See eg Christof Heyns, 'Preliminary Observations on the official visit to Papua New Guinea by Mr. Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, 3-14 March 2014' (Press Statement, 14 March 2014) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14373&LangID=E>.

first asylum seeker was transferred to Manus Island,¹³⁵ not one final refugee determination has been made and no refugees have been resettled.¹³⁶

There is currently no system of comprehensive independent oversight of places of immigration detention on PNG and Nauru, despite Nauru being a state party to the UN Optional Protocol to the Convention Against Torture. The lack of oversight is made worse by the very limited access that is currently granted to lawyers, NGOs and the media.

Untreated septicaemia kills Hamid Kehazaei¹³⁷

In September 2014 Hamid Kehazaei, a 24-year-old Iranian asylum seeker detained on Manus Island, contracted cellulitis after cutting his foot in the detention centre. His requests for treatment were denied and within days the cellulitis developed into septicaemia. He was transferred back to Australia, but died soon after his arrival.

It has been reported that Mr Kehazaei was kept on Manus Island for a week waiting for approval to be medically transferred to Port Moresby, despite showing signs of septicaemia.¹³⁸

Dr Peter Young, the former director of mental health services at detention centre service provider International Health and Mental Services (**IHMS**) explained, 'whenever people are placed in a remote place like this, where there aren't access to local services on the ground, it inevitably creates a situation in which there are going to be delays when people have deteriorating conditions and when higher level, tertiary care is required.'¹³⁹

¹³⁵ Chris Bowen, Minister for Immigration and Citizenship, 'First transfer to Papua New Guinea' (Media Release, 21 November 2012)

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2060960%22>>

¹³⁶ Section 15A of the *Migration Act 1980* (Papua New Guinea) empowers the Foreign Affairs Minister of Papua New Guinea to determine whether a non-citizen is a 'refugee'. No such determinations have been made in respect of any asylum seeker transferred by Australia since the Manus detention centre reopened in November 2012.

¹³⁷ Oliver Laughland, 'Asylum Seeker Declared Brain Dead After Leaving Manus Island', *The Guardian Australia* (online), 3 September 2014 <www.theguardian.com/world/2014/sep/03/asylum-seeker-declared-brain-dead-medical-evacuation-manus-island>.

¹³⁸ Sarah Whyte, 'Critically ill asylum seeker held on Manus for week: witness accounts', *The Sydney Morning Herald*, 20/09/2014.

¹³⁹ Oliver Laughland, 'Asylum Seeker Declared Brain Dead After Leaving Manus Island', *The Guardian Australia* (online), 3 September 2014 <www.theguardian.com/world/2014/sep/03/asylum-seeker-declared-brain-dead-medical-evacuation-manus-island>.

Processing Claims

The UNHCR has observed that the combination of slow processing, limited information about plans for eventual resettlement and harsh physical conditions have created a return-orientated environment within both the Manus Island and Nauru centres.¹⁴⁰ Such pressure on asylum seekers to return may lead to some who are genuinely in need of protection to nevertheless return to real risks of serious harm.

“ limited information about plans for eventual resettlement and harsh physical conditions have created a return-orientated environment ”

There are also concerns about the adequacy of legal protections against refoulement in PNG and Nauru. The Memoranda of Understanding with both nations¹⁴¹ include assurances that refugees processed under those agreements will not be subject to refoulement contrary to article 3 of CAT. However, PNG is not a party to CAT or OPCAT and, as noted below in section 9.4, asylum seekers transferred to PNG or Nauru do not have access to complementary protection under the laws of those countries.

Serious concerns have also been raised for the safety and wellbeing of gay and lesbian asylum seekers transferred to Manus Island, as PNG criminalises homosexuality, raising the additional risk that transfer to Manus Island could constitute refoulement under article 3 of CAT.¹⁴²

Violent incident on Manus Island on 16-17 February 2014¹⁴³

On 16 February 2014, tensions within the Manus Island detention center reached a ‘flashpoint’ following a meeting with PNG and Australian officials during which asylum seekers were informed that they would never be resettled in Australia and were likely to have to remain at the Manus Island regional processing centre for an indeterminate period and possibly up to four years.

Several hours after the meeting, a group of around 30-35 detainees escaped from the Oscar compound by running through the open gate when a food truck arrived. They were cut off on the road

¹⁴⁰ UNHCR Regional Representation, Canberra, above n 129, 24 and UNHCR Regional Representation, Canberra, above n 126, 25.

¹⁴¹ *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, Australia-Nauru, signed 3 August 2013, [19] and *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues*, Australia-Papua New Guinea, signed 6 August 2013 [20].

¹⁴² Oliver Laughland, ‘Gay asylum seekers told they could be reported to PNG police, Amnesty says’, *The Guardian Australia* (online), 11 December 2013 <www.theguardian.com/world/2013/dec/11/gay-asylum-seekers-told-they-could-be-reported-to-png-police-amnesty-says>.

¹⁴³ Details taken from a report produced by public servant Robert Cornall who was engaged by the Australian Department of Immigration and Border Protection to conduct an independent investigation into the events of 16-18 February 2014. See Robert Cornall, *Report to the Secretary, Department of Immigration and Border Protection: Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre* (23 May 2014) <https://www.immi.gov.au/about/dept-info/_files/review-robert-cornall.pdf>.

by around 100 local G4S guards, who tackled them, threatened them with sticks and dragged them back to the compound. During this incident, one detainee was attacked from behind by an unidentified local G4S guard who 'slashed his neck, causing a 10-12 cm horizontal slit across his throat'.¹⁴⁴

Local G4S guards, together with some other PNG nationals, pursued the detainees into and continued assaulting them inside the complex with large sticks and pipes. They broke windows and doors and began attacking transferees within their accommodation blocks.

Following this first attack, 25 detainees were treated for casualties including 'broken bones, lacerations, loss of consciousness, a lung contusion and pain in various parts of the body'.¹⁴⁵

International Health and Medical Services (IHMS), which administered the medical treatment, confirmed that the type of injuries suffered by detainees suggested that they were 'attacked while running away when they were hit, or crouching down trying to protect their face and head behind a raised arm'.¹⁴⁶

On the night of 17 February 2014, violent protests broke out in several compounds of the centre, during which internal fences were pushed over, property was damaged and rocks and various missiles were thrown. At the height of these protests, members of the PNG mobile police squads pushed over the perimeter fence and entered the compound and began firing shots within the accommodation blocks. An unspecified number of G4S local security personnel, local employees of other service-providers at the Centre and several ex-pat G4S staff then followed the police into the compound and 'started bashing detainees'.¹⁴⁷ Detainees reported being dragged from under beds and bashed with chairs, water pipes, stones and fists.

During the course of this violence, Iranian asylum seeker Reza Berati was attacked by a local employee of the Salvation Army, together with G4S guards and other locals while attempting to flee up some stairs. He fell down the stairs where his roommate, who witnessed the attack, said he was assaulted by a group of around 10 PNG locals, PNG G4S guards and Australian expats who kicked him repeatedly in the head. A local Salvation Army employee then brought down a large rock on his skull. Mr Berati was treated by IHMS for massive head injuries and died a short time later. Two former guards have been arrested and charged with Mr Berati's murder.¹⁴⁸

Proposed Recommendation:

That asylum seekers who arrive in Australia have their claims processed in Australia and, if found to be refugees, are resettled in Australia.

¹⁴⁴ Ibid 5.

¹⁴⁵ Ibid 45.

¹⁴⁶ Ibid 45-46.

¹⁴⁷ Ibid 7.

¹⁴⁸ Helen Davidson, 'Manus guards charged over death of Iranian asylum seeker Reza Barati', *The Guardian*, 19 August 2014.

That the Australian Government cooperate with the governments of Nauru and Papua New Guinea to establish a system of independent monitoring and oversight of all places of immigration detention.

9.3. Immigration detention (Australia)

Mandatory, prolonged and indefinite detention

Australian law continues to mandate the detention of asylum seekers who arrive without a visa, with no legislative exceptions for individual vulnerabilities. Asylum seekers who arrive in Australia by boat after 19 July 2013 are subject to mandatory transfer to offshore detention centres as soon as practicable and are detained in Australia pending removal.¹⁴⁹

Asylum seekers have no access to substantive judicial review of their detention in Australia.

Legal assistance for asylum seekers within Australia has also been significantly scaled back following policy changes announced on 31 March 2014. These changes have removed government funded legal assistance under the Immigration Advice and Application Assistance Scheme for those who arrived without a valid visa (either by boat or plane). Those who arrive with visas and are eligible for the scheme receive legal assistance at the primary stage of status determination only. Consequently, many asylum seekers will go through the refugee assessment process without the benefit of legal advice or representation.

Indefinite detention of refugees with negative security and character assessments

Under current Australian law, non-citizens issued with an 'adverse security assessment' by ASIO are ineligible to obtain a visa and are, as a matter of policy, indefinitely detained in immigration detention.

Unlike citizens, non-citizens do not have the right to seek independent merits review of their adverse security assessment and have no legal entitlement to the reasoning and information on which it is based.¹⁵⁰ Consequently, non-citizens can be indefinitely detained on the basis of decisions which they cannot challenge and which are never explained to them.¹⁵¹

“ non-citizens can be indefinitely detained on the basis of decisions which they cannot challenge and which are never explained to them ”

A non-statutory, non-compellable system for reviewing adverse security assessments for those in immigration detention was established in late 2012.¹⁵² However, it cannot lead to binding decisions to

¹⁴⁹ *Migration Act 1958* (Cth) s 198AD.

¹⁵⁰ *Australian Security Intelligence Organisation Act 1979* (Cth) s 36(b).

¹⁵¹ For a detailed discussion of the relevant Australian domestic laws, see Ben Saul, 'Dark Justice: Australia's indefinite detention of refugees on grounds under international human rights law' (2012) 13 *Melbourne Journal of International Law* 1.

¹⁵² Attorney-General's Department, *Independent Reviewer of Adverse Security Assessments*, Commonwealth of Australia

release a person or to revoke a negative assessment. Further, the process does not guarantee non-citizens any access to the reasons for their initial negative assessment or the information on which it was based.

Similarly, section 65(1) of the *Migration Act 1958* requires that the Minister must be satisfied that the person passes a 'character test' set out in section 501(6) of the *Migration Act 1958* before they are granted a visa. Under this requirement, refugees who have committed or been accused of very minor offences may be denied a visa and forced to remain in indefinite immigration detention.

FKAG v Australia and MMM v Australia

In *FKAG v Australia* and *MMM v Australia*, the UN Human Rights Committee found that the indefinite detention of 46 refugees with adverse security assessments was arbitrary and amounted to cruel, inhuman or degrading treatment under articles 9(1), 9(2), 9(4), 7, 10(1), 17(1), 23(1) and 24(1) of the ICCPR. This followed similar conclusions by Australian expert bodies.¹⁵³

The UN Human Rights Committee recommended that the Australian Government provide the refugees with an effective remedy including the release of the authors under individually appropriate conditions, rehabilitation and appropriate compensation. Almost all of those refugees remain in indefinite immigration detention. Neither the adverse security assessment, nor their detention, can be reviewed effectively or overturned by a court or tribunal.

One year after the decision, the Australian government still has not implemented the UN Human Rights Committee's recommendations.

Indefinite detention on 'character grounds'¹⁵⁴

Ali Mohammed has been found to be a refugee under Australian law, but has remained in immigration detention for over a year based on criminal charges related to unrest in a detention centre. Mr Mohammed was convicted of the charges, but did not serve a custodial sentence due to the

www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx.

¹⁵³ See eg materials cited in Saul, above n 151, 4 nn 16-23; *SBEG v Secretary, Department of Immigration and Citizenship* [2012] FCA 277; *Sagar v O'Sullivan* (2011) 193 FCR 311; *Soh v Commonwealth* (2008) 101 ALD 310; *Parkin v O'Sullivan* (2009) 260 ALR 503; *Leghaei v Director-General of Security* (2007) 97 ALD 516; *Kaddari v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 597; *Director General Security v Sultan* (1998) 90 FCR 334; Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) 408; Australian Human Rights Commission, Submission to *Independent Review of the Intelligence Community*, April 2011; Senate Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (2012) 161; UNHCR Regional Representative, Canberra, *Expert Roundtable on National Security Assessments for Refugees, Asylum-seekers and Stateless Persons in Australia* (28 May 2012) <<http://unhcr.org.au/unhcr/images/2012-05-28%20Chairs%20Summary.pdf>>; Australian Labor Party, *National Platform* (2011) 173–174; Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012 (Cth).

¹⁵⁴ Name has been changed to protect identity.

convictions being for minor offences. Mr Mohammed always maintained that he was not an instigator in these events, but had been assaulted himself.

Mr Mohammed has received no indication of how long his detention might continue and he may be ineligible for a visa grant based on character grounds. All attempts to advocate for either his release on a bridging visa or transfer back into the community have been unsuccessful.

Access to healthcare in immigration detention

The long-term effects of prolonged detention on the health and emotional wellbeing of persons in immigration detention are well documented and give rise to significant implications for compliance with article 16 of CAT.

After giving evidence to the third public hearing of the Australian Human Rights Commission's (AHRC) *National Inquiry into Children in Immigration Detention 2014*,¹⁵⁵ psychiatrist Dr Peter Young, the former director of mental health services with IHMS, the organisation contracted to provide healthcare services in immigration detention centres, remarked that the immigration detention environment is 'inherently toxic' and akin to torture.¹⁵⁶

“ the immigration detention environment is inherently toxic and akin to torture – Dr Peter Young ”

There are currently insufficient steps being taken to address the over-representation of individuals suffering from mental illness in immigration detention. Statistics compiled by IHMS revealed that one third of people held in detention had mental health problems, and it was 'clearly established' that such problems were caused by prolonged time in detention.¹⁵⁷ According to Dr Young, 'the longer people stay in detention, the higher the risk that those symptoms will develop into something which is a recognisable psychiatric diagnosis'.¹⁵⁸

Despite clear evidence of the harm prolonged detention is causing, as at 31 July 2014, asylum seekers detained in Australia are spending an average of 349 days in closed immigration detention facilities, almost triple the average time spent 12 months earlier.¹⁵⁹

¹⁵⁵ Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014* (Public Hearing, Sydney, 31 July 2014).

¹⁵⁶ Lexi Metherell, *Immigration detention psychiatrist Dr Peter Young says treatment of asylum seekers akin to torture* (6 August 2014) ABC Radio Australia <<http://www.radioaustralia.net.au/international/2014-08-05/immigration-detention-psychiatrist-dr-peter-young-says-treatment-of-asylum-seekers-akin-to-torture/1352972>>.

¹⁵⁷ Oliver Laughland, 'Christmas Island detainees stripped of basic medication, inquiry told' *The Guardian Australia* (online), 31 July 2014 <www.theguardian.com/world/2014/jul/31/immigration-department-detention-child-mental-health-inquiry>.

¹⁵⁸ Agence France-Presse, 'Australian Immigration Detention Like 'Torture', Doctor Claims', *The Jakarta Globe* (online), 5 August 2014 <www.thejakartaglobe.com/international/australian-immigration-detention-like-torture-doctor-claims>.

¹⁵⁹ Department of Immigration and Border Protection, above n 125.

Healthcare in detention¹⁶⁰

A six-year-old girl, known as A.S. has been in detention for more than a year. During that time she's had an ongoing dental infection, allergies, separation anxiety, bed wetting, has developed a stammer and is refusing food. She has been assessed by a child psychiatrist as having Post Traumatic Stress Disorder. She was separated from her mother for an extended period when her mother was taken to mainland Australia to have a baby, since that separation she has woken two or three times per night to check that her mother is still with her. A.S. has received minimal healthcare for her significant health issues and her lawyer describes her as 'an alarmingly sad and anxious child, with serious mental health issues'.

Children in immigration detention

The provisions giving rise to the mandatory detention of unlawful non-citizens contain no exceptions for children, including unaccompanied children.¹⁶¹ Despite the Minister for Immigration and Border Protection's recent undertaking to release 150 children under 10 years of age from detention and into the community by the end of 2014, as of 31 July 2014, 766 children remained in closed immigration detention in Australia's on and offshore detention facilities.¹⁶²

Independent reports indicate that basic health and education services are not being provided to children in immigration detention centres in Australia. A 'letter of concern' provided by 15 doctors working at the detention centre on Christmas Island identifies similar concerns about mental and physical health. Overall, the doctors' letter states that detention is 'unsuitable for children and a contravention of human rights' and that the doctors' duty of care obliges them to advocate 'for their immediate removal from the detention environment'.¹⁶³

“ detention is ‘unsuitable for children and a contravention of human rights’ ”

The lack of any measures to protect children from psychological harm has contributed to the deterioration of the mental health of children in detention. Dr Young has stated that IHMS had collected figures showing 'significant' mental health problems among a large number of child detainees and the 'early data' was 'broadly in line with what we are seeing with adults and perhaps a

¹⁶⁰ Maurice Blackburn, 'Class Action Against Commonwealth and Scott Morrison over Injured Asylum Seekers on Christmas Island' (Media Release, 26 August 2014) <www.mauriceblackburn.com.au/about/media-centre/media-statements/2014/class-action-against-commonwealth-and-scott-morrison-over-injured-asylum-seekers-on-christmas-island>.

¹⁶¹ *Migration Act 1958* (Cth) s 189(1) and (3).

¹⁶² Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary 31 July 2014* (31 July 2014) Commonwealth of Australia <www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-july2014.pdf>.

¹⁶³ *Christmas Island Medical Officer's Letter of Concerns* (November 2013) <www.theguardian.com/world/interactive/2014/jan/13/christmas-island-doctors-letter-of-concern-in-full>.

little higher'.¹⁶⁴ Dr Young also told the AHRC's *National Inquiry into Children in Immigration Detention 2014* he was aware of self-harm incidents involving children, including poison attempts, and that there was no full-time child psychiatrist on Christmas Island.¹⁶⁵

Mia's detention on Christmas Island¹⁶⁶

Mia is 12 years old. She has spent over a year in immigration detention on Christmas Island with her mother, Anne. When Anne met with her lawyer she explained that Mia had not eaten or left her bed for five days, in the hope that she would quietly die. Mia had written a note, which read: 'This is my life now. Know I'm in here – in the fence alone. No friends, nothing to do. I hate my life, I want to die soon. Why?'

Anne recently tried to take her own life, along with several other mothers detained on Christmas Island, because she thought that her death might increase the chances of Mia receiving protection in Australia. Prime Minister Tony Abbott responded to the attempted suicides by saying that he will not give in to 'moral blackmail'.¹⁶⁷

Mia does not benefit from the Minister for Immigration and Border Protection's recent decision to release some children from immigration detention, as that policy only applies to children detained on the Australian mainland.

People with disability in immigration detention

The 'letter of concern' provided by 15 doctors working at the detention centre on Christmas Island identified that the Christmas Island immigration detention centre is unsuitable for any person living with significant intellectual or physical disability. It states that 'the detention environment exacerbates their burden of care and the facilities and medical services provided are inadequate to accommodate their needs.'¹⁶⁸

¹⁶⁴ Rebecca Barrett and Karen Barlow, *Immigration detention inquiry: Government tried to cover up asylum seekers' mental health problems* (31 July 2014) ABC News <www.abc.net.au/news/2014-07-31/detention-centre-inquiry-hears-claims-of-immigration-cover-up/5637654>.

¹⁶⁵ Laughland, above n 157.

¹⁶⁶ Katie Robertson, 'Christmas Island Children Should be Freed from Detention', *The Age* (Melbourne), 29 August 2014.

