

# Freedom Respect Equality Dignity: Action

NGO Submission to the Human Rights Committee:  
Australia's Compliance with the International Covenant on Civil and Political Rights



September 2008

This submission to the Human Rights Committee has been prepared by the National Association of Community Legal Centres, the Human Rights Law Resource Centre and Kingsford Legal Centre, with substantial contributions from over 50 NGOs. This submission is supported, in whole or in part, by more than 200 NGOs across Australia.

The National Association of Community Legal Centres is the peak body for over 200 community legal services across Australia. Each year, community legal centres provide free legal services, information and advice to over 250,000 disadvantaged Australians.

The Human Rights Law Resource Centre is a national specialist human rights legal service. It aims to promote and protect human rights, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law.

The Kingsford Legal Centre is a community legal centre in Sydney which provides free advice and ongoing assistance to members of community in relation to a number of areas of law, including discrimination law. Kingsford Legal Centre also undertakes law reform and community education work.

This publication does not contain legal advice and you should seek professional advice before taking any action based on its contents.



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## Introduction

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### ABOUT THIS SUBMISSION

1. This submission to the United Nations Human Rights Committee has been prepared by the Human Rights Law Resource Centre, the National Association of Community Legal Centres and Kingsford Legal Centre, with substantial contributions from over 50 non-government organisations (**NGOs**) across Australia. The principal authors of this submission are Ben Schokman and Philip Lynch of the Human Rights Law Resource Centre, Teena Balgi of Kingsford Legal Centre and Annie Pettitt of the National Association of Community Legal Centres.
2. The Human Rights Law Resource Centre is a national specialist human rights legal service. It aims to promote and protect human rights, particularly the human rights of people who are disadvantaged or living in poverty, through the practice of law.
3. The National Association of Community Legal Centres is the peak body for more than 200 community legal services across Australia. Each year, community legal centres provide free legal services, information and advice to over 250,000 disadvantaged Australians.
4. The Kingsford Legal Centre is a community legal centre in Sydney that provides free advice and ongoing assistance to members of the community in relation to a number of areas of law, including discrimination law. The Kingsford Legal Centre also undertakes law reform and community education work.
5. The authors would like to acknowledge the following organisations and individuals set out on page 4 of this submission, who made invaluable contributions to this submission. The authors would also like to acknowledge Maria Herminia Graterol and Olivia Girard for the translation of the Executive Summary.
6. This submission is supported, in whole or in part, by the NGOs set out on page 6 of this submission.
7. The National Association of Community Legal Centres, the Human Rights Law Resource Centre and Kingsford Legal Centre would like to acknowledge the substantial pro bono assistance of Mallesons Stephen Jaques, a leading commercial law firm, in assisting to research, edit and print this submission.<sup>1</sup>

### SOCIAL AND POLITICAL CONTEXT OF SUBMISSION

8. Australia's Common Core Document, which incorporates Australia's Fifth Report under the *International Covenant on Civil and Political Rights (ICCPR)*, was lodged with the Human Rights Committee on 25 July 2007. It was prepared under the former Liberal/National Coalition Government (**former Australian Government**), which held federal office from 1996

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<sup>1</sup> The opinions expressed are solely those of the attributed authors and are not those of Mallesons Stephen Jaques or its staff.

to November 2007. In November 2007, there was a federal general election at which a Labor Government was elected (**current Australian Government**). This submission therefore not only responds to Australia's Common Core Document but, wherever possible, also seeks to address actual or proposed changes in relevant