¹⁶⁷ Matthew Knott, 'Tony Abbott says government will not give in to 'moral blackmail' over asylum seeker suicide attempts', *The Age* (Melbourne), 9 July 2014.

¹⁶⁸ *Christmas Island Medical Officer's Letter of Concerns* (November 2013) <www.theguardian.com/world/interactive/2014/jan/13/christmas-island-doctors-letter-of-concern-in-full>.

Facilities for people with disability on Christmas Island¹⁶⁹

A three year old girl with epilepsy arrived on Christmas Island. Her parents had brought her medical records and a supply of the two medications she required to treat her epilepsy. The medications were destroyed on their arrival and the medical records were not made available to doctors. The girl started having seizures until, sometime later, the doctors were able to obtain a supply of the medication that she initially arrived with. However, only one months' worth of the medication was delivered and so in a few weeks the girl began to have seizures again.

Proposed Recommendations:

That the Australian Government:

- repeal the provisions of the *Migration Act 1958* (Cth) relating to mandatory detention;
- enact legislation to ensure that asylum seekers are detained only where strictly necessary, for the shortest possible time and as a last resort;
- enact legislation to ensure that children and their families are not held in immigration detention;
- provide for regular, periodic, judicial review of a person's detention;
- codify in law time limitations on immigration detention; and
- ensure that all detainees have adequate access to legal counsel, interpreters, communication facilities, education, physical and mental health services and social, cultural and religious support networks.

9.4. Refoulement

Complementary protection

Since 24 March 2012, complementary protection claims have been assessed as part of the existing primary protection assessment framework. This legislative reform rectified the previous situation where Australia relied solely on Ministerial discretion to meet its non-refoulement obligations.

However, there are two Bills currently before the Australian federal parliament which would either repeal or amend the existing complementary protection legislation. On 4 December 2013, the Australian Government introduced the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013 (Cth) (**2013 Bill**) which seeks to repeal the complementary protection provisions in the Migration Act.¹⁷⁰ The Bill is currently before the Senate, where a Senate Committee has recommended that it be passed. This would revert the system to one where implementation of the

¹⁶⁹ Case study based on evidence given by Dr Grant Ferguson Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014* (Public Hearing, Sydney, 31 July 2014).

¹⁷⁰ Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013 (Cth).

non-refoulement obligation is dependent on a personal, non-compellable and non-reviewable discretion of the Minister.

On 25 June 2014, the Australian Government introduced the *Migration Amendment (Protection and Other Measures) Bill 2014* (Cth) (**2014 Bill**), which would only come into effect should the federal parliament fail to pass the 2013 Bill. Under Schedule 2 of the 2014 Bill, the threshold for determining whether a person satisfies the complementary protection test will change. Under the proposed changes, the Minister would have to consider that it be ‘more likely than not that the non-citizen will suffer significant harm’ if the person is removed from Australia to another country.¹⁷¹ The proposed change is inconsistent with international law, including the Committee’s own interpretation of article 3 of CAT.¹⁷²

Asylum seekers transferred to PNG or Nauru do not have access to complementary protection under the laws of those countries.

Non-statutory refugee assessments (screening out)

A policy of ‘enhanced screening’ was introduced by the former Australian Government on 27 October 2012, in response to an increase in the number of boat arrivals from Sri Lanka.¹⁷³

The most recent Australian Government data confirms that over 50 per cent of Sri Lankans arriving in Australia by boat are found to be refugees. Yet Australia premises its treatment of Sri Lankans arriving by boat on the assumption that they are not in need of protection.

“ Screening is a truncated process that expedites the removal of asylum seekers without any rigorous assessment of their protection claims ”

Screening is a truncated process that expedites the removal of asylum seekers without any rigorous assessment of their protection claims. It is an administrative shortcut, sidestepping fairer and more comprehensive procedures for assessing

refugee claims under Australian law. Screening takes place behind closed doors in immigration detention centres in Australia or offshore, making it very difficult to obtain information about the details of the process. What is clear, however, is that the decision to ‘screen out’ and return an asylum seeker to Sri Lanka is not subject to independent oversight or review.

The process also involves interviewing recent arrivals without providing them access to legal advice or information about their rights. In 2013, the Department of Immigration and Border Protection

¹⁷¹ Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) sch 2 item 4.

¹⁷² Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 23 – 26 June 2014; Legislative Instruments received 7 - 20 June 2014* (2014).

¹⁷³ *Questions Taken on Notice, Budget Estimates Hearing, 27-28 May 2013, Immigration and Citizenship Portfolio*, Parliament of Australia
<www.aph.gov.au/~media/Estimates/Live/legcon_ctte/estimates/bud_1314/diac/BE13-0103.ashx>.

confirmed in a Senate Estimates Committee hearing that asylum seekers subject to the screening process are not advised of their right to speak with a lawyer and, even if they specifically request legal assistance, they are just given a phone book and access to a phone.¹⁷⁴

'Enhanced screening' was developed as a deterrence measure. Sri Lankans are the only national group confirmed to be subject to enhanced screening.¹⁷⁵ Since October 2012, Australia has returned 1248 Sri Lankans to their country using the 'enhanced screening' process.¹⁷⁶

The Minister for Immigration and Border Protection, Scott Morrison, has publicly stated that Sri Lankans should expect 'even more stringent' screening than people from other countries and that 'anyone who may have come from Sri Lanka should know that they will go back to Sri Lanka. We have an arrangement with the Sri Lankan government and...we'll be ensuring that we maximise those who go back and, preferably, they will all go back'.¹⁷⁷

Enhanced screening is a grossly inadequate safeguard against wrongful return to a country which Australia knows continues to produce refugees.

Interception and boat turn-backs

'Operation Sovereign Borders', the Australian's Government's military-led 'border security operation', commenced on 18 September 2013.¹⁷⁸ A key component of Operation Sovereign Borders is 'instructing the Australian Defence Force to turn back boats where it is safe to do so'.¹⁷⁹

¹⁷⁴ Evidence to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra 28 May 2013, 62 (Vicki Parker). The Human Rights Law Centre offered to compile a list of free legal services that could be given to asylum seekers who request legal help, but the Department of Immigration and Border Protection refused to distribute the information.

¹⁷⁵ *Question Taken on Notice, Supplementary Budget Estimates Hearing: 19 November 2013, Immigration and Border Protection Portfolio*, Parliament of Australia
<www.aph.gov.au/~media/Estimates/Live/legcon_ctte/estimates/sup_1314/DIBP/SE13-0115.ashx>.

¹⁷⁶ Immigration and Border Protection, Answer to Question Taken on Notice, 25 February 2014,
<http://www.aph.gov.au/~media/Estimates/Live/legcon_ctte/estimates/add_1314/DIBP/AE14-391.pdf>.

¹⁷⁷ Scott Morrison, Mark Binskin and Tony Negus, 'Operation Sovereign Borders: Joint Press Conference with Scott Morrison – Minister for Immigration and Border Protection, Air Marshal Mark Binskin – Vice-Chief of the Defence Force and Commissioner Tony Negus – Australian Federal Police' (Press Conference at Sydney, 11 October 2013) <www.minister.immi.gov.au/media/sm/2013/sm208747.htm>.

¹⁷⁸ Scott Morrison and Angus Campbell, 'Operation Sovereign Borders: Joint Press Conference with Scott Morrison – Minister for Immigration and Border Protection and Lieutenant General Angus Campbell – Commander of Operation Sovereign Borders' (Press Conference, Sydney, 23 September 2013) <www.minister.immi.gov.au/media/sm/2013/sm208387.htm>.

¹⁷⁹ *Operation Sovereign Borders Policy* (July 2013) The Liberal Party of Australia <http://lpaweb-static.s3.amazonaws.com/Policies/OperationSovereignBorders_Policy.pdf>.

Due to the Australian Government's policy of not discussing 'on-water activities', there is limited information publicly available about the nature and frequency of Australia's interceptions at sea.¹⁸⁰ Prime Minister Tony Abbott has justified the Australian Government's silence by stating that efforts to deter boats are akin to a 'war' against people smugglers, 'and if we were at war, we wouldn't be giving out information that is of use to the enemy'.¹⁸¹

What is known, however, is that asylum seekers attempting to reach Australia by boat from Indonesia have been intercepted, loaded on to single-use lifeboats and towed back to just outside Indonesian waters.¹⁸² On multiple occasions, Australia has also towed boats back within Indonesian waters without the permission of the Indonesian Government.¹⁸³

As well as returns to Indonesia, the Australian Government has been clear in its intention to return Sri Lankans arriving by boat. The Minister for Immigration and Border Protection, Scott Morrison, has said that Australia will continue 'to ensure that people who may seek to come from Sri Lanka would be intercepted outside of our sea border and returned directly and all of them'.¹⁸⁴

Sri Lankan asylum seekers returned to the Sri Lankan navy

In late June 2014, a boat from Sri Lanka carrying 41 asylum seekers (37 Sinhalese and 4 Tamils) was intercepted by an Australian 'Operation Sovereign Borders Vessel'. On 6 July 2014, all 41 asylum seekers were handed over to the Sri Lankan Navy.¹⁸⁵ There was no formal or thorough assessment of their protection claims. Rather, they were screened at sea. It is unclear exactly what this screening

¹⁸⁰ See eg comments by the Australian Government in George Roberts, *Indonesia says second asylum seeker boat forced back by Australian Navy* (4 February 2014) ABC News <www.abc.net.au/news/2014-01-07/indonesia-says-second-boat-forced-back/5189332>.

¹⁸¹ *Prime Minister Tony Abbott likens campaign against people smugglers to 'war'* (4 February 2014) ABC News <www.abc.net.au/news/2014-01-10/abbott-likens-campaign-against-people-smugglers-to-war/5193546>.

¹⁸² Paul Farrell and Nick Evershed, 'Operation Sovereign Borders timeline: every encounter', *The Guardian Australia* (online), 2 July 2014 <www.theguardian.com/news/datablog/interactive/2014/jul/01/operation-sovereign-borders-timeline>.

¹⁸³ Kate Lamb and Oliver Laughland, 'Australian navy went into Indonesian waters 'too easily' and 'often'', *The Guardian Australia* (online), 14 February 2014 <www.theguardian.com/world/2014/feb/14/australian-navy-incursion-into-indonesian-waters-intentional>.

¹⁸⁴ Scott Morrison and Mark Binskin, 'Operation Sovereign Borders update: Joint Press Conference with Scott Morrison – Minister for Immigration and Border Protection and Air Marshal Mark Binskin – Vice-Chief of the Defence Force' (Press Conference, Sydney, 30 September 2013) <www.minister.immi.gov.au/media/sm/2013/sm208372.htm>.

¹⁸⁵ Daniel Hurst, 'Australia returns asylum seekers to Sri Lanka in sea transfer', *The Guardian Australia* (online) 7 July 2014 <www.theguardian.com/world/2014/jul/07/australia-asylum-seekers-sri-lanka-sea-transfer>.

process involved, but there are reports it involved as few as four questions asked over Skype without the asylum seekers being provided with any access to legal assistance.¹⁸⁶

Weakening protections and processes under the Migration Act

In September 2014, the Australian Government introduced extensive amendments to Australia's migration and maritime powers laws which would have the effect of limiting or removing certain rights and protections presently afforded to asylum seekers under domestic and international law.¹⁸⁷ For example, the proposed amendments introduce a 'fast track assessment process' for protection visa applications under which applicants would only have recourse to limited merits review for an adverse decision or, in some instances, no recourse to any merits review. The new laws also declare that the Australian Government's power to deport an unlawful non-citizen is available independent of assessments of Australia's *non-refoulement* obligations under the Refugees Convention. Further, the proposed amendments seek to replace references to the Refugees Convention in domestic legislation with a new, independent and self-contained statutory framework which articulates the Australian Government's own interpretation of its protection obligations under the Refugees Convention.¹⁸⁸

Inadequate monitoring of immigration returnees

“ Despite the risk of harm on return to Sri Lanka, Australia does not take any proactive steps to monitor the safety of the over 1,100 people who have been returned ”

Despite the risk of harm on return to Sri Lanka, Australia does not take any proactive steps to monitor the safety of the over 1,100 people who have been returned since October 2012.¹⁸⁹

Most of these returns have been carried out under the manifestly inadequate 'enhanced screening' procedure that fails to properly determine whether Sri Lankans have genuine protection claims (section 9.4).

The Australian High Commission in Colombo, Sri Lanka has investigated four complaints of harm by returned Sri Lankans. Although the Australian Government insists that the claims were not substantiated, documents show that Australian officials have turned a blind eye where torture may

¹⁸⁶ Jane Wardell, *All at sea: Is Australia's fast-tracked asylum screening policy fair?* (8 July 2014) Reuters <www.reuters.com/article/2014/07/08/us-sri-lanka-australia-screening-idUSKBN0FD0TK20140708>.

¹⁸⁷ See Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), introduced into the Senate of the Parliament of Australia on 25 September 2014.

¹⁸⁸ The proposed statutory framework redefines key terms such as 'refugee' and 'well-founded fear of persecution': see Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) sch 5 item 7.

¹⁸⁹ Australian High Commission, Sri Lanka, 'Remaining Sri Lankan boat arrivals returned to Colombo' (Media Release, 22 November 2013) <www.srilanka.embassy.gov.au/clmb/22112013REMAININGSRILANKANBOATARRIVALSRURNEDTOCOLOMBO.html>.

have occurred. In these circumstances, Australia is in violation of its responsibility to prevent and respond to the commission of torture and also the obligation of non-refoulement.

Australian officials decline to speak with man ‘severely tortured’ by Sri Lankan police

In 2013, a Sri Lankan man who had been forcibly returned to Sri Lanka by Australia complained that he had been severely tortured by Sri Lankan Police. The AFP officer in Colombo raised the allegations with the Sri Lankan CID, who denied the allegations, and who invited the AFP officer to visit the individual in custody. Disturbingly, the cable cites the AFP as saying: ‘In the interests of keeping our distance from the Sri Lankan investigations, we do not intend to take up the offer to meet with him’.¹⁹⁰

The failure to independently meet with a returnee who had claimed he was severely tortured by Sri Lankan Police and the deference by Australian agencies to Sri Lankan authorities seriously undermines confidence in Australia’s investigations of mistreatment claims. It is on investigations such as these that Australia bases its assertion that no claims of mistreatment have been substantiated.

This incident reveals Australia’s wilful blindness to the ongoing real risk of ill-treatment or harm of returnees at the hands of Australia’s Sri Lankan partners.

¹⁹⁰ Department of Foreign Affairs and Trade, ‘Sri Lanka: Claims of mistreatment (as at 9/5/2010)’, obtained by the Human Rights Law Centre under the *Freedom of Information Act 1982* (Cth), copy on file with the author. This was reported by Oliver Laughland, ‘Australian police declined to interview ‘tortured’ Sri Lankan asylum seeker’, *The Guardian Australia* (online), 11 March 2014 <www.theguardian.com/world/2014/mar/11/repatriated-sri-lankan-asylum-seekers-torture-claims-ignored-by-police>.

Proposed Recommendations:

That Australia:

- retain existing complementary protection legislation and abandon proposed reforms which would either repeal it or increase the threshold for complementary protection to 'more likely than not';
- cease using 'enhanced screening' and ensure all asylum seekers have their protection claims properly and thoroughly assessed under Australia's standard refugee determination process;
- cease the interception and return of asylum seekers to the countries from which they are fleeing or to transit countries which do not offer legal protection to refugees; and
- ensure the adequate monitoring of the well-being of the asylum seekers it forcibly returns to refugee producing countries.

10. Criminalisation of poverty

Articles 2 and 16

10.1. Overview

From 31 July 2006 to 16 August 2006, the UN Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, conducted a visit to Australia to investigate the implementation of the right to adequate housing. In his 2007 report to the UN, the Special Rapporteur concluded that Australia had failed to implement the human right to adequate housing and was in the midst of a 'serious national housing crisis'.¹⁹¹ Since then, the number of people in Australia experiencing homelessness has continued to grow and in 2011 it was estimated that there were 105,237 homeless Australians (including 26,238 young people), up from 89,728 in 2006.¹⁹²

The Special Rapporteur's report noted his concerns about the criminalisation of homelessness and poverty. He found every urban centre in Australia to have laws that 'authorize policing authorities to continuously displace people who occupy and live in public spaces'.¹⁹³ The Special Rapporteur noted:

¹⁹¹ Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia (31 July to 15 August 2006)* (11 May 2007), A/HRC/4/11/Add.2, paragraph 52.

¹⁹² Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness, 2011* (ABS Catalogue No 2049.0, 12 November 2012) 5.
<[www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/EB59F237159F7102CA257AB100170B61/\\$File/20490_2011.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/EB59F237159F7102CA257AB100170B61/$File/20490_2011.pdf)>.

¹⁹³ Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living – Addendum: Mission to Australia (31 July to 15 August 2006)*, UN Doc A/HRC/4/18/Add.2 (11 May 2007) [47].

'Enforcement of public space laws criminalizes the homeless and may violate civil rights, including the right to be free from inhuman or degrading treatment or punishment'.¹⁹⁴ He recommended 'laws that criminalize poverty and homelessness and those currently disproportionately impacting upon homeless people such as begging laws, public drinking laws and public space laws, should be revised and amended to ensure that fundamental human rights are protected'.¹⁹⁵

10.2. Action on homelessness

The Australian Government made notable commitments to addressing homelessness in the years following the Special Rapporteur's report. In 2008, the Australian Government released its White Paper on Homelessness, *The Road Home: A National Approach to Reducing Homelessness (White Paper)*, which contained commendable targets and goals, including halving overall homelessness in Australia by 2020. To work towards these commitments, the National Affordable Housing Agreement (**NAHA**) and the National Partnership Agreement on Homelessness (**NPAH**) provide the funding frameworks for the Australian Government and state and territory governments to reduce homelessness and \$6.2 billion of Commonwealth funding over five years was allocated under NAHA. In 2009, the bi-partisan House of Representatives Standing Committee on Family, Community, Housing and Youth was established to conduct an inquiry into homelessness legislation and its report, *Housing the Homeless (Standing Committee Report)*, recommended the enactment of a national Homelessness Act which contains a right to adequate housing.¹⁹⁶ The Prime Minister's Council on Homelessness was also established in 2009 to provide an independent overview of the implementation of White Paper goals and to advise the government on the progress, risks and emerging issues in homelessness.

In 2013, however, the Prime Minister's Council on Homelessness was abolished. Funding of \$115 million was allocated under NPAH, but this was a reduction of \$44 million from the previous year and there is not yet funding certainty beyond 2014-15.¹⁹⁷ Amendments have been proposed to the social security system, whereby people under 30 years of age will be ineligible for payments in their first six months of unemployment, and such changes present an increased risk of homelessness for young people.¹⁹⁸

¹⁹⁴ Ibid.

¹⁹⁵ Ibid [132].

¹⁹⁶ House of Representatives Standing Committee on Family, Community, Housing and Youth, Parliament of Australia, *Housing the Homeless: Report on the inquiry into homelessness legislation* (2009) [4.52].

¹⁹⁷ *Budget 2014-15: Federal Financial Relations Budget Paper No. 3 2014-15* (13 May 2014) Commonwealth of Australia, 58 <www.budget.gov.au/2014-15/content/bp3/download/consolidated_BP3.pdf>.

¹⁹⁸ *Budget 2014-15: Overview* (13 May 2014) Commonwealth of Australia, 10 <www.budget.gov.au/2014-15/content/overview/download/Budget_Overview.pdf>.

10.3. Criminalisation of homelessness and poverty

Despite some commendable policy responses to homelessness since 2006, the Australian Government has not acted on the Special Rapporteur's recommendation to revise or amend laws that criminalise homelessness and poverty.

In 2009, the Standing Committee Report recommended that, as part of a new national legislative framework to address homelessness, the Australian Government, in cooperation with state and territory governments, conduct an audit of laws and policies that impact disproportionately on people experiencing homelessness.¹⁹⁹ To date, the Australian Government has not enacted a comprehensive legal framework or conducted an accompanying audit of these laws.

“ There continue to be laws in all Australian states and territories that have the effect of criminalising homelessness and poverty ”

There continue to be laws in all Australian states and territories that have the effect of criminalising homelessness and poverty.

These laws vary from laws that expressly prohibit the presence or activities of people

experiencing homelessness and poverty to neutral laws that disproportionately affect people experiencing homelessness because, without access to safe and secure accommodation, they are forced to live their private lives in public places.

Examples of legislative provisions that have a punitive impact on clients experiencing homelessness and poverty are:

- begging offences;²⁰⁰
- public intoxication offences²⁰¹
- move on powers;²⁰² and

¹⁹⁹ House of Representatives Standing Committee on Family, Community, Housing and Youth, above n 196, 81.

²⁰⁰ *Summary Offences Act 1966* (Vic) s 49A; *Summary Offences Act 2005* (Qld) s 8; *Summary Offences Act 1953* (SA) s 12(1); *Police Offences Act 1935* (Tas) s 8(1)(a); *Summary Offences Act 1923* (NT) s 56(1)(c). In New South Wales, begging is an offence in relation to major events and many prominent public spaces: *Major Events Act 2009* (NSW) ss 41(1)(f) and (g); *Centennial Park and Moore Park Trust Regulations 2009* (NSW) reg 13(1)(a); *Parramatta Park Trust Regulation 2012* (NSW) reg 10(1)(a); *Royal Botanic Gardens and Domain Trust Regulation 2013* (NSW) reg 55; *Sydney Harbour Foreshore Authority Regulation 2011* (NSW) regs 4(1)(f) and (g); *Sydney Olympic Park Authority Regulation 2012* (NSW) regs 4(k) and (l).

²⁰¹ *Summary Offences Act 1966* (Vic) ss 13 and 14; *Summary Offences Act 2005* (Qld) s 10; *Summary Offences Act 1923* (NT) s 45D; *Liquor Act 2014* (NT).

²⁰² *Summary Offences Act 1966* (Vic) s 6; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197; *Police Powers and Responsibilities Act 2000* (Qld) ss 44-48; *Summary Offences Act 1953* (SA) s 18; *Police Offences Act 1935* (Tas) s 15B; *Criminal Investigation Act 2006* (WA) s 27; *Criminal Code* (WA) s 64; *Crime Prevention Powers Act 1998* (ACT) s 4; *Summary Offences Act 1923* (NT) ss 47A-47B. Further, in 2013 the Parliament of Victoria passed the *Summary Offences and Sentencing Amendment Act 2013* (Vic), which gave police and other authorised officers expanded power to direct people to move on and to arrest people if they contravene a move on order, and introduced 'exclusion orders' which could see people excluded from public places for up to 12 months.

- Prohibited Behaviour Orders.²⁰³

Fines and charges for public space offences exacerbate the hardship of homelessness.

Homelessness and accompanying vulnerabilities make it hard to navigate the complicated legal processes required to address the fines and charges, and the financial penalties impact people with low incomes more harshly than the rest of the community. Consequently, homeless people are over-represented in the Australian prison system.²⁰⁴

Move on powers and public drunkenness/begging (Western Australia)²⁰⁵

In Western Australia, police have the power to direct people to move on under section 27 of the *Criminal Investigation Act 2006 (WA)* if an officer reasonably suspects that a person is doing or about to do an act that involves the use of violence against a person, is committing any other breach of the peace, is hindering or preventing lawful activity, or intends to or has just committed an offence.

John is about 60 years old, alcohol dependent and on unemployment benefits. On one day, he received more than five move on notices in a 24 hour period: for street drinking at 11.57am; for begging (which is not an offence in Western Australia) at 11.25am; for obstructing police at 1.20pm; for begging at 7.30pm; and for street drinking at 11.55pm. In all cases John moved on.

Begging (Victoria)²⁰⁶

Begging is an offence in Victoria under section 49A of the *Summary Offences Act 1966 (Vic)*, which sets out a maximum penalty of 12 months imprisonment. From February to March 2014, Victoria Police conducted a 'crack down' on begging in Melbourne's central business district.

Harry, a 54 year-old man with a history of homelessness, depression and drug dependency, was caught up in the crackdown. Harry was observed by police sitting on the street with a coffee cup with a sign that said 'can you spare some loose change for a room and some food please thank you'. When approached by police, Harry said that he begs so that he can afford food and accommodation;

²⁰³ *Prohibited Behaviour Orders Act 2010 (WA)*. The legislation provides for injunctive orders for persons who have accumulated at least two relevant convictions for anti-social offences in a three-year period and may prohibit the person from entering specified areas and/or from being in specified areas while under the influence of alcohol. These orders are disproportionately impacting on Aboriginal people, especially those who are homeless, socio-economically disadvantaged, and suffering from physical and mental health problems. At 26 July 2013, 52% of the applications made by the Western Australia Police were made against Aboriginal people: Aboriginal Legal Service of Western Australia, *Statutory Review of the Prohibited Behaviour Orders Act 2010*, Submission to the Department of the Attorney General (2010).

²⁰⁴ Australian Institute of Health and Welfare, above n 56, 26-28.

²⁰⁵ Case study provided by StreetLaw Centre, Western Australia.

²⁰⁶ Case study provided by Justice Connect Homeless Law, Victoria.

he is unemployed and is receiving social security payments of approximately \$400 per fortnight. When he was arrested, Harry had been begging for 10 minutes. He had 30 cents in the cup. He was subsequently charged with begging.

Public drunkenness and mandatory alcohol treatment (Northern Territory)²⁰⁷

In the Northern Territory, the *Alcohol Mandatory Treatment Act 2012* (NT) states that a person who is 'misusing alcohol' may be ordered to undergo mandatory alcohol treatment, either in the community or in a residential treatment facility. The Act gives the Alcohol Mandatory Treatment Tribunal wide powers, including the power to authorise a person's detention at a treatment centre, require a person to participate in treatment, and ban a person from going to certain places or being with certain people.²⁰⁸ Importantly, an assessment for mandatory alcohol treatment is triggered by a person being apprehended for intoxication three times in two months.²⁰⁹ The Act also makes it an offence to leave a treatment centre and imposes a penalty of a maximum of three months' imprisonment.²¹⁰

Michael, a homeless Aboriginal man who has lived in Darwin for approximately 10 years, was arrested by police and ordered by the Alcohol Mandatory Treatment Tribunal to be detained at a mandatory residential treatment facility. It was said that he had lost capacity to make appropriate decisions about his alcohol use and personal welfare, and that his alcohol misuse was a risk to his health, safety and welfare. Michael was not charged with any offence and was not an involuntary patient under any mental health legislation. He did not understand why he was being detained like a criminal, or why he was banned from consuming alcohol.

Prohibited Behaviour Orders (Western Australia)²¹¹

W is a homeless, alcoholic Aboriginal woman with serious health issues and a history of domestic violence. Her prior offending comprises low level public order offences (22 convictions for breaching move-on orders, 45 convictions for breaching bail, 28 convictions for disorderly conduct, 4 convictions for trespass and 4 convictions for street drinking). An application was made for a prohibitive behaviour order against W seeking to prohibit her from entering the Perth CBD and Northbridge. If the order were to be granted it would prevent W from accessing homelessness and other support services and allow the publication of her personal details on a 'name and shame' website.

²⁰⁷ Case study provided by Darwin Community Legal Centre, Northern Territory.

²⁰⁸ *Alcohol Mandatory Treatment Act 2012* (NT) ss 12(a), 11(1)(a), 12(c), 11(2)(b), 11(2)(d).

²⁰⁹ *Police Administration Act* (NT) s 128A.

²¹⁰ *Alcohol Mandatory Treatment Act 2012* (NT) s 72.

²¹¹ Case studies provided by the Aboriginal Legal Service of Western Australia (Inc).

Proposed recommendations:

That the Australian Government engage with state and local governments to:

- conduct an audit of laws and policies that impact disproportionately on people experiencing homelessness;
- amend laws and policies at state and local levels that have a disproportionate or discriminatory impact on people experiencing homelessness;
- ensure close cooperation between all relevant stakeholders including homelessness, housing, health, law enforcement and justice professionals at all levels to intensify efforts to find solutions for homelessness in accordance with human rights standards; and
- offer incentives for implementation of non-enforcement based approaches to homelessness, including by making state and local governments' approaches to homelessness a consideration in allocation of federal funding.

11. Trafficking

Articles 2 and 16

11.1. Overview

Australia is a destination country for men, women and children trafficked for exploitation and slavery. While the majority of identified victims of trafficking are women from Asia (predominantly Thailand, the Republic of Korea and Malaysia) who have been exploited in the sex industry, an increasing number of men and women have been identified as having been exploited in other industries.²¹² Nationally, the AFP have undertaken approximately 400 assessments and investigations into allegations of human trafficking and slavery since January 2004 (when the Australian Government first implemented its strategy to respond to trafficking).²¹³ Seventeen individuals have been convicted of trafficking or slavery-related offences.²¹⁴

In its last Concluding Observations on Australia, the Committee recommended that Australia 'take effective measures to prosecute and punish trafficking in persons and provide recovery services to victims on a needs basis, unrelated to whether they collaborate in investigations'.²¹⁵ Since then, the

²¹² Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government Response – 1 July 2012 – 30 June 2013* (2014) Commonwealth of Australia, 4 <www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/ReportoftheInterdepartmentalCommitteeonHumanTraffickingandSlaveryJuly2012toJune2013.pdf>.

²¹³ *Ibid* 17.

²¹⁴ *Ibid* 20.

²¹⁵ Committee Against Torture, *Consideration of reports submitted by States Parties under article 19 of the Convention – Concluding observations of the Committee against Torture: Australia*, 40th sess, 828th mtg, UN Doc CAT/C/AUS/CO/3, 22 May 2008 [32].

Australian Government has undertaken an extensive review and expansion of laws proscribing human trafficking and related offences. Welcome amendments made to the *Criminal Code Act 1995* (Cth) in 2013 expanded the definition of exploitation; introduced new offences of forced labour, forced marriage, harbouring a victim, and organ trafficking; and extended the application of existing sexual servitude and deceptive recruiting offences so that they also apply to non-sexual servitude and all forms of deceptive recruiting.

11.2. Victims' compensation

Australia currently lacks a federal victims' compensation scheme. State-based schemes exist, but these eight separate schemes have different time limits, categories of harm considered and levels of award, leading to inconsistencies across jurisdictions and differences in outcomes. These differences and inconsistencies are particularly problematic for victims of human trafficking and slavery. Such

“ Such victims have experienced grave personal harm, but may not satisfy the requirements for state victims' compensation schemes ”

victims have experienced grave personal harm, but may not satisfy the requirements for state victims' compensation schemes. As human trafficking and slavery are

Commonwealth crimes, there is a need for a comprehensive victims' compensation scheme at federal level.

11.3. Trafficking visa framework and support for survivors

Australia's visa scheme for victims of human trafficking and slavery contains three different visas: a Bridging F visa, Criminal Justice Stay visa and a Witness Protection (Trafficking) (Permanent) visa. The Bridging F visa (Class WF) is a temporary visa available to any person who has been identified by the AFP as a suspected victim of human trafficking. The visa is linked to an Australian Government-funded victim support program. Beyond the period of this initial visa, the availability of further visas is linked to the victim being willing and able to participate in the criminal justice process, as is the support provided under the government-funded support program. Some victims of human trafficking and slavery are fearful of assisting police owing to threats made against them and their families by their traffickers or because of possible retribution. Some are unable to assist because they have experienced trauma that is so great they cannot articulate their experiences to the standard of proof required in a criminal investigation. These victims of human trafficking and slavery will not be entitled to further visas or government-funded support unless they are able to engage in the criminal justice process.

A Witness Protection (Trafficking) (Permanent) visa is a permanent visa that may be offered to a trafficked person if the Attorney-General certifies they have contributed to and cooperated closely with a trafficking prosecution or investigation and the Minister for Immigration and Border Protection is satisfied they would be in danger if returned home. Criminal investigations and prosecutions are complex, uncertain and protracted, meaning victims of human trafficking and slavery experience uncertainty about their future in Australia. Also, victims are unable to be joined in Australia by their families until a permanent visa has been granted.

Proposed recommendations:

That the Australian Government establish a federal compensation scheme for victims of human trafficking and slavery who have been victims of criminal offences set out in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth).

That the Australian Government consider the grant of a permanent visa to any victim of human trafficking and slavery engaged in the criminal justice process within six months of being identified as a victim of human trafficking and slavery.

That the Australian Government extend the government funded Support for Trafficked People Program to accommodate victims of human trafficking and slavery who are unable or unwilling to participate in law enforcement processes.

12. Violence against women

Articles 2 and 16

12.1. Overview

Violence against women in Australia occurs in epidemic proportions. Conservative estimates are that approximately one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime.²¹⁶ Domestic and family violence puts more women aged 15-44 years at risk of ill health and premature death than any other risk factor.²¹⁷ Aboriginal women are 31 times more likely to be hospitalised as a result of family violence-related assault than non-Aboriginal women²¹⁸ and women with disability are at a higher risk of being assaulted, and experience sexual assault at twice the rate of women who do not have disability.²¹⁹ Culturally and linguistically diverse women, young women, older women, LGBTIQ-identifying people and women in prison also experience high levels of violence.

²¹⁶ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children, 2009–2021* (2009) 9 <www.dss.gov.au/sites/default/files/documents/05_2012/the_plan.pdf>.

²¹⁷ VicHealth and Victorian Department of Human Services, *The health costs of violence: Measuring the burden of disease caused by intimate partner violence – A summary of findings* (2004) 10 <www.vichealth.vic.gov.au/~media/ResourceCentre/PublicationsandResources/PVAW/IPV%20BOD%20web%20version.ashx>.

²¹⁸ Steering Committee for the Review of Government Service Provision, Australian Government Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (2011) <www.pc.gov.au/__data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf>.

²¹⁹ Lucy Healey et al, *Building the Evidence: A report on the status of policy and practice in responding to violence against women with disabilities in Victoria* (2008) Women's Health Victoria and Victorian Women with Disabilities Network <www.wdv.org.au/documents/BTE%20Final%20Report.pdf>.

“ Domestic and family violence puts more women aged 15-44 years at risk of ill health and premature death than any other risk factor ”

Against this background, it is a matter of concern that the Australian Government's Report begins its discussion of violence against women with the claim that:

'domestic violence does not fall within the scope of CAT under articles 2 and 16, as it is not conduct that is committed by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity'.²²⁰

International law clearly establishes that a State can be found responsible for the conduct of a private actor where it has not acted with due diligence to prevent or respond to the violation.²²¹ Acting with due diligence requires that governments take reasonable and effective measures to prevent, investigate, punish and redress domestic violence.²²²

The Committee has emphasised that:²²³

gender is a key factor, which intersects with other identifying characteristics or status of the person such a race, nationality, religion, sexual orientation, age, immigrant status, etc. to determine the ways that women are subject to or at risk of torture or ill-treatment and the consequences thereof.

The Australian Government's interpretation of international law is outdated, gendered and inconsistent with the Committee's jurisprudence and that of authoritative human rights bodies.²²⁴

²²⁰ Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedures – Fourth and fifth periodic reports of States parties due in 2012: Australia*, UN Doc CAT/C/AUS/4-5 (9 January 2014) 15.

²²¹ See eg *Velasquez Rodriguez v Honduras* (Inter-American Court of Human Rights, Series C No 4, 29 July 1988); Committee Against Torture, *Decision: Communication No 161/2000*, 29th sess, UN Doc CAT/C/29/D/161/2000 (2 December 2002) ('*Dzemajl et al v Yugoslavia*'); Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence Against Women*, 11th sess, UN Doc No A/47/38 (1993) 1.

²²² Yakin Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women: Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc E/CN.4/2006/61 (20 January 2006).

²²³ Committee Against Torture, *Convention against Torture and other cruel, inhuman or degrading treatment or punishment: General Comment No 2 – Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (24 January 2008, [22]).

²²⁴ Committee Against Torture, *General Comment No 2*, above n 223; Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/7/3 (15 January 2008) [68]; see Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge University Press, 2011) 198-261. Katharine Fortin, 'Rape as torture: An evaluation of the Committee against Torture's attitude to sexual violence', *Utrecht Law Review*, 2008, .4(3), 145.

12.2. National Plan to Reduce Violence Against Women and their Children

The Australian Government's primary response to violence against women is set out in the *National Plan to Reduce Violence against Women and their Children 2010–2022 (National Plan)* and was released in February 2011.²²⁵ The National Plan brings together the efforts of the Australian Government as well as state and territory governments to make a real and sustained reduction in the levels of violence against women. The National Plan is being implemented through a series of four, three-year action plans (**Action Plans**), the first of which was launched in 2012,²²⁶ and the second in 2014.²²⁷

The National Plan and Action Plans represent important developments in providing a nationally consistent and strategic approach to violence against women in Australia. Some of the key achievements under the National Plan and the First Action Plan include:

- bipartisan support for recognition of the gendered nature of family violence and sexual assault;
- providing national impetus for states and territories to each develop their jurisdictional implementation plans linked to the National Plan;
- the establishment and ongoing development of the 1800 RESPECT counselling line;
- the establishment of the national social marketing campaign, *The Line*, aimed at young people;
- the establishment of Australia's National Research Organisation for Women's Safety tasked to develop a national research agenda to improve policy and service delivery;
- the establishment of the Foundation to Prevent Violence against Women and their Children – an independent, not for profit organisation, aimed at engaging the whole community in action to prevent violence against women and their children;
- commencement of work on the National Data Collection and Reporting Framework; and
- release of the Evaluation Plan.

However, despite these positive developments, concerns from civil society continue to include the need to ensure that the National Plan is sufficiently and sustainably resourced to ensure its timely implementation and that it is informed by active participation by civil society and independent

²²⁵ Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children 2010-2022* (2011) <www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf>.

²²⁶ Council of Australian Governments, *National Implementation Plan for the First Action Plan 2010–2013: Building a Strong Foundation* (2012) <www.dss.gov.au/sites/default/files/documents/07_2014/first_action_plan_1.pdf>.

²²⁷ Department of Social Services, *Second Action Plan 2013–2016: Moving Ahead – Of the National Plan to Reduce Violence against Women and their Children 2010-2022* (2014) Commonwealth of Australia <www.dss.gov.au/sites/default/files/documents/06_2014/sap_updated_26june.pdf>.

monitoring and evaluation.²²⁸ Additionally, progress on the development and implementation of some state and territory plans has been slow.²²⁹

Implementation

NGOs and civil society are concerned about delays of implementation of the National Plan. For example, in the First Action Plan the Australian Government committed to considering the recommendations made by the Australian Law Reform Commission (**ALRC**) and New South Wales Law Reform Commission in their 2010 joint report, *Family Violence – A National Legal Response*.²³⁰ While the Australian Government has now formally responded to the report, the response was limited and shifted responsibility for much of the implementation to the states/territories and other bodies.

The ALRC was also requested to undertake a follow-on inquiry into the intersection of family violence and Commonwealth laws. The Final Report, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, was released in 2012.²³¹ Only a small number of the recommendations from this second inquiry have been implemented.

Sufficient and sustainable funding and resourcing

Implementation of the National Plan and Action Plans is reliant on sufficient resourcing and sustainable funding of all initiatives.

Improvements in community awareness about domestic and family violence and sexual assault, one of the underlying objectives of the National Plan, will likely lead to an increase in reporting and therefore an increased demand on these services. It is therefore important that culturally safe and specialist women's services operating at the front line of response to violence against women such as women's health, counselling, housing and legal services as well as Aboriginal services are adequately funded. Accordingly, funding cuts to specialist women's services within Australia are concerning (see, for example, section 12.4).

Active participation and engagement

Active participation by NGOs and civil society in the development and implementation of the National Plan is essential for its success. One of the key NGO and civil society concerns relating to the

²²⁸ See eg *Joint NGO Report on Australia's Human Rights Record – An update on Australia's progress towards implementing Universal Periodic Review recommendations for the United Nations Human Rights Council* (2014) National Human Rights Network of the National Association of Community Legal Centres, 63-64 <www.naclc.org.au/resources/Joint_NGO_Report_on_Australia_s_Human_Rights_Record_Final.pdf>; *Australia: Non-Government Organisations Follow-up Report to the United Nations Committee on the Elimination of Violence Against Women* (2012) <www2.ohchr.org/english/bodies/cedaw/docs/ngos/JointNGOsSubmission_AustraliaFollowUp.pdf>.

²²⁹ See eg *Joint NGO Report on Australia's Human Rights Record*, above n 228, 64.

²³⁰ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010).

²³¹ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2012).

development and implementation of the National Plan and its mechanisms is the lack of consultation and engagement with a broad cross-section of civil society, and particularly with Aboriginal communities, women from culturally- and linguistically-diverse backgrounds and women with disability. For example, there were few, if any, opportunities for input from civil society in the development of the First Action Plan. Although consultation and engagement improved in the development of the Second Action Plan, the consultative process needs to be more inclusive and transparent. In response to the criticism about inadequate participatory and consultative mechanisms and lack of specific strategies particularly for Aboriginal communities, women from culturally and linguistically diverse backgrounds and women with disability, the Australian Government has identified these as focus areas in the Second Action Plan. Meaningful consultation and engagement with young women, mature age women, women in prison, women from regional, rural and remote areas and LGBTIQ-identifying people is also required.

Proposed recommendations:

That the state, territory and Australian Governments adequately fund the implementation of the *National Plan to Reduce Violence against Women and their Children (2010-2022)* and relevant state and territory plans.

That the state, territory and Australian Governments review the effectiveness of existing consultative mechanisms and develop appropriate opportunities for ongoing participation by civil society in the development, implementation, monitoring and evaluation of the *National Plan to Reduce Violence Against Women and Their Children 2010–2022* and associated Action Plans.

That the Australian Government reconsider and implement the recommendations for reform made by the ALRC and New South Wales Law Reform Commission in *Family Violence – A National Legal Response* (2010) and the ALRC in *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (2012).

12.3. Systemic review of family violence deaths

Family violence homicides entail a breach of obligations under CAT if the Australian Government has failed to exercise due diligence to prevent, investigate, prosecute and punish the person responsible.²³² The Government's due diligence should include effective policy formulation based on an understanding of the demographics, patterns and risk factors of domestic/family deaths; and the translation of those policies into practical initiatives.

²³² Committee Against Torture, *Convention against Torture and other cruel, inhuman or degrading treatment or punishment: General Comment No 2 – Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (24 January 2008).

“ Domestic violence killings often have predictive elements to them, and an examination of these homicides could help prevent future deaths ”

Domestic violence killings often have predictive elements to them, and an examination of these homicides could help prevent future deaths by analysing data, uncovering patterns, risk indicators

and systems failures, and then formulating risk assessment and action.²³³ In Australia, there remains a need for effective and ‘joined up’ domestic/family violence death reviews.

Proposed recommendations:

That all states and territories establish their own domestic/family violence death reviews that are statutorily based, securely funded, adhere to core best practice principles (which include independence, accountability, transparency and the active participation and central involvement of advocates for women and experts in violence against women), and collaborate with one another.

That the Australian Government establish an accessible national public database of death review recommendations, responses and practical outcomes.

12.4. Violence against Aboriginal women

Aboriginal and Torres Strait Islander women are 31 times more likely to be hospitalised as a result of injuries caused by assault,²³⁴ and each year around one in five is a victim of violence.²³⁵ One in five (or 20 per cent) of victims in intimate partner homicides are Aboriginal despite Aboriginal peoples comprising only 3 per cent of the total Australian population,²³⁶ and Aboriginal women are ten times more likely to die as a result of violent assault in comparison with non-Aboriginal women.²³⁷

There are varied and complex factors that contribute to high rates of violence against Aboriginal women, including institutional failures to adequately prevent and respond to family violence. For

²³³ Betty Taylor, *Dying to be Heard: Domestic and Family Violence Death Reviews – Discussion Paper* (2008) Domestic Violence Death Review Action Group, 11 <www.wdvcs.org.au/files/D315135830.pdf>.

²³⁴ Steering Committee for the Review of Government Service Provision, Australian Government Productivity Commission, above n 218, 4.

²³⁵ Ibid.

²³⁶ Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* (ABS Catalogue No 3238.0.55.001, 30 August 2013) <www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.

²³⁷ Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander people* (2006) <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442458606>.

example, there are ongoing failures by police to act on breaches of family violence orders.²³⁸ Family Violence Prevention Legal Services (FVPLS) reports that:²³⁹

police handling of family violence matters is often linked to their perceptions and/or responses to culture, including but not limited to Aboriginal and Torres Strait Islander culture, and does not reflect best practice for responding to family violence. FVPLS clients specifically continue to be subjected to prejudice based on their Aboriginality, which includes inappropriate and racist comments, not taking the matters seriously, and/or encouraging clients not to take action to protect their safety.

Police responses to violence against Aboriginal women²⁴⁰

Tiffany Paterson is a Darwin resident and a survivor of family violence. In 2008, her former partner, Victor Dunn, was imprisoned for assaulting her. Following his release, Ms Paterson began to receive threatening phone calls from Mr Dunn, in breach of his domestic violence order. Ms Paterson attended the local police station and the police filed a report, but failed to take any further steps to protect her. Amongst other omissions, the police failed to contact the alcohol rehabilitation facility where Mr Dunn was supposed to reside as a term of his release. Ms Paterson said 'I had a restraining order in place, the things that were mentioned on the restraining order, no text messages, no calling, all those things were happening and yet there was nothing that the police could do'. A few days later Mr Dunn brutally attacked Ms Paterson, slashing open her face. Ms Paterson later sued the Northern Territory Police and the matter was settled out of court.

There are also systemic barriers that prevent Aboriginal women from reporting violence, including, for example, fear that their children will be removed. Aboriginal children are vastly over-represented in the care and protection system. National statistics show they are nine times more likely to be on care and protection orders and ten times more likely to be in out of home care than non-Aboriginal children.²⁴¹ The *Bringing Them Home Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* identified the legacy of past policies of forced removal and cultural assimilation,

“ despite the disproportionately high rates of violence against Aboriginal women, there is a chronic lack of protection measures and cultural and gender-specific services ”

²³⁸ National Family Violence Prevention Legal Services, Submission No 51 to Senate Standing Committees on Finance and Public Administration, *Inquiry into Domestic Violence in Australia*, July 2014, 16; State Coroner of South Australia, *Finding of Inquest into death of Zahra Abrahamzadeh – Inquest number 23/2013 (0400/2010)* (7 July 2014) <http://officeforwomen.sa.gov.au/__data/assets/pdf_file/0018/17811/abrahamzadeh-zahra.pdf>.

²³⁹ Ibid.

²⁴⁰ Damian Carrick, *Can Police be Held Responsible for Not Protecting Women?* (21 March 2104) Australian Broadcasting Corporation <www.abc.net.au/radionational/programs/lawreport/5334654>.

²⁴¹ Australian Institute of Health and Welfare, 'Child protection Australia 2010–11' (Child Welfare Series No 53, 2012) viii <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737421014>.

including intergenerational effects of forced removals, as underlying causes of the current situation.²⁴²

Further, as discussed in section 12.4, despite the disproportionately high rates of violence against Aboriginal women, there is a chronic lack of protection measures and cultural and gender-specific services, particularly in vital areas such as housing and legal assistance. Many of the services that do exist are under threat. For example under the Commonwealth Government's new Indigenous Advancement Strategy, 150 programs have been 'rationalised' into just five high level programs, with a proposed cut of \$534.4 million through the process. The FVPLS no longer receive direct funding and are being required to tender for funding alongside other service providers, which ignores the particular importance of FVPLS in assisting Aboriginal women experiencing family violence.

Child protection and systemic barriers to reporting violence²⁴³

Sally is an Aboriginal woman in her fifties and was diagnosed with anxiety, depression and bi-polar disorder. She has attempted suicide and, on occasion, has been hospitalised due to her mental health issues. Sally now lives with her husband in rural Victoria and has been happily married for 20 years. They own their own home and live on a big property. She has four children with her previous husband, who was violent to her. He went to jail for the abuse and still has limited contact with their children.

Sally explains her fear of telling anyone about the violence: 'Cause the other thing too you worry about if you went into a place, you got welfare on your back, you know what I mean, child support, child agencies would be on your back too, so you gotta worry about that as well. So mothers would probably be in fear about that as well. You see, that's why a lot of women won't go and get help because they hear about all what's happened to other women and they say welfare get involved and that and you're worried about your children getting taken off you'.

²⁴² Australian Human Rights Commission, *Bringing the home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families* (1997)
<https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>.

²⁴³ This case study was taken from Delanie Woodlock, Deborah Western and Philippa Bailey, *Voices Against Violence – Paper Six: Raising Our Voices – Hearing from Women with Disabilities* (2014) Women with Disabilities Victoria
<[www.wdv.org.au/documents/Voices%20Against%20Violence%20Paper%20Six%20Hearing%20from%20Women%20with%20Disabilities%20\(PDF%201.2MB\).pdf](http://www.wdv.org.au/documents/Voices%20Against%20Violence%20Paper%20Six%20Hearing%20from%20Women%20with%20Disabilities%20(PDF%201.2MB).pdf)>.

Andrea's story²⁴⁴

Andrea, an Aboriginal mother to 13 children, was brutally murdered by her estranged husband after separation.

After his release from prison, where he had been serving time for breaching restraining orders, Andrea's estranged partner made repeated threats against Andrea and her family. When Andrea notified police of the threats no effective action was taken to arrest him and revoke his parole.

Prior to her death Andrea had repeatedly engaged with state government agencies charged with assisting women to escape from family violence. Andrea requested safe refuge accommodation for her and her 7 youngest children but was unsuccessful in securing a refuge due to the number of her children in her care and the failure to offer her available refuges outside the Perth metropolitan area.

Andrea attempted to seek legal assistance from the local Aboriginal Legal Service but was informed that they could not assist her because the perpetrator had already sought their assistance and there would be a conflict of interest. When seeking a referral to a specialist FVPLS service, Andrea was unsuccessful because she did not live in the right region to be eligible for FVPLS services. Andrea had to flee her home with her children until she was stalked and murdered by her estranged husband on 12th January 2009.

Proposed recommendations:

That the Australian Government adopts special measures in consultation with Aboriginal peoples to address the significant ongoing disadvantage of Aboriginal women and children that perpetuates disproportionate rates of family violence.

That the Australian Government work with states and territories and Aboriginal peoples to ensure that family violence orders are accessible and that breaches are actioned in a culturally safe manner.

That Aboriginal families and communities are resourced, supported and empowered to provide for the safety of their children.

That the Australian Government adequately fund the national Aboriginal Family Violence Prevention Legal Service program.

²⁴⁴ Some details changed. For more information see:
<http://www.abc.net.au/4corners/stories/2012/07/30/3554420.htm>.

12.5. Violence against women with disabilities

The UN Committee on the Rights of Persons with Disabilities' most recent Concluding Observations on Australia's compliance with the CRPD expressed 'deep concern' at the high rates of violence perpetrated against women and girls with disabilities.²⁴⁵

Women and girls with disabilities make up approximately 20 per cent of the population of Australian women, equating to about two million people, or 9.5 per cent of the total population.²⁴⁶ Although women and girls with disabilities experience the same forms of violence as other women and girls, they also experience forms of violence that are particular to their situation of social disadvantage, cultural devaluation and increased dependency.²⁴⁷ Research shows that women and girls with disabilities are also at greater risk of violence, exploitation and abuse than men with disabilities or other women.²⁴⁸

People with Disability Australia reports that women and girls with disabilities were 37.3 per cent more likely than women and girls without disabilities to experience some form of intimate partner violence, with 19.7 per cent reporting a history of unwanted sex (compared to 8.2 per cent of women and girls without disabilities).²⁴⁹ A particularly high-risk group is that of Aboriginal women and girls, with disability affecting Aboriginal peoples at a rate that is 2.2 times higher than non-Aboriginal Australians.²⁵⁰ This problem is compounded by the fact that many Aboriginal peoples live in remote areas which lack services, information, awareness and education with respect to disability in general.

²⁴⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013)*, 10th sess, 118th mtg, UN Doc CRPD/C/AUS/CO/1 (21 October 2013).

²⁴⁶ Leanne Dowse et al, 'Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia' (Background paper to the National Symposium Violence Against Women and Girls with Disabilities, Sydney, 25 October 2013) 28 citing Elizabeth Broderick, 'Violence against women with a disability in rural Australia' (Speech delivered at the Side Event of the 56th Session of the CSW-Rural Women and Girls with Disabilities: Economic Empowerment and Political Participation, New York, 28 February 2012) and Disability Representative, Advocacy, Legal and Human Rights Organisations, *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (August 2012) <http://doc.afdo.org.au/CRPD_Civil_Society_Report_PDF>.

²⁴⁷ Dowse et al, above n 246, 25 citing L Chenoweth, 'Violence and women with disabilities: silence and paradox' in S Cook and J Bessant, *Women's Encounters: Australian Experiences* (Sage Publications, 1997) and K Swift, 'Women with disabilities and violence: Challenges and visions in the Asia Pacific Region' (Speech delivered at the CSW57 Side Event, New York, 8 March 2013).

²⁴⁸ Dowse et al, above n 246, 25 citing International Network of Women with Disabilities, 'Violence Against Women with Disabilities' (Barbara Faye Waxman Fiduccia Papers on Women and Girls with Disabilities, Centre for Women Policy Studies, 2011).

²⁴⁹ Dowse et al, above n 246, 28 citing *Key figures about women and girls with disability* (2013) People with Disability Australia <<http://www.stvp.org.au/stats.htm>>.

²⁵⁰ Australian Government Productivity Commission, *Disability Care and Support: Productivity Commission Inquiry Report* (Report No 54, 31 July 2011) 533.

The nature of the violence experienced by women and girls with disabilities covers a broad spectrum: physical, sexual or psychological violence, economic abuse, institutional violence, disability-based violence and others. Disability-based violence may manifest itself in a variety of ways, such as controlling access to medication, mobility and communication supports, coercive sterilisation, abortion, threats to withdraw care or to institutionalise, use of restrictive practices (see section 15.2), assault, sexual abuse, rape and abuse of enduring Power of Attorney. While the most common perpetrators of violence against women with disabilities are male intimate partners, women with disabilities are also at increased risk of experiencing violence from support staff, family members,

“ Women and girls with disabilities in Australia have been disadvantaged by certain institutional failings and policy or legislative deficits ”

service providers, peers and male co-residents.

Women and girls with disabilities in Australia have been disadvantaged by certain institutional failings and policy or legislative deficits. People frequently do not report the

violence they experience because institutions of justice are often inaccessible.²⁵¹ People with disabilities have not been able to engage properly with the justice system for many reasons, including the perception that they are unreliable, not credible or incapable of being witnesses.²⁵² For people with communication difficulties, reporting violence can be very difficult. This marginalisation particularly affects women and girls because it heightens the risk of them being viewed by perpetrators as ‘ideal victims’, unable to report violence or not believed when they do.²⁵³ There is a lack of research on how many reported cases of violence against people with disability are not prosecuted, and the reasons for not proceeding with prosecutions.

Similar access barriers exist with respect to violence response services in Australia. Access barriers may be physical, such as limiting a person’s ability to access buildings, use transport or find information) and/or programmatic, such as a response agency lacking a service philosophy that considers the needs of women and girls with disabilities when planning and developing its

²⁵¹ Dowse et al, above n 246, 27-28 citing S Ortoleva and H Lewis, ‘Forgotten Sisters – A Report on Violence Against Women with Disabilities: An Overview of its Nature, Scope, Causes and Consequences’ (Northeastern Public Law and Theory Faculty Research Paper Series No 104, 2012); see generally Georgina Dimopoulos and Elanor Fenge, *Voices Against Violence – Paper Three: A Review of the Legislative Protections Available to Women with Disabilities who have Experienced Violence in Victoria* (2013) Women with Disabilities Victoria <[www.wdv.org.au/documents/Voices%20Against%20Violence%20Paper%20Three%20A%20Review%20of%20the%20Legislative%20Protections%20Available%20to%20Women%20with%20Disabilities%20who%20have%20Experienced%20Violence%20in%20Victoria%20\(PDF%201.4MB\).pdf](http://www.wdv.org.au/documents/Voices%20Against%20Violence%20Paper%20Three%20A%20Review%20of%20the%20Legislative%20Protections%20Available%20to%20Women%20with%20Disabilities%20who%20have%20Experienced%20Violence%20in%20Victoria%20(PDF%201.4MB).pdf)>.

²⁵² Australian Human Rights Commission, *Equal before the law: Towards disability justice strategies* (2014) 5 www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, (22 May 2014) <<http://www.alrc.gov.au/publications/disability-dp81>>.

²⁵³ Dowse et al, above n 246, 28 citing E M Lund, ‘Violence against people with disabilities: New developments and important implications’ (2012) *Spotlight on Disability Newsletter*.

services).²⁵⁴ One manifestation of these barriers is the lack of safe and accessible accommodation options available to women and girls with disabilities who are unable to safely live in their home. In Victoria, for example, most crisis refuges and transitional accommodation facilities are not built according to universal design standards and are therefore not accessible to women or girls who use assistive equipment.²⁵⁵ Access barriers such as this make it difficult for these women and girls to escape violence.

Inadequate response from support services²⁵⁶

Louise is in her mid-40s and lives in Melbourne. Louise identifies as having cerebral palsy but states her main impairment is osteoarthritis, and she now uses a walking frame. Louise enjoys travelling and is active in the disability rights community. Louise experienced violence from her sister whom she lived with, who was also her care provider. Louise now lives in a private rental.

When attempting to escape her violent situation, Louise contacted several services including housing, disability and family violence agencies. She explained: 'I initially called a housing service but they couldn't help me 'cause at that time I was thinking of moving interstate, but you know, that's when I sort of started getting blocked, you know because it was like domestic violence ones couldn't help me 'cause of this and disability couldn't help me with that, so then I'd go to refuges and caravan parks and I was going through everything you know, hotels, motels anything, trying to find and nothing just seemed to be working. I mean I've got an exercise book just full of all these organisations and that that I approached.'

Proposed recommendations:

That women and girls with disabilities are provided opportunities to actively participate in and be represented on decision-making, advisory and planning bodies at all three levels of government (federal, state and local) and across all portfolio areas concerning violence against women and girls with disabilities

That the Australian Government together with state and territory governments consider strategies (including legislative action) to address the lack of accessible violence response services for women and girls with disabilities. These strategies should ensure that violence response services operate within a framework that requires them to consider the needs of persons with disabilities at each stage of the service delivery model.

²⁵⁴ Lucy Healey, *Voices Against Violence – Paper Two: Current Issues in Understanding and Responding to Violence against Women with Disabilities* (2013) Women with Disabilities Victoria, 44 <[www.wdv.org.au/documents/Voices%20Against%20Violence%20Paper%20Two%20Current%20Issues%20in%20Understanding%20and%20Responding%20to%20Violence%20Against%20Women%20with%20Disabilitites%20\(PDF%201.1MB\).pdf](http://www.wdv.org.au/documents/Voices%20Against%20Violence%20Paper%20Two%20Current%20Issues%20in%20Understanding%20and%20Responding%20to%20Violence%20Against%20Women%20with%20Disabilitites%20(PDF%201.1MB).pdf)>.

²⁵⁵ Ibid 47.

²⁵⁶ Woodlock, Western and Bailey, above n 243.

That the Australian Government together with state and territory governments consider strategies to address the lack of violence prevention, recognition and response in disability and health services. Most urgently, the National Disability Insurance Agency ensures that appropriate safeguards, standards and practice guidelines are developed that prioritise and drive responses to violence against people with disabilities and ensure referral pathways to violence response services. As part of this, the new National Disability Insurance Scheme workforce must be trained in understanding gendered violence and applying the principles of good practice to uphold the safety of people with disabilities.

13. Counter-terrorism measures

Articles 2 and 16

13.1. Overview

The Committee has stated that it 'is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies [including threats of terrorist acts]'.²⁵⁷

In its last Concluding Observations on Australia, the Committee expressed concern about several of Australia's anti-terrorism laws and practices, including ASIO's powers to detain, and the lack of judicial review of secrecy surrounding preventative detention and control orders.²⁵⁸

In recent years, two important positive developments have occurred to enhance the scrutiny that is applied to Australia's counter-terrorism laws and promote compliance with human rights principles:

- the establishment of the position of Independent Monitor of National Security Legislation (the **Monitor**) (the tenure of the first Monitor expired on 21 April 2014 and the Australian Government has failed to date to appoint a new Monitor, but has committed to retaining the position); and
- the establishment of the Joint Parliamentary Committee on Human Rights and the requirement that new legislation be introduced with a Statement of Compatibility with Human Rights (section 5.2).

²⁵⁷ Committee Against Torture, General Comment No. 2, above n 223.

²⁵⁸ Committee Against Torture, *Consideration of reports submitted by States Parties under article 19 of the Convention – Concluding observations of the Committee against Torture: Australia*, 40th sess, 828th mtg, UN Doc CAT/C/AUS/CO/3, 22 May 2008 [10].

Reviews of some aspects of Australia's counter-terrorism laws have also been undertaken by the Council of Australian Governments (**COAG**) and the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**).²⁵⁹

These bodies help ensure that the federal parliament and the Australian community are aware of what aspects of Australia's counter-terrorism laws interact with, undermine or breach human rights, including rights protected under CAT. They can also make recommendations for how to amend or improve existing laws to improve compliance with human rights principles.

However, the recommendations made by these bodies are not binding and in many cases have not generated a legislative response from Australian governments. As a result, there remain many features of Australia's counter-terrorism laws that give rise to human rights concerns, and which undermine Australia's obligations under the CAT.²⁶⁰

Further, as at the date of this report, the Australian Government had introduced, but not yet enacted, significant amendments to Australia's national security legislation. The amendments cover three

²⁵⁹ See eg Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Report of the Inquiry into Potential Reforms of National Security Legislation* (2013) and Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013).

²⁶⁰ Since 2001, Australia has introduced more than 50 new counter-terrorism laws, often without assessing their potential impact on human rights. A comprehensive list of the relevant legislation is available at Attorney-General's Department, *Laws to combat terrorism*, Commonwealth of Australia <www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/Laws-to-combat-terrorism.aspx>. See also Law Council of Australia, *Anti-Terrorism Reform Project* <www.lawcouncil.asn.au/lawcouncil/index.php/10-divisions/144-anti-terrorism-reform-project>.

areas – Australia’s security intelligence framework,²⁶¹ counter-terrorism measures,²⁶² and data retention laws²⁶³ – and have the potential to raise significant human rights issues.

Proposed recommendation:

That Australia swiftly appoint an expert to the role of the Independent National Security Legislation Monitor.

13.2. Definition of ‘Terrorist Act’

The meaning of ‘terrorist act’ in section 100.1 of the Criminal Code is broadly defined and relies on ambiguous terms which makes it difficult to precisely determine the type of conduct that it captures, or to make an assessment of whether the measures available to prevent, investigate and prosecute that conduct are proportionate to the risk that is sought to be averted. It includes an action or threat of action done or made with the intention of advancing a political, religious or ideological cause and with the intention of coercing, or influencing by intimidation, an Australian or foreign government or foreign country, or intimidating the public or a section of the public. It does not include advocacy, protest,

²⁶¹ On 16 July 2014, the Australian Government introduced the National Security Legislation Amendment Bill (No. 1) 2014 (Cth) as part of ‘Tranche 1’ of the national security legislation reforms. The Bill is largely based on recommendations from a 2013 bipartisan report by the PJCIS, titled *Report of the Inquiry into Potential Reforms of Australia’s National Security Legislation*. The Bill seeks to: (a) give ASIO the power to hack into an innocent third party’s computer to access a target computer, and to infiltrate entire computer networks on a single warrant; (b) introduce an ‘identified person warrant’ to authorise the use of multiple powers to collect intelligence on an person under a single warrant; (c) permit ASIO to use force against persons and things in the execution of warrants; (d) grant immunity to participants in ‘special intelligence operations’ for any civil or criminal liability incurred by reason of their conduct in an operation (unless that conduct constitutes torture, causes death or serious injury, or involves a sexual offence); (e) introduce a new offence for unauthorised disclosure of information relating to a special intelligence operation, punishable by up to 10 years’ imprisonment if the disclosure endangers life; and (f) increase the maximum penalties applying to unauthorised communication of certain secret information. The PJCIS tabled its report on the Bill, *Inquiry into the National Security Legislation Amendment Bill (No. 1) 2014*, on 17 September 2014, and the Australian Government accepted all of the recommendations made therein: see George Brandis, ‘Government Response to Committee Report on National Security Legislation Amendment Bill (No 1) 2014’ (Media Release, 19 September 2014) <www.attorneygeneral.gov.au/Mediareleases/Documents/ResponsePJCISreportNSLAB.pdf>.

²⁶² On 24 September 2014, the Australian Government introduced the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) as part of ‘Tranche 2’ of the national security legislation reforms. The Bill seeks to: (a) introduce new offences relating to terrorism and terrorist acts; (b) extend for a further 10 year period existing counter-terrorism regimes relating to AFP control orders and preventative detention orders, as well as ASIO’s special questioning and detention powers; (c) introduce search warrants that may be executed without first notifying the occupier of the premises; (d) suspend or seize passports or travel documents of persons who ASIO suspect may leave Australia to engage in conduct that might prejudice national security; and (e) stop welfare payments for persons whose passports have been cancelled or refused.

²⁶³ The Australian Government has noted that data retention laws will be introduced as a ‘Tranche 3’ of the national security law reforms. See Tony Abbott, George Brandis and Julie Bishop, ‘New counter-terrorism measures for a safer Australia; Racial Discrimination Act; Malaysia Airlines Flight MH17; Baby Gammy’ (Press Conference at Canberra, Australia, 5 August 2014) <www.pm.gov.au/media/2014-08-05/joint-press-conference-canberra-0>.

dissent or industrial action that is not intended to cause serious harm to a person or property or endanger life or create a serious risk to the health or safety of the public or a section of the public.

This broad definition of ‘terrorist act’ is the gateway to a series of serious offence provisions (which extend liability beyond the commission of a terrorist act to include support for, association with and membership of terrorist organisations) and the trigger for a range of exceptional executive powers which would, in all but emergency circumstances, be regarded as unjustified and unnecessary.

In light of these concerns, the UN Human Rights Committee has recommended that the definition be amended to ‘address the vagueness of the definition’ and to ‘ensure that its application is limited to offences that are indisputably terrorist offences’.²⁶⁴

These concerns relating to the breadth of the existing definition of ‘terrorist act’ are heightened in the context of proposed legislative amendments introduced by the Australian Government in September 2014 which, if enacted, would further broaden the range of conduct captured under terrorism-related offences. For example, the proposed amendments seek to introduce a new criminal offence for ‘advocating’ terrorism, and a new criminal offence for travelling, without a legitimate purpose, to an area in a foreign country that has been declared by the Australian Government to be one where a terrorist organization is engaging in hostile activity.²⁶⁵

Proposed recommendations:

That Australia review the definition of ‘terrorist act’ in the Criminal Code so that it is limited to countering offences that correspond to the characteristics of conduct to be suppressed in the fight against international terrorism, as identified by the Security Council in its resolution 1566.

That Australia remove the reference to ‘threat of action’ and other references to ‘threat’ from the definition of ‘terrorist act’ in section 100.1(1) of the Criminal Code.

13.3. ASIO’s powers to question and detain

Under Australia’s counter-terrorism laws, ASIO can require a person to answer questions or to detain a person for up to seven days for the purposes of questioning.²⁶⁶

Under these powers, ASIO can question or detain anyone who is able to substantially assist in the investigation of a terrorism offence, even if they are not suspected of being involved in a terrorist offence. People detained are required to keep certain information secret, and have limited opportunities to contact family or lawyers, or to challenge their detention.

²⁶⁴ Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant – Fifth periodic reports of States parties: Australia*, UN Doc CCPR/C/AUS/5 (19 February 2008) [11].

²⁶⁵ See Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

²⁶⁶ *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 3.

Whilst individuals detained under these warrants are permitted to contact a lawyer of their choice in certain circumstances, this contact can be tightly controlled and limited.²⁶⁷ The ability of lawyers to access security information²⁶⁸ for proceedings relating to a warrant under Part III Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth), or about the treatment of a person in connection with such a warrant, is further restricted by regulations and by requirements of the Attorney-General's Department.²⁶⁹

ASIO's powers to question and detain continue to be of particular relevance, especially in light of proposed legislative amendments introduced by the Australian Government in September 2014 which, among other things, propose to extend the operation of ASIO's special powers for a further 10 years of operation (until 2026).²⁷⁰

Proposed recommendations:

That Australia review ASIO's power to obtain a warrant to question and detain a person under Part III Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth), and review ASIO's questioning warrant powers.

13.4. Police powers to detain without charge

Deprivation of Liberty

Part 1C of the *Crimes Act 1914* (Cth) (**Crimes Act**) currently allows the police to detain persons suspected of terrorist related offences for certain periods without charge. It also allows the police to exclude certain periods of time from the total period which they are authorised to detain such suspects. This Part of the Crimes Act was amended in 2011 and now contains a maximum period of pre-charge detention by clarifying that a maximum of seven days 'dead time' can be excluded from the calculation of the 'investigation period' in terrorism cases.²⁷¹

²⁶⁷ For example, subsection 34G(5) of the *Australian Security Intelligence Organisation Act 1979* (Cth) provides that, as a person is generally prohibited from contacting any persons not named in the warrant, a questioning and detention warrant must identify the single lawyer of the person's choice. A questioning and detention warrant may also specify a time when the person is permitted to contact the person identified as a lawyer.

²⁶⁸ *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZT.

²⁶⁹ See *Australian Security Intelligence Organisation Regulations 1980* (Cth) reg 3B. This regulation provides that a lawyer must not be given access to security information relating to a questioning, or questioning and detention warrant unless the lawyer has been given a security clearance by the Secretary of the Attorney-General's Department in relation to the information; or the Secretary of the Attorney-General's Department is satisfied that providing the lawyer with access to the information would not be prejudicial to the interests of security.

²⁷⁰ See Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

²⁷¹ Section 23DB(11) of the *Crimes Act 1914* (Cth) now provides that no more than seven days may be excluded from the 'investigation period'.

Despite this amendment, the period for pre-charge detention remains excessive and unjustified, and is a considerably longer period of time than pre-charge detention permitted under the Crimes Act in non-terrorism cases.²⁷²

Access to Lawyer

There are a number of safeguards in Part 1C of the Crimes Act. These safeguards include the right of a person to communicate with a lawyer before and during questioning and the requirement that a person's lawyer, parent, guardian or relative must be present during questioning for people who are under 18 years of age.

However, there remain restrictions on access to a lawyer of a person's choice in the preventative detention order regime under Division 105 of the Criminal Code, which only allows detainees to access legal representation for limited purposes such as obtaining advice or giving instructions regarding the issue of the order or treatment while in detention.²⁷³ Contact with a lawyer for any other purpose is not permitted. In addition, communication between a lawyer and a detained person can be monitored.²⁷⁴

Proposed recommendations:

That Australia review and restrict the period of time which can be excluded from the investigation period in respect of terrorist suspects in Part 1C of the Crimes Act.

14. Police use of force

Article 16

14.1. Overview

All jurisdictions in Australia require substantial improvement to their systems of regulating, monitoring and investigating use of force by law enforcement officials in order to comply with Australia's

“ models of investigation for instances of ill-treatment and excessive use of force by law enforcement officials and police-related deaths remain wholly inadequate ”

obligations under international human rights law. In particular, the models of investigation for instances of ill-treatment and excessive use of force by law enforcement officials and police-

²⁷² Section 23C(4) of the *Crimes Act 1914* (Cth) provides that a person can be detained for two hours if the person is or appears to be under 18 years, an Aboriginal person or a Torres Strait Islander, or four hours in any other case, after the arrest, unless the period is extended under section 23DA. Section 23DA(7) of the *Crimes Act 1914* (Cth) provides that in the investigation period may be extended for a period not exceeding 8 hours, and must not be extended more than once.

²⁷³ Criminal Code Act 1995 (Cth) sch 1 s 105.37(1) ('*Criminal Code*').

²⁷⁴ *Criminal Code* s 105.38.

related deaths remain wholly inadequate in all but one of Australia's states and territories.

There have been some positive developments since the Committee adopted its last Concluding Observations on Australia. For example, in December 2013, Victoria Police released its response to a public inquiry into racial profiling and launched a three year action plan to address community concerns about discriminatory policing and racial profiling.²⁷⁵

However, NGOs remain concerned that across the country the weaknesses in policy and legal frameworks guiding the use of force and systems of investigation increase the risk of violations of human rights occurring, including instances of torture, cruel treatment or punishment.²⁷⁶

14.2. Systems of investigation

A human rights-based approach requires a death caused by police use of force or allegations of torture or ill-treatment by police to be investigated by an effective and independent system to determine the cause of any death or injury and, if necessary, to hold accountable those responsible for it.²⁷⁷ Despite the continued concerns raised by the Committee and other treaty bodies, there has been little reform in Australia. In general, the primary investigation into instances of ill-treatment, excessive use of force or death related to police contact is undertaken by agents of the law enforcement agency implicated in the incident.²⁷⁸

Queensland provides one exception to this rule by providing for the Queensland Coroner to exercise primary responsibility for the investigation of deaths in custody in Queensland.²⁷⁹ In contrast, for

²⁷⁵ Victoria Police, *Equality is not the same... Victoria Police Response to Community Consultation and Reviews on Field Contact Policy and Data Collection and Cross Cultural Training* (2013) <www.police.vic.gov.au/retrievemedia.asp?Media_ID=99361>. The inquiry and report were the outcome of a settlement of a racial discrimination claim by a number of young men of African descent commenced in 2008 – see *Haile-Michael & Ors v Konstantinidis, the Chief Commissioner of Victoria Police, the State of Victoria & Ors* (Unreported, Federal Court of Australia, VID 969 of 2010).

²⁷⁶ Emily Howie, Anna Brown and Philip Lynch, *Upholding Our Rights: Towards Best Practice in Police Use of Force – Final Report* (2011) Human Rights Law Centre <www.hrlc.org.au/files/HRLC-Police-Use-of-Force-Final-Report-2-September-2011.pdf> and Emily Howie, Anna Brown and Philip Lynch, *Upholding Our Rights: Towards Best Practice in Police Use of Force – Final Background Research Paper* (2011) Human Rights Law Centre <www.hrlc.org.au/files/HRLC-Police-Use-of-Force-Final-Background-Research-Paper-2-September-2011.pdf>.

²⁷⁷ *Dodov v Bulgaria* (2008) 47 EHRR 41, [80]; *Vo v France* (2005) 40 EHRR 12, [90]-[91]; *Calvelli and Ciglio v Italy* [2002] ECHR 3, [49]; *Powell v United Kingdom* (2000) 30 EHRR CD 362, [49].

²⁷⁸ Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedures – Fourth and fifth periodic reports of States parties due in 2012: Australia*, UN Doc CAT/C/AUS/4-5 (9 January 2014) [216]. While complaints regarding police conduct can be made directly to the Ombudsman and/or integrity or oversight bodies in some jurisdictions, generally these matters are referred back to the law enforcement agency in question for investigation.

²⁷⁹ Office of the State Coroner of Queensland, *Inquest into the death of Mulrunji* (File No COR 2857/04(9), 14 May 2010) 150 <http://www.courts.qld.gov.au/__data/assets/pdf_file/0008/86858/cif-doomadgee-mulrunji-20100514.pdf>. See also Independent Expert Panel, *Simple Effective Transparent Strong: An independent review of the Queensland police complaints, discipline and misconduct system* (2011) State of Queensland <www.premiers.qld.gov.au/publications/categories/reviews/qps-complaints.aspx>.

example, in Victoria, the Police Integrity Commission has been replaced by the Independent Broad-Based Anti-Corruption Commission (**IBAC**), which has a broader mandate encompassing corruption and misconduct by all public officials, including police. The majority of complaints received by IBAC relate to police and most of these are referred back to police.²⁸⁰ In the case of police-related deaths, the homicide squad and major collisions units within Victoria Police continue to conduct the primary investigation and prepare a brief of evidence for the Coroner, with oversight by Professional Standards Command.²⁸¹ In Western Australia, the Corruption and Crime Commission of Western Australia (CCC) investigates complaints of serious misconduct by the police, but these complaints can be directed back to Western Australian Police Service (WAPOL) for investigation.

Flawed investigation into police shooting of Adam Salter

In November 2009, a 36-year old web designer Adam Salter was shot by police in the kitchen of his suburban Sydney home. Paramedics were already at the house treating him for self-inflicted wounds. He died in hospital soon afterwards from the gunshot wound.

The Deputy State Coroner for NSW found that there were a number of 'difficulties with the police version of events' and made several criticisms of the police response to the shooting of Mr Salter.²⁸² A subsequent Police Integrity Commission inquiry into the police investigation of Mr Salter's death found seven officers engaged in misconduct and that four of them should face criminal charges. The Commission recommended the NSW Police Commissioner remove them from the force.²⁸³

Proposed Recommendations:

That the Australian Government comprehensively review laws, policies and procedures and training relating to use of force to ensure that force is only used when strictly necessary and in a manner proportionate to a legitimate purpose.

That the Australian Government take immediate steps to establish a mechanism to provide independent investigation into complaints concerning ill-treatment and excessive use of force by police and police-related deaths.

²⁸⁰ Officers of Independent Broad-Based Anti-Corruption Commission, Presentation to community legal centres and human rights organisations (29 May 2013).

²⁸¹ It is unclear whether IBAC provides oversight of these investigations, a role previously performed by the Police Integrity Commission.

²⁸² New South Wales Police Integrity Commission, *Report to Parliament: Operation Calyx* (2013) vi <<http://www.pic.nsw.gov.au/files/reports/PIC%20Calyx%20Report.pdf>>.

²⁸³ Nick Ralston, 'Police officers should be charged over fatal shooting watchdog says', *The Sydney Morning Herald* (online), 26 June 2013 <www.smh.com.au/nsw/police-officers-should-be-charged-over-fatal-shooting-watchdog-says-20130626-2owk1.html>.

14.3. Tasers

A number of disturbing incidents and findings by coroners and oversight bodies indicate increased reliance on Tasers by police and demonstrate an urgent need for more rigorous police training and more stringent regulation of police use of force in Australia. There is some divergence in approach between the states and territories. While jurisdictions such as Victoria have taken a cautious approach to arming their members with Tasers there has been a growing number of disturbing instances of misuse of Tasers in other jurisdictions such as NSW, Queensland and Western Australia. Rather than representing isolated incidents, the number of deaths and misuse of Tasers point to systemic failures in the regulation and training of police.

There have been at least four recorded Taser related deaths to date in Australia. In each case, there are credible allegations that the Taser use was inappropriate or excessive. Oversight bodies have found that the use of Tasers has crept outside established thresholds for use and Tasers have been subject to misuse by officers including use for compliance purposes.²⁸⁴ In one extreme case in Western Australia, a Taser was reportedly deployed 41 times against a man in custody, Kevin Spratt. Mr Spratt was subsequently acquitted of any offence.²⁸⁵ The incident led to an investigation by the Western Australia Crime Commission (**WACC**) and a number of officers involved in the incident have now been convicted of assault.²⁸⁶ The WACC did note that a number of improvements had been made to police policy and practice in response to their 2010 report.²⁸⁷

Vulnerable and disadvantaged groups are particularly affected by the use of Tasers by police. A 2012 report by the NSW Ombudsman found that almost 30 per cent of Taser use in NSW is against Aboriginal people, while 41 children aged 15 years or under were subject to Taser use by NSW police

²⁸⁴ See generally Western Australia Corruption and Crime Commission, *The use of Taser weapons by Western Australia Police* (4 October 2010) <www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202010/Full%20Report%20-%20Use%20of%20Taser%20Weapons%20by%20WAPOL.pdf>; New South Wales Ombudsman, *How are Taser weapons used by the NSW Police Force? A Special Report to Parliament under s. 31 of the Ombudsman Act 1974* (October 2012) <www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/how-are-taser-weapons-used-by-nsw-police-force>; Queensland Crime and Corruption Commission, *An Update on Taser Use in Queensland* (November 2012) <www.ccc.qld.gov.au/research-and-publications/publications/police/tasers/an-update-on-taser-use-in-queensland.pdf>.

²⁸⁵ Western Australia Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct in Relation to the Use of Taser Weapons by Officers of the Western Australia Police and the Department of Corrective Services* (16 April 2012) <www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202012/Use%20of%20Taser%20Weapons%20by%20WAPOL%20and%20DCS%20Officers.pdf>.

²⁸⁶ Joanna Menagh, *Police officers found guilty of assault after repeatedly tasered detainee Kevin Spratt* (22 January 2014) ABC News <www.abc.net.au/news/2014-01-21/police-officers-found-guilty-of-assault-of-spratt/5211642>.

²⁸⁷ Western Australia Corruption and Crime Commission, above n 285, vi.

between 2008 and 2012.²⁸⁸ The Queensland Crime and Corruption Commission has found that over 25 per cent of people subject to Taser use 'were believed to have a mental health condition'.²⁸⁹

The death of Roberto Curti

Mr Roberto Curti died in March 2012 in NSW following a chase by, and violent struggle with, 11 police officers, many of whom were acting on incorrect reports of an armed robbery. He had earlier jumped over the counter of a convenience store in an LSD-induced psychotic state and left with two packets of biscuits.²⁹⁰ Mr Curti died within minutes of being Tasered up to 14 times, sprayed with up to 2.5 cans of capsicum spray, and held to the ground. Mr Curti was a 21 year old Brazilian national studying and playing soccer in Sydney. Mr Curti's death raises questions about the safety claimed to be inherent in the use of Tasers, and highlighted the need for greater regulation and monitoring of their use.

In the finding handed down following the inquest into the death Mr Curti, the NSW State Coroner was highly critical of NSW police and has recommended officers face disciplinary proceedings in relation to the excessive force used against the victim. State coroner Mary Jerram said the actions of some officers involved excessive force and were 'in some instances even thuggish'.²⁹¹ She said they had been swept up by 'an ungoverned pack mentality, like schoolboys in the Lord of the Flies'. Ms Jerram said taking down Mr Curti involved 'a frenzy of officers' most of whom were inexperienced and some 'behaving out of control'.²⁹²

A subsequent inquiry by the Police Integrity Commission has led to criminal charges being pursued against a number of the officers involved.²⁹³

²⁸⁸ New South Wales Ombudsman, above n 284, 99.

²⁸⁹ Queensland Crime and Corruption Commission, above n 284. A report released in 2013 by the Queensland Crime and Corruption Commission into prolonged or multiple uses of Tasers recommended improved training to enable police officers to engage with people with mental illness: see Queensland Crime and Corruption Commission, *Multiple and prolonged Taser deployments* (June 2013) 37-38 <www.ccc.qld.gov.au/research-and-publications/publications/police/tasers/multiple-and-prolonged-taser-deployments.pdf>.

²⁹⁰ New South Wales State Coroner, *Inquest into death of Roberto Laudio Curti* (File No 2012/00086603, 14 November 2012) <www.coroners.lawlink.nsw.gov.au/agdbasev7wr/_assets/coroners/m40160114/curti%20decision%2014%20nov%202012.pdf>.

²⁹¹ Ibid 21.

²⁹² Ibid 22.

²⁹³ New South Wales Police Integrity Commission (Media Release, 20 May 2013) <www.pic.nsw.gov.au/files/MediaReleases/Anafi%20media%20release%20May%202013.pdf>.

Proposed Recommendations:

That Australia:

- review and amend guidelines around thresholds for use to align with international human rights law standards, including prohibiting use for compliance purposes;
- ensure that policies and training reflect the risk of serious harm and death for vulnerable groups and that special consideration are given to particular groups who are at greater risk of serious harm or death from the use of Tasers; and
- ensure Tasers with cameras are used where possible and the use of Tasers is rigorously monitored.

15. Treatment of people with disability

Articles 2, 11, 13 and 16

15.1. Overview

The Committee has previously stated that ‘the principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention.’²⁹⁴ People with disability are frequently subject to discriminatory treatment that may constitute torture, or cruel, inhuman or degrading treatment, including persistent and severe violence and abuse, forced sterilisation, long-term neglect of basic human needs, and painful and degrading behaviour modification techniques or ‘restrictive practices’.²⁹⁵ The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has expressed concern that ‘in many cases such practices, when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognised as torture or other cruel, inhuman or degrading treatment or punishment’.²⁹⁶

²⁹⁴ Committee Against Torture, *General Comment No. 2*, above n 223, [20].

²⁹⁵ Phillip French, Julie Dardel and Sonya Price-Kelly, *Rights Denied: Towards a national policy agenda about abuse, neglect & exploitation of persons with cognitive impairment* (2010) People with Disability Australia, 72 <www.pwd.org.au/documents/pubs/RightsDenied2010.pdf>.

²⁹⁶ Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/7/3 (15 January 2008) 9.

15.2. Behaviour modification and restrictive practices

In Australia, people with disability are routinely subjected to unregulated and under-regulated behaviour modification or restrictive practices that include chemical, mechanical, social and physical restraint, detention, seclusion and exclusionary time out.²⁹⁷

Behaviour modification and restrictive practices can cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement, alter

thought and thought processes, and deprive persons of their property and access to their children.

These practices can also constitute humiliation and punishment, and can be imposed as a means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support.²⁹⁸

“ behaviour modification and restrictive practices can cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement, alter thought and thought processes, and deprive persons of their property and access to their children ”

Restrictive practices are sometimes facilitated by guardianship and mental health legislation, among other legal frameworks, which fail to recognise the legal capacity of people with disability.

Restrictive practices are not limited to the disability and mental health service settings, such as institutions, group homes, boarding houses and mental health facilities. They also occur in schools, hospitals, residential aged care facilities and prisons.²⁹⁹ Research and available data on the use of restrictive practices and the impact of these practices on people with disability is very limited in Australia. Further, there is an absence of any definitive, regular and reliable national public reporting of the rates of use of restrictive practices and, where reporting is required, there is an under-reporting of the number of people who endure these practices.³⁰⁰

²⁹⁷ Carolyn Frohmader, *Submission to the UN Analytical Study on Violence against Women with Disabilities* (2011) Women with Disabilities Australia, 25 <wwda.org.au/wp-content/uploads/2013/12/WWDAsubUNStudyViolenceWWDDec2011.pdf>; French, Dardel and Price-Kelly, above n 295, 95.

²⁹⁸ Frohmader, above n 297, 17 citing Keith McVilly, *Physical restraint in disability services: Current practices, contemporary concerns and future directions* (2009) Victorian Department of Human Services <www.dhs.vic.gov.au/__data/assets/pdf_file/0010/607708/osp_physicalrestraintindisabilityservicescurrentpractices_300309.pdf>.

²⁹⁹ Frohmader, above n 297, 25.

³⁰⁰ National Mental Health Consumer & Carer Forum, *Ending Seclusion and Restraint in Australian Mental Health Services* (2009) <www.nmhccf.org.au/documents/Seclusion%20&%20Restraint.pdf>; Paul Ramcharan et al, *Experiences of restrictive practices: A view from people with disability and family carers* (2009) Victorian Department of Human Services <www.dhs.vic.gov.au/__data/assets/pdf_file/0008/608588/osp_experiencesofrestrictivepractices_pdf_0509.pdf>.

Available research indicates that an estimated 44 to 80 per cent of people with disability who show 'behaviours of concern' are administered a form of chemical restraint,³⁰¹ between 50 and 60 per cent are subjected to regular physical restraint,³⁰² and those with multiple impairments and complex support needs are subjected to much higher levels of restraint and seclusion.³⁰³

Restrictive practices regulation in jurisdictions such as Victoria, Queensland and Tasmania occurs through disability services legislation. This legislation establishes the position of senior practitioner, who is responsible for protecting the rights of people who are subject to these practices, and for generally reducing or eliminating the need for restrictive practices.

Other Australian state and territory Governments rely on policy-based frameworks, voluntary codes of practice, and regulation through the guardianship framework. In these States and Territories, senior practitioner positions are occasionally created as a discretionary measure to support policy and practice, but regulation of restrictive practices is often left to guardianship tribunals. Regulation through guardianship tribunals only deals with the provision of consent for a person to be subject to restrictive practices; it does not deal with the broader question of whether restrictive practices should be permissible, or whether the rights of people with disability are being protected.³⁰⁴ For example, in Queensland an adult guardian has the authority to make a short term approval for a containment and seclusion order of up to six months.³⁰⁵ In Tasmania, people with disability are 'regularly restrained ... when they demonstrate behavioural difficulties. Guardians can often agree to the misuse of personal treatment orders because of tiredness or lack of knowledge.'³⁰⁶

There is a range of relevant reform activity in relation to disability services legislation in a number of jurisdictions.

At a national level, in early 2014, Commonwealth, state and territory disability ministers endorsed the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (the National Framework). The National Framework outlines high-level principles and core strategies to reduce the use of restrictive practices in the disability services sector.

³⁰¹ Lynne Webber, Mandy Donley and Hellen Tzanakis, *Chemical Restraint: What Every Disability Support Worker Needs to Know* (2008) Victorian Department of Human Services <www.dhs.vic.gov.au/__data/assets/pdf_file/0010/608581/osp_chemicalrestraintinfofordisabilitysupportworker_pdf_0808.pdf>.

³⁰² Ibid 2.

³⁰³ Office of the Senior Practitioner, *Annual Report 2008–2009* (2010) Victorian Department of Human Services, 21.

³⁰⁴ French, Dardel and Price-Kelly, above n **Error! Bookmark not defined.**, 96

³⁰⁵ Department of Communities, 'Short Term Approvals — Frequently Asked Questions' (Fact Sheet, Queensland Government, undated) <<http://www.communities.qld.gov.au/resources/disability/publication/positive-futures-short-term-approvals-faqs.pdf>>.

³⁰⁶ Submission by attendee at the CRPD Shadow Report consultation in Hobart, Tasmania (3 December 2009).

Treatment in residential centres

Luke is 21 and has autistic spectrum disorder. He lives in a residential facility in Victoria. Before going into care, Luke was well groomed and spoke quite well. Since entering the facility Luke's condition has deteriorated to the point of self-harm, after spending hours each day locked in a room with little more than a bed and a toilet. He is severely depressed, refuses to wear clothes and often will tear them to shreds. He is completely alone, even his food is passed through a door.³⁰⁷

Restrictive Practices in Schools

Disability representative and advocacy organisations report that many children with disability in both mainstream and special schools are being subjected to chemical and physical restraint and seclusion under the guise of 'behaviour management' policies and practice.³⁰⁸ There is strong evidence that children with disability are experiencing:

- solitary confinement to small rooms or small fenced areas as punishment for 'bad' behaviour;
- physical force, including being thrown to the ground and pinned down;
- chemical restraint by requiring parents to medicate their children otherwise they cannot attend school; and
- acceptance of self-harming behaviour without exploring why this is occurring at school.

Restrictive Practices in Prisons

People with disability in Australia are over-represented in the prisoner population and many are arbitrarily detained in prison due to the unavailability of other appropriate accommodation options. In at least one legal case, the judge noted that this potentially constitutes cruel, inhuman and degrading treatment.³⁰⁹

Prisoners with disability are often placed in isolated management and observation cells when displaying 'behaviours of concern' because of a lack of other appropriate accommodation and support options.³¹⁰ Further, women with psychosocial disability and intellectual or learning disability are disproportionately classified as high security prisoners and are more likely to be in high security facilities than other prisoners.³¹¹

³⁰⁷ Australian Broadcasting Corporation, 'Victoria's Disabled Housing 'in Crisis'', *Stateline Victoria*, 4 December 2009.

³⁰⁸ Information received from Children with Disability Australia and the Disability Discrimination Legal Service. See also Australian Broadcasting Corporation, 'Hidden Shame', 7.30, 17 May 2011 (Mary Gearin) <www.abc.net.au/7.30/content/2011/s3219518.htm>.

³⁰⁹ *R v White* [2007] VSC 142.

³¹⁰ Victorian Institute of Forensic Mental Health, above n 58, 21.

³¹¹ Sisters Inside, *Submission to the National Human Rights Consultation: Rights of Women Prisoners* (2009) <www.sistersinside.com.au/media/FINAL%20-%20National%20HR%20Submission%20June%202009.pdf>.

See also sections 7.6 and 7.7 on treatment of people with disability in prison.

15.3. Forced treatment and experimentation

Medical and Scientific Experimentation

Many people with disability are particularly susceptible to being chemically restrained and administered medication in combinations that may pose a risk to their physical and mental health or cause actual bodily harm. There are limited protections from abuse of medication regimes and a lack of criminal offences concerning the maladministration of medications to control and manage behaviour.³¹²

In Australia, few measures have been taken to protect people with disability from medical or scientific experimentation where they are unable to give their free and informed consent, including people with disability who require support in exercising their legal capacity. Only legislation in Victoria and the Australian Capital Territory contains provisions prohibiting medical or scientific experimentation or treatment on persons without their full, free and informed consent.³¹³

Involuntary or coerced sterilisation

Involuntary or coerced sterilisation of people with disability, particularly women and girls with disability, is an ongoing practice in Australia. This practice has been identified as a form of torture by the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment,³¹⁴ and as a form of violence by the UN Committee on the Rights of the Child.³¹⁵

A Senate report on the involuntary or coerced sterilisation of people with disability in Australia was released in July 2013.³¹⁶ The Report recommends that national uniform legislation be developed to regulate sterilisation of children and adults with disability, rather than to prohibit the practice, as has been recommended to Australia by international human rights treaty bodies, UN special procedures, and international medical bodies since 2005.³¹⁷

Several of the Report's recommendations are welcomed, critically, the Report recommends that for an adult with disability who has the 'capacity' to consent, sterilisation should be banned unless undertaken with that consent. However, it also recommends that where a person with disability does

³¹² French, Dardel and Price-Kelly, above n 295.

³¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10(c); *Human Rights Act 2004* (ACT) s 10(2).

³¹⁴ Manfred Nowak, above n 296, 14.

³¹⁵ Human Rights Committee, *General Comment No 13: The Right of the Child to Freedom from All Forms of Violence*, UN Doc CRC/C/GC/13 (18 April 2011) [16], [21].

³¹⁶ Available at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/involuntary_sterilisation/first_report/index.htm

³¹⁷ See UN Docs: CRC/C/AUS/CO/4; A/HRC/WG.6/10/L; CEDAW/C/AUS/CO/7; CRC/C/15/Add.268; A/67/227; A/HRC/22/53. See also: FIGO (International Federation of Gynecology and Obstetrics), *Female Contraceptive Sterilization*. Available at: <http://www.wvda.org.au/FIGOGuidelines2011.pdf>

not have 'capacity' for consent, substitute decision-making laws and procedures may permit the sterilisation of persons with disability. These recommendations leave open the potential for children and adults with disabilities to be sterilised provided that they 'lack capacity' and that the procedure is in their 'best interest', as determined by a third party.

Forced psychiatric treatment

“ People in Australia with psychosocial disability are subject to widespread use of non-consensual psychiatric medication, electroshock and other restrictive and coercive practices ”

People in Australia with psychosocial disability are subject to widespread use of non-consensual psychiatric medication, electroshock and

other restrictive and coercive practices. The Committee on the Rights of Persons with Disabilities has stated that forced treatment by psychiatric and other health and medical professionals is a violation of the right to be free from torture.³¹⁸

State and Territory laws regulating forced psychiatric treatment differ, but none of these laws comply with international human rights standards, such as those articulated by the UN Human Rights Committee in their Concluding Observations on the United States of America, namely that States should ensure:³¹⁹

that non-consensual use of psychiatric medication, electroshock and other restrictive and coercive practices in mental health services is generally prohibited. Non-consensual psychiatric treatment may only be applied, if at all, in exceptional cases as a measure of last resort where absolutely necessary for the benefit of the person concerned, provided that he or she is unable to give consent, and for the shortest possible time without any long-term impact and under independent review.

In all Australian jurisdictions, mental health tribunals play a vital part in influencing the extent to which people with psychosocial disability are subject to involuntary treatment. Some of the broad issues relating to tribunals identified in an NGO report to Australia's most recent review under the CRPD include:³²⁰

- inadequate preparation of reports, documents and professional assessments and advice leading up to a hearing;³²¹

³¹⁸ Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) – Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [42].

³¹⁹ Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America*, 110th sess, 3061st mtg, UN Doc CCPR/C/USA/CO/4 (23 April 2014) [18].

³²⁰ Disability Representative, Advocacy, Legal and Human Rights Organisations, above n 246.

³²¹ Terry Carney and Fleur Beaupert, 'Strengths and Weaknesses of Mental Health Review Process' (Paper presented at 20th Anniversary Conference 'Learning from the Past, Looking to the Future', Melbourne, 6-7 December 2007) 28. For example, the 2005 Annual Report of the Western Australia Mental Health Review Board states: 'In some cases no member of the treating team with up-to-date information about the patient's progress

- resource pressures leading to shortened hearings, use of video link and cramped or stressful settings used for hearings³²² — for example, a study of 25 hearings in Victoria indicated that 36 percent of hearings took less than 10 minutes and 60 percent took less than 15 minutes;³²³
- an unreasonably lengthy duration between detainment and the initial review of the detention order;³²⁴
- a lack of knowledge by the person of the right to access information, independent advocacy support and legal representation, and the right to lodge an appeal with respect to involuntary status;³²⁵ and
- a failure to strictly and explicitly limit the circumstances under which voluntary treatment can be made involuntary — for example, the voluntary status of a person can be changed to involuntary merely on the basis that the person is refusing a course of treatment or failing to comply with the instructions of a medical practitioner.³²⁶

Proposed recommendations:

That the Australian Government establish a national, consistent legislative and administrative framework for the protection of people with disability from behaviour modification and restrictive practices that cause harm and punishment as recommended by the Australian Law Reform Commission.

That the Australian Government develop an evidence-based national plan that outlines actions for the development of positive behaviour support strategies that acknowledge and respect the physical and

and current situation is available at the hearing to provide information needed by Board members in order to make an informed decision about the patient's involuntary status': Mental Health Review Board Western Australia, *Annual Report 2005* (2005) <www.mhrbwa.org.au/publications/pdfs/Annual_Report_2005.pdf>.

³²² Open letter from Mary Macken to Greg James, *Erosion of Patient Rights Due to Proposed Changes to the Function of the Mental Health Act 2007*, 30 April 2010 <www.lawsociety.com.au/idc/groups/public/documents/internetpolicysubmissions/066417.pdf>.

³²³ Carney and Beaupert, above n 321, 28.

³²⁴ In Western Australia, sections 138 and 139 of the *Mental Health Act 1996* (WA) provide for a review of involuntary orders up to eight weeks after the initial order for admission has been made, and at least every 12 months thereafter. In the Northern Territory, involuntary patients must be reviewed within 14 days after admission: *Mental Health and Related Services Act* (NT) s 123(1). In NSW, a person subject to continued involuntary detention must have their case reviewed at least once every three months for the first 12 months of detention, and once every six months after that: *Mental Health Act 2007* (NSW) ss 37(1), 37(1)(b). In Queensland, patients must be reviewed within six weeks after admission with subsequent intervals not exceeding six months: *Mental Health Act 2000* (Qld) s 187(1). In Tasmania, the Tribunal must review a continuing care order within 28 days from when the order is made or renewed: *Mental Health Act 1996* (Tas) ss 52(1), 52(2). In South Australia, the review must take place as soon as practicable after a detention order is made if the detention commenced within seven days of the person being discharged from an approved treatment centre pursuant to the expiry or revocation of a previous detention order: *Mental Health Act 1993* (SA) ss 12, 24(1)(b).

³²⁵ Victorian Council for Civil Liberties, *Review of the Mental Health Act: Liberty Submission* (27 February 2009) 6-7 <www.libertyvictoria.org/sites/default/files/Mental_Health_Act_Submission_Mar09.pdf>.

³²⁶ People With Disability Australia, *NSW Health Review of the Mental Health Act 1990 – Exposure Draft Bill: Mental Health Bill 2006* (3 November 2006) 8 <www.pwd.org.au/documents/pubs/SB06-MentalHealth.doc>.

mental integrity of the person, and for the elimination of environments and treatment approaches that have been shown to exacerbate behaviour that leads to application of inappropriate levels of restriction and restraint.

That the Australian Government conduct a national inquiry into the use of restrictive practices on children and young people with disability in mainstream and segregated schools and identify and implement recommendations for the elimination of these practices.

That states and territories review laws and institutions which permit and facilitate forced psychiatric treatment to ensure they comply with international human rights law.

That Australia develops and enacts national uniform legislation prohibiting, except where there is a serious threat to life or health, the use of sterilisation of children, regardless of whether they have a disability, and of adults with disability in the absence of their prior, fully informed and free consent.

16. Rape and sexual violence against children

Articles 2, 12, 13, 14

16.1. Overview

The Committee has acknowledged that rape and sexual violence may constitute torture and cruel, inhuman and degrading treatment.³²⁷ States parties to CAT have an obligation to prevent, punish and redress such acts.³²⁸ Article 2 of CAT requires States parties to:

- 'eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented';³²⁹ and
- prevent officials and people acting in an official capacity 'from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture.'³³⁰

The Committee has emphasised the obligation to prohibit, prevent and redress torture and ill-treatment in 'institutions that engage in the care of children'.³³¹

³²⁷ See, for example *C.T. and K.M. v. Sweden*, (CAT) Communication No. 279/2005, 17 Nov., 2006; see also United Nations Committee Against Torture, General Comment 2, UN Doc: CAT/C/GC/2 (2008) [22]; Felice D. Gaer, 'Rape as a Form of Torture: The Experience of the Committee against Torture,' 15 *New York City Law Review* 293, 301-302 (2012);

³²⁸ United Nations Committee Against Torture, General Comment 2, UN Doc: CAT/C/GC/2 (2008),

³²⁹ *Ibid*, [4].

³³⁰ *Ibid*, [17].

³³¹ *Ibid*, [15].

The current Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) represents a broad national investigation which will provide authoritative information, identify best practices and recommend the laws, policies, practices and systems that will effectively prevent and respond to the sexual abuse of children in institutions. The Royal Commission's final reporting date has recently been extended and is now scheduled for 15 December 2017.

The Government is to be commended for initiating and supporting the Royal Commission and should commit to timely and thorough implementation of the Commission's recommendations.

16.2. The Royal Commission

The Royal Commission was established in 2013 and is mandated to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters.

In July 2014 the Royal Commission issued an interim report addressing, among other things, failures in prevention, investigation, prosecution and remedy. The interim report includes findings that:

- significant failings in institutional responses to abuse which serve to 'allow abuse to continue, compound the harm of the abuse, impede justice and undermine abuse prevention';³³²
- particular problems arise when institutions conduct internal investigations, rather than involving independent agents. In some cases the lack of external scrutiny allows perpetrators to abuse other children;³³³ and
- of the cases that are reported, only a small percentage lead to a conviction. For example, in New South Wales, fewer than 16 per cent of cases reported to the police resulted in proven charges of child sex offences between 1995 and 2004. The rate is lower if the complainant is an adult.³³⁴ In Victoria, taking into account low reporting rates, technical appeals and high attrition of survivors who are unable to endure a retrial, only 0.3% of Victorian cases actually result in any jail time served.³³⁵

Survivors, their families and whistleblowers have told the Royal Commission of threats, including death threats, and reprisals.³³⁶

³³² Interim Report of Royal Commission into Institutional Responses to Child Sexual Abuse 30 June 2014, Volume 1, page 154

³³³ Interim Report of Royal Commission into Institutional Responses to Child Sexual Abuse 30 June 2014, Volume 1, page 140

³³⁴ Interim Report of Royal Commission into Institutional Responses to Child Sexual Abuse 30 June 2014, Volume 1, pages 99-100

³³⁵ Judy Courtin (2006) "Judging the Judges: How the Victorian Court of Appeal is dealing with appeals against conviction in child sexual assault matters". Current Issues in Criminal Justice University of Sydney. Volume 18 Number 2 November 2006

³³⁶ Based on discussions with SNAP Australia by survivors and whistleblowers

Failure to prosecute and convict³³⁷

Nicky was the only one of 49 known victims of her perpetrator able to make an official police statement or willing to appear in court. Nicky had multiple eyewitnesses to her years of sexual assaults by Catholic clergy, some of whom were prepared to testify, an unusual level of corroborating evidence for these secretive crimes.

Nicky's abuser was charged with assaulting a female and committing an act of indecency on someone under the age of 16, even though the police reportedly received no assistance from the church during the investigation. However, the charges were dropped when the accused was deemed unfit to stand trial.

According to Nicky, 'I was absolutely devastated. To have a conviction, it would be proof that it really did happen and that somebody took it seriously. In cases like these, and there are lots of them, where is the fairness to his victims, or the children he may harm in the future?'

Proposed recommendations:

That the Australian Government expeditiously and fully implement the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse when they are issued.

17. Extraterritorial obligations

Articles 2 and 16

17.1. Overview

Current and previous Australian Governments have taken a narrow view of the scope of Australia's extraterritorial obligations under international human rights treaties. For instance, the Australian Government has repeatedly asserted that its human rights obligations do not extend to violations that occur within its offshore centres in PNG and Nauru, despite the Australian Government's clear exercise of 'effective control' over those centres (discussed in section 9.2).³³⁸

The scope of States parties' obligations under CAT is established in article 2(1), which states:

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

In its General Comment No 2, the Committee stated:³³⁹

³³⁷ Case study provided by SNAP Australia

³³⁸ See eg Evidence to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 17 December 2012, 2-11 (Vicki Parker).

³³⁹ Committee Against Torture, *Convention against Torture and other cruel, inhuman or degrading treatment or punishment: General Comment No 2 – Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (24

The Committee considers that the scope of “territory” under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.

The Committee has previously stated that States parties are under an obligation to ‘ensure that the provisions of the Convention...apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world’.³⁴⁰

Earlier in 2014, the Committee made further clarifying comments about the scope of application of CAT in the Committee’s Concluding Observations on the initial report of the Holy See:³⁴¹

The Committee’s General Comment No. 2 recalls that States bear international responsibility for the acts and omissions of their officials and others acting in an official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. This responsibility extends to actions and omissions of the public servants of a State party deployed on operations abroad. The Committee reminds States parties to the Convention that they are obligated to adopt effective measures to prevent their officials and others acting in an official capacity from perpetrating or instigating the commission of torture or ill-treatment and from consenting to or acquiescing in the commission of such violations by others, including non-state actors, in any situation in which they exercise jurisdiction or effective control.

Australia may also bear responsibility under international law where it aids and assists abuses commissioned outside of Australian sovereign territory or areas of control. The International Law Commission’s *Draft Articles on State Responsibility* provide that a State can be responsible for the act of another State if the State:³⁴²

- aids or assists in the commission of an ‘internationally wrongful act’ by the other State;
- does so knowing the circumstances of the internationally wrongful act; and
- could not lawfully commit that act.

January 2008); see O. De Schutter et al, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ (2012) 34 *Human Rights Quarterly* 1084.

³⁴⁰ Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention – Conclusions and recommendations of the Committee against Torture: United States of America*, 36th sess, 720th-721st mtgs, UN Doc No CAT/C/USA/CO/2 (25 July 2006) [15].

³⁴¹ Committee Against Torture, *Concluding observations on the initial report of the Holy See*, 52nd sess, 1246th-1247th mtgs, UN Doc No CAT/C/VAT/CO/1 (17 June 2014) [8].

³⁴² *Report of the International Law Commission – Fifty-third session (23 April-1 June and 2 July-10 August 2001)*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) 43-59 (‘Draft Articles’), art 16. The Draft Articles are a persuasive tool for interpreting international law but are not themselves binding on States. The International Law Commission is a UN body that works to promote the progressive development and codification of international law. It was established by the UN and its members are international law experts elected by the General Assembly.

An ‘internationally wrongful act’ includes a violation of international human rights law, such as torture or cruel, inhuman and degrading treatment.³⁴³

In addition to offshore processing of asylum seekers (section 9.2), Australia’s human rights obligations are also engaged in the context of its co-operation with and support for foreign authorities, its return of failed asylum seekers, and its cooperation, promotion and regulation of Australian businesses’ overseas operations.

The Australian Government should be encouraged to revisit its views on the extraterritorial scope of its obligations under CAT and the other human rights treaties to which it is a party.

17.2. Aiding and assisting foreign security forces accused of human rights abuses

Australia provides a range of police, military and intelligence assistance to foreign security forces in the Asia Pacific region, some of whom stand accused of serious human rights abuses including torture, rape and cruel, inhuman and degrading treatment.

“ ***There is a real risk that Australian assistance to foreign military and police amounts to aiding and assisting the commission of torture*** ”

There is a real risk that Australian assistance to foreign military and police amounts to aiding and assisting the commission of torture and other cruel,

inhuman and degrading treatment by foreign security forces. Australia knows or ought to know that the individuals or units that it funds and trains have committed serious abuses. Yet Australia does not vet any of the individuals or units that receive this aid and assistance or conduct any adequate due diligence of its international police and military partners.

Aiding and assisting detention by Sri Lankan security forces

Australia provides training, resources and intelligence to the Sri Lankan police and military to block Sri Lankan asylum seekers from leaving their country. Since at least 2009, Australia has encouraged, facilitated and resourced the Sri Lankan police and military to stop its people leaving the country as part of Australian border control operations. The aim is to stop boats at their source before they can depart Sri Lanka.³⁴⁴

The AFP, Defence, and Australian Customs and Border Protection Service (**Customs**) maintain a presence on the ground in Sri Lanka to share information with, and develop the capacity of, Sri Lankan authorities to intercept boats. Australia provides around \$2 million in materiel support for the Sri Lankan Navy every year and has gifted critical resources such as patrol boats for the Sri Lankan

³⁴³ Under article 2 of the Draft Articles, internationally wrongful act requires an act or omission attributable to a State that constitutes a breach of international obligations of that State.

³⁴⁴ The full extent of the relationship is set out in Human Rights Law Centre, *Can't flee, can't stay: Australia's interception and return of Sri Lankan asylum seekers* (March 2014) <www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf>.

Navy and Coast Guard. Sri Lanka, Police did not have an 'illegal migration' surveillance capacity until Australia established one for them.³⁴⁵

The Sri Lankan interceptions expose the intercepted people to an unacceptable risk of torture and mistreatment in Sri Lankan custody. Those who are intercepted are held in navy custody before being handed to the Sri Lankan police. Many of the people who are intercepted are likely to be asylum seekers and at risk of torture and mistreatment in custody.

The Committee has previously stated that it was 'seriously concerned' about widespread use of torture and other cruel, inhuman and degrading treatment of suspects in police custody, including after the end of the civil war.³⁴⁶ Research conducted with Sri Lankan people who have tried to leave the country but were caught by Sri Lankan authorities supports the conclusion that interceptions do lead to mistreatment of some of the passengers, namely those who are associated with the Liberation Tigers of Tamil Eelam (LTTE).³⁴⁷

Detention by Sri Lankan authorities itself can place some asylum seekers at risk of harm. The updated United Kingdom country guidance case on Sri Lanka acknowledges that if a person is detained by the Sri Lankan security services 'there remains a real risk of ill-treatment or harm requiring international protection'.³⁴⁸ Sri Lankans associated with the LTTE or with scarring on their body are particularly vulnerable to mistreatment on interception.³⁴⁹ The Sri Lankan security forces have a long and well-documented track record of torture and mistreatment in custody, including the rape of

³⁴⁵ See *ibid* ch 5.

³⁴⁶ Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention – Concluding observations of the Committee against Torture: Sri Lanka*, 47th sess, 1050th-1052nd mtgs, UN Doc CAT/C/LKA/CO/3-4 (8 December 2011) [6].

³⁴⁷ That research discussed people who were identified as having actual or perceived links to the LTTE who reported being stripped, searched for scars and beaten in Sri Lankan navy and police custody after being intercepted. Emily Howie, *Australia dangerously close to the abuse of fleeing Sri Lankans* (15 January 2014) The Conversation <<http://theconversation.com/australia-dangerously-close-to-the-abuse-of-fleeing-sri-lankans-21166>>.

³⁴⁸ *GJ and Others (post-civil war: returnees) Sri Lanka CG v Secretary of State for the Home Department* (Unreported, United Kingdom Upper Tribunal (Immigration and Asylum Chamber), 3 July 2013) [356(4)].

³⁴⁹ See Freedom from Torture, *Out of the Silence: New Evidence of Ongoing Torture in Sri Lanka, 2009-2011* (September 2012) <www.freedomfromtorture.org/sites/default/files/documents/Sri%20Lanka%20Ongoing%20Torture%20Report_for%20release%208%20Nov%20-%20with%20cover.pdf> which documents the torture from medico-legal reports prepared for asylum seekers in the United Kingdom. "Those who bore scars (even if they were incurred during shelling) were told that this was evidence of LTTE membership and were then removed to a separate place of detention": at 8-9.

men and women.³⁵⁰ Sri Lankan security forces are extremely well-networked to identify boat passengers of interest to the Sri Lankan authorities.³⁵¹

The BBC has reported that some people who are intercepted attempting to leave Sri Lanka by boat are handed directly to TID for investigation and are held under Sri Lanka's draconian counter-terror laws, the *Prevention of Terrorism Act (PTA)*.³⁵² Those detainees face a particularly high risk of torture.³⁵³ Amnesty International has reported detainees' claims that torture is common in TID custody.³⁵⁴ In fact, the PTA contains an extraordinary defence to torture: TID officers are shielded from prosecution for torture if they claim they acted 'in good faith' in pursuance of an order or direction given under the PTA.³⁵⁵

In these circumstances, there are good arguments that Australia's direct and active support of Sri Lankan interventions aids and assists in the mistreatment of the intercepted people by Sri Lankan forces. Australia is well aware of Sri Lankan track record of torture in custody, having raised the issue during Sri Lanka's UPR in 2012.³⁵⁶

Australia does not conduct any comprehensive vetting of the Sri Lankan police or navy officers or units that receive Australian aid, equipment, intelligence and training.

³⁵⁰ Human Rights Watch has documented and published at least 50 cases of rape and sexual violence of men and women, accompanied by other forms of torture and cruel, inhuman and degrading treatment by Sri Lanka's security forces against persons in custody since the conflict's end. See Human Rights Watch, *"We Will Teach You a Lesson": Sexual Violence against Tamils by Sri Lankan Security Forces* (26 February 2013) <www.hrw.org/sites/default/files/reports/srilanka0213webwcover_0.pdf>.

³⁵¹ *GJ and Others (post-civil war: returnees) Sri Lanka CG v Secretary of State for the Home Department* (Unreported, United Kingdom Upper Tribunal (Immigration and Asylum Chamber), 3 July 2013) [356(6)]-[356(9)].

³⁵² Mahinda Liyanage, 'SL Navy intercept Australia bound 'boat people' from India', *Daily News* (online), 6 May 2013 www.dailynews.lk/2013/05/08/sec01.asp. See also *Six migrants detained under PTA* (14 September 2011) BBC Sinhala.com <www.bbc.co.uk/sinhala/news/story/2011/09/printable/110914_boatpeople.shtml>.

³⁵³ Detention under the PTA is indefinite, arbitrary and lacks the most basic safeguards of ordinary detention such as judicial oversight.

³⁵⁴ Amnesty International, *Locked Away: Sri Lanka's Security Detainees* (2012) 15 <<http://files.amnesty.org/archives/asa370032012eng.pdf>>.

³⁵⁵ United Nations High Commissioner for Refugees, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*, UN Doc HCR/EG/LKA/12/04 (21 December 2012) 10.

³⁵⁶ Commonwealth of Australia, *Universal Period Review of Sri Lanka – 14th Session, Statement by Australia* (1 November 2012) <www.geneva.mission.gov.au/gene/Statement391.html>.

Funding PNG mobile squads to provide security

Australian aid has historically been used to fund the PNG mobile squads.³⁵⁷ In August 2013, *The Age* reported that the Australian Department of Immigration and Border Protection was secretly funding PNG mobile squads on Manus Island by providing a \$100 per day living away from home allowance and providing motor vehicles for their use.³⁵⁸

These mobile squads stand accused of a range of human rights abuses in PNG, including torture and rape, as well as participation in the violence at Manus Island Detention Centre in February 2014 that resulted in the death of Iranian immigration detainee, Reza Berati (section 9.2)).

Support for Detachment 88

On 28 August 2012, the ABC's 7.30 television program aired evidence that a counter-terrorism unit within the Indonesian National Police, Detachment 88, which 'receives training, supplies and extensive operational support from the Australian Federal Police', had been involved in torture, ill-treatment and extra-judicial killings in the Indonesian province of West Papua.³⁵⁹ The evidence included interviews with victims and witnesses, together with video of alleged incidents of abuse.

The allegations were raised with the Special Rapporteur on Torture and the Special Rapporteur on Extrajudicial Killings in a request from the Human Rights Law Centre in August 2012.³⁶⁰

³⁵⁷ Australian Broadcasting Corporation, 'Australian aid to PNG training 'private armies'', *Radio Australia*, 30 April 2012 (Geraldine Coutts and Andrew Lattas) <www.radioaustralia.net.au/international/radio/program/pacific-beat/australian-aid-to-png-training-private-armies/935196>.

³⁵⁸ Rory Callinan, 'Australia funds lethal brute squad', *The Age* (online), 4 August 2013 <www.theage.com.au/victoria/australia-funds-lethal-brute-squad-20130803-2r6g1.html>.

³⁵⁹ Hayden Cooper and Lisa Main, *Papuans claim Australian link to death squad* (29 August 2012) ABC News <www.abc.net.au/news/2012-08-28/papuans-claim-australian-link-to-death-squad/4228710>.

³⁶⁰ Open letter from Human Rights Law Centre to Juan Mendez and Christof Heyns, *Australia's support for Indonesian counter-terrorism unit implicated in serious human rights abuses*, 29 August 2012 <www.hrlc.org.au/files/Letter-to-UN-SRs-re-Australia-support-for-Detachment-88.pdf>.

Proposed Recommendations:

That Australia ensure that its international border security partnerships do not place people in danger of torture and cruel, inhuman and degrading treatment. To this end, Australia should stop encouraging, facilitating and resourcing Sri Lankan authorities to intercept asylum seekers as they try to flee Sri Lanka.

That Australia should ensure that it thoroughly vets all individuals and units within foreign security forces that receive direct aid from Australia. The law should require:

- vetting of all military or police personnel and units overseas who receive Australian training or assistance for credible allegations against them of serious human rights abuses, including rape and torture, war crimes or crimes against humanity; and
- that any personnel with such credible allegations made against them cannot be the recipient of Australian assistance.

17.3. Business and human rights

Several UN treaty bodies have confirmed that States have obligations to ensure that companies operating outside their territory do not violate human rights. For instance, the Committee on Economic, Social and Cultural Rights has stated that:³⁶¹

States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.

The Committee on the Rights of the Child (**CRC**) has commented that:³⁶²

Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned.

Consistent with this comment, in 2012 the CRC raised concerns regarding the impact of Australian corporations' activities, and recommended that, among other things, Australia:³⁶³

³⁶¹ Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, 46th sess, UN Doc E/C.12/2011/1 (12 July 2011) [5].

³⁶² Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, UN Doc CRC/C/GC/16 (17 April 2013) [43].

³⁶³ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia*, 60th sess, 1725th mtg, UN Doc CRC/C/AUS/CO/4 (28 August 2012).

Examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations.

Similarly, in 2010 the Committee on the Elimination of All Forms of Racial Discrimination noted with concern the absence of an adequate legal framework regulating the obligations of Australian corporations at home and overseas. The Committee encouraged Australia to:³⁶⁴

take appropriate legislative or administrative measures to prevent acts by Australian corporations which negatively impact on the enjoyment of rights... and to regulate the extraterritorial activities of Australian corporations abroad.

The Australian Government's business and human rights obligations are also set out in the UN *Guiding Principles on Business and Human Rights (Guiding Principles)* which the Australian Government co-sponsored in 2011. Since then, a number of discrete positive steps have been taken, for example Australia has joined the Voluntary Principles on Security and Human Rights (an extractives sector initiative that addresses human rights issues associated with the security arrangements adopted by companies in Australia and overseas) and Australia's export credit agency,

“ the Australian Government has not yet made efforts to systematically incorporate the Guiding Principles into domestic law or policy ”

the Australian Export Finance and Insurance Corporation (EFIC), has adopted a grievance mechanism.

However, the Australian Government has not yet made efforts to

systematically incorporate the Guiding Principles into domestic law or policy, or made a commitment to develop a national action plan for their implementation in Australia.

In September 2013, the Australian Government committed to ensure that 'Australia's economic interests underpin the operations of the Department of Foreign Affairs and Trade. There will be an unambiguous focus on promoting the interests of Australian businesses abroad'.³⁶⁵ The Government has also announced a 'new paradigm in development assistance' which focuses on 'sustainable economic growth driven by the private sector' and directs Australia's development assistance towards

³⁶⁴ Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the Convention – Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 77th sess, 2043rd mtg, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010).

³⁶⁵ Liberal Party of Australia and The Nationals, *The Coalition's Policy for Foreign Affairs* (September 2013) <http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2717541/upload_binary/2717541.pdf;fileType=application%2Fpdf#search=%22COJ%22>.

the pursuit of economic growth through the promotion of free markets, trade agreements and private sector development.³⁶⁶

In light of these commitments, there is a pressing need to ensure compliance with the obligations under UN treaties and the Guiding Principle that require States to:³⁶⁷

take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

The UN's former Special Representative on Business and Human Rights, Professor John Ruggie, has recommended that any partnerships between the public and private sectors should:³⁶⁸

include in their governance arrangements measures to reinforce existing state duties as well as corporate due diligence processes to avoid adverse impacts, and to address them where they do occur. Multi-stakeholder initiatives should also ensure they have in place effective grievance mechanisms consistent with the provisions set out in the guiding principles.

This requirement is particularly pertinent in cases where there is a strong State-business nexus, such as where the Australian Government is partnering with an Australian corporation in the delivery of its aid program, or supporting business through its export credit agency.

Cambodian Railway Project

The Greater Mekong Sub-region Rehabilitation of the Railway in Cambodia Project was launched in 2006 to restore approximately 650 kilometres of railway infrastructure in Cambodia. The Australian Government's aid agency is the project's second largest financier and the project is linked to a concession agreement under which an Australian company, Toll Holdings, is part of a joint venture to manage the railway system for 30 years.

The project involved the forced relocation or partial destruction of houses and other assets of over 4000 families. Compensation and resettlement packages provided were not sufficient to ensure that affected families had access to adequate housing and could meet other basic needs after they resettled. Inadequate compensation and lack of livelihood support and opportunities near the resettlement sites have resulted in widespread reduction in income and crippling debt. Many resettled families are unable to meet subsistence needs. In particular, many parents have expressed concern about their inability to take care of their children. Some parents have reported that they are no longer

³⁶⁶ Julie Bishop, 'A new paradigm in development assistance – harnessing the private sector' (Speech delivered at the 2014 Magna Carta Lecture, Melbourne, 29 April 2014) <http://foreignminister.gov.au/speeches/Pages/2014/jb_mr_140429.aspx?ministerid=4>.

³⁶⁷ John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/8/5 (7 April 2008).

³⁶⁸ John Ruggie, *Making public-private partnerships work* (11 September 2013) Thomson Reuters Foundation <www.trust.org/item/20130911091253-vmh6s>.

able to adequately feed their children or send their children to school. In some cases children have dropped out of school in order to work to supplement household income.

In October 2012, Inclusive Development International and Equitable Cambodia filed a complaint with the Australian Human Rights Commission (AHRC) on behalf of 30 families affected by the project alleging that they suffered serious violations of their human rights as a result of resettlement. The AHRC dismissed the complaint as misconceived on the basis that the Australian Government did not exercise 'effective control' over the relevant territory in Cambodia.

Proposed recommendations:

That the Australian Government engage with NGOs, businesses and other stakeholders and experts to develop a national action plan on the implementation of the UN Guiding Principles on Business and Human Rights. The national action plan should include measures to ensure that Australian companies do not violate human rights in their overseas operations.

That the Australian Government conduct its own human rights due diligence of projects (including aid and development projects) that engage the private sector and require its business partners to do the same. The Government should not support activities that are likely to cause or contribute to human rights abuses.

The Government should establish a formal grievance mechanism to provide access to effective remedies for people who suffer human rights violations in connection with Australian government aid and development projects and/or the overseas operations of Australian businesses.

Appendix: proposed recommendations

Legislative and institutional protection of human rights

That the Australian Government

- fully incorporate its international human rights obligations into domestic law by introducing a comprehensive, judicially-enforceable Human Rights Act;
- improve the quality of Statements of Compatibility and its responses to the findings of the Joint Parliamentary Committee on Human Rights; and
- amend s 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.

That the Australian Government pursue wide-ranging amendments based on the recommendations of the Expert Panel on Constitutional Recognition.

That the Australian Government give full and proper consideration to the adverse Views of the UN treaty bodies and implement them in good faith.

That the Joint Parliamentary Committee on Human Rights be tasked with monitoring and reporting on the implementation of the Concluding Observations and Views of UN treaty bodies and the recommendations of the Special Procedures and Universal Periodic Review of the UN Human Rights Council.

Optional Protocol to CAT

That the Australian Government ratify OPCAT without delay.

Prisons

That states and territories commit to reducing the number of people entering the prison system and fund early-release support programs to reduce the overcrowding of prisons.

That prisoners are afforded the same access to quality healthcare, including access to needle and syringe programs, as people in the general community.

That the Australian Government work collaboratively with state and territory governments to develop a strategy to reduce women's incarceration rates, including through implementing gender-specific early intervention and diversionary programs, and other community-based solutions.

That the human rights issues that arise from the incarceration of transgender people be the subject of a thorough consultation process with affected. Subsequently, the Australian Government should commit to devising best practice standards so as to guide state and territory practice.

That state and territory governments commit to increasing the provision of mental health services to prisoners, (including culturally appropriate mental health services for Aboriginal prisoners). Mental health services in prisons should be at least equivalent to those available in the community.

That all states and territories introduce evidence-based, early intervention and diversion strategies to reduce the over-incarceration of people with mental health issues.

That the state and territory governments commit to reducing the number of young people in pre-trial detention by modifying current bail and remand practices.

That the Queensland Government reinstate the principle that custody be a matter of last resort, and change the definition of a young person so that the age is extended to 17 years.

That the Queensland, Western Australia and Northern Territory Governments repeal their naming and shaming laws.

Over-representation of Aboriginal Peoples in the criminal justice system

That state and territory governments commit to funding early intervention programs and specialist, therapeutic and diversionary courts, including Aboriginal Courts, with the goal of diverting Aboriginal peoples away from the criminal justice system.

That the Federal Government take a leading role in the implementation of justice reinvestment approaches in Aboriginal communities, as well as setting 'justice targets' to monitor and reduce the number of Aboriginal peoples in the prison system.

That the Australian Government commit to adequately funding community-controlled, culturally-specific legal services, to allow them to provide assistance in criminal, family and civil law matters. These services should be supported to engage in and contribute to law reform and advocacy work.

That states and territories actively commit to implementing the Royal Commission's recommendations, and report to the Australian Government on tangible improvements.

That all state and territory governments develop effective prisoner repatriation and post-release support programs, and monitor the rates of post-release deaths.

That a properly resourced, professional and transparent agency in each State and Territory be tasked with conducting objective, thorough and independent investigations into all deaths in custody, including police-related deaths.

That state and territory governments repeal mandatory sentencing laws.

Refugees and asylum seekers

That asylum seekers who arrive in Australia have their claims processed in Australia and, if found to be refugees, are resettled in Australia.

That the Australian Government cooperate with the governments of Nauru and Papua New Guinea to establish a system of independent monitoring and oversight of all places of immigration detention.

That Australia:

- repeal the provisions of the *Migration Act 1958* (Cth) relating to mandatory detention;

- enact legislation to ensure that asylum seekers are detained only where strictly necessary, for the shortest possible time and as a last resort;
- enact legislation to ensure that children and their families are not held in immigration detention;
- provide for regular, periodic, judicial review of a person's detention;
- codify in law time limitations on immigration detention; and
- ensure that all detainees have adequate access to legal counsel, interpreters, communication facilities, education, physical and mental health services and social, cultural and religious support networks.

That Australia:

- retain existing complementary protection legislation and abandon proposed reforms which would either repeal it or increase the threshold for complementary protection to 'more likely than not';
- cease using 'enhanced screening' and ensure all asylum seekers have their protection claims properly and thoroughly assessed under Australia's standard refugee determination process;
- cease the interception and return of asylum seekers to the countries from which they are fleeing or to transit countries which do not offer legal protection to refugees; and
- ensure the adequate monitoring of the well-being of the asylum seekers it forcibly returns to refugee producing countries.

Criminalisation of poverty

That the Australian Government engage with state and local governments to:

- conduct an audit of laws and policies that impact disproportionately on people experiencing homelessness;
- amend laws and policies at state and local levels that have a disproportionate or discriminatory impact on people experiencing homelessness;
- ensure close cooperation between all relevant stakeholders including homelessness, housing, health, law enforcement and justice professionals at all levels to intensify efforts to find solutions for homelessness in accordance with human rights standards; and
- offer incentives for implementation of non-enforcement based approaches to homelessness, including by making state and local governments' approaches to homelessness a consideration in allocation of federal funding.

Trafficking

That the Australian Government establish a federal compensation scheme for victims of human trafficking and slavery who have been victims of criminal offences set out in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth).

That the Australian Government consider the grant of a permanent visa to any victim of human trafficking and slavery engaged in the criminal justice process within six months of being identified as a victim of human trafficking and slavery.

That the Australian Government extend the government funded Support for Trafficked People Program to accommodate victims of human trafficking and slavery who are unable or unwilling to participate in law enforcement processes.

Violence against women

That the state, territory and Australian Governments adequately fund the implementation of the *National Plan to Reduce Violence against Women and their Children (2010-2022)* and relevant state and territory plans.

That the state, territory and Australian Governments review the effectiveness of existing consultative mechanisms and develop appropriate opportunities for ongoing participation by civil society in the development, implementation, monitoring and evaluation of the *National Plan to Reduce Violence Against Women and Their Children 2010–2022* and associated Action Plans.

That the Australian Government reconsider and implement the recommendations for reform made by the ALRC and New South Wales Law Reform Commission in *Family Violence – A National Legal Response* (2010) and the ALRC in *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (2012).

That all states and territories establish their own domestic/family violence death reviews that are statutorily based, securely funded, adhere to core best practice principles (which include independence, accountability, transparency and the active participation and central involvement of advocates for women and experts in violence against women), and collaborate with one another.

That the Australian Government establish an accessible national public database of death review recommendations, responses and practical outcomes.

That the Australian Government adopts special measures in consultation with Aboriginal peoples to address the significant ongoing disadvantage of Aboriginal women and children that perpetuates disproportionate rates of family violence.

That the Australian Government work with states and territories and Aboriginal peoples to ensure that family violence orders are accessible and that breaches are actioned in a culturally safe manner.

That Aboriginal families and communities are resourced, supported and empowered to provide for the safety of their children.

That the Australian Government adequately fund the national Aboriginal Family Violence Prevention Legal Service program.

That women and girls with disabilities are provided opportunities to actively participate in and be represented on decision-making, advisory and planning bodies at all three levels of government

(federal, state and local) and across all portfolio areas concerning violence against women and girls with disabilities.

That the Australian Government together with state and territory governments consider strategies (including legislative action) to address the lack of accessible violence response services for women and girls with disabilities. These strategies should ensure that violence response services operate within a framework that requires them to consider the needs of persons with disabilities at each stage of the service delivery model.

That the Australian Government together with state and territory governments consider strategies to address the lack of violence prevention, recognition and response in disability and health services. Most urgently, the National Disability Insurance Agency ensures that appropriate safeguards, standards and practice guidelines are developed that prioritise and drive responses to violence against people with disabilities and ensure referral pathways to violence response services. As part of this, the new National Disability Insurance Scheme workforce must be trained in understanding gendered violence and applying the principles of good practice to uphold the safety of people with disabilities.

Counter-terrorism measures

That Australia swiftly appoint an expert to the role of the Independent National Security Legislation Monitor.

That Australia review the definition of 'terrorist act' in the Criminal Code so that it is limited to countering offences that correspond to the characteristics of conduct to be suppressed in the fight against international terrorism, as identified by the Security Council in its resolution 1566.

That Australia remove the reference to 'threat of action' and other references to 'threat' from the definition of 'terrorist act' in section 100.1(1) of the Criminal Code.

That Australia review ASIO's power to obtain a warrant to question and detain a person under Part III Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth), and review ASIO's questioning warrant powers.

That Australia review and restrict the period of time which can be excluded from the investigation period in respect of terrorist suspects in Part 1C of the Crimes Act.

Police use of force

That the Australian Government comprehensively review laws, policies and procedures and training relating to use of force to ensure that force is only used when strictly necessary and in a manner proportionate to a legitimate purpose.

That the Australian Government take immediate steps to establish a mechanism to provide independent investigation into complaints concerning ill-treatment and excessive use of force by police and police-related deaths.

That Australia:

- review and amend guidelines around thresholds for use to align with international human rights law standards, including prohibiting use for compliance purposes;
- ensure that policies and training reflect the risk of serious harm and death for vulnerable groups and that special consideration are given to particular groups who are at greater risk of serious harm or death from the use of Tasers; and
- ensure Tasers with cameras are used where possible and the use of Tasers is rigorously monitored.

Treatment of people with disability

That the Australian Government establish a national, consistent legislative and administrative framework for the protection of people with disability from behaviour modification and restrictive practices that cause harm and punishment as recommended by the Australian Law Reform Commission.

That the Australian Government develop an evidence-based national plan that outlines actions for the development of positive behaviour support strategies that acknowledge and respect the physical and mental integrity of the person, and for the elimination of environments and treatment approaches that have been shown to exacerbate behaviour that leads to application of inappropriate levels of restriction and restraint.

That the Australian Government conduct a national inquiry into the use of restrictive practices on children and young people with disability in mainstream and segregated schools and identify and implement recommendations for the elimination of these practices.

That states and territories review laws and institutions which permit and facilitate forced psychiatric treatment to ensure they comply with international human rights law.

That Australia develops and enacts national uniform legislation prohibiting, except where there is a serious threat to life or health, the use of sterilisation of children, regardless of whether they have a disability, and of adults with disability in the absence of their prior, fully informed and free consent.

Rape and sexual violence against children

That the Australian Government expeditiously and fully implement the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse when they are issued.

Extraterritorial obligations

That Australia ensure that its international border security partnerships do not place people in danger of torture and cruel, inhuman and degrading treatment. To this end, Australia should stop encouraging, facilitating and resourcing Sri Lankan authorities to intercept asylum seekers as they try to flee Sri Lanka.

That Australia should ensure that it thoroughly vets all individuals and units within foreign security forces that receive direct aid from Australia. The law should require:

- vetting of all military or police personnel and units overseas who receive Australian training or assistance for credible allegations against them of serious human rights abuses, including rape and torture, war crimes or crimes against humanity; and
- that any personnel with such credible allegations made against them cannot be the recipient of Australian assistance.
- That the Australian Government engage with NGOs, businesses and other stakeholders and experts to develop a national action plan on the implementation of the UN Guiding Principles on Business and Human Rights. The national action plan should include measures to ensure that Australian companies do not violate human rights in their overseas operations.
- That the Australian Government conduct its own human rights due diligence of projects (including aid and development projects) that engage the private sector and require its business partners to do the same. The Government should not support activities that are likely to cause or contribute to human rights abuses.
- The Government should establish a formal grievance mechanism to provide access to effective remedies for people who suffer human rights violations in connection with Australian government aid and development projects and/or the overseas operations of Australian businesses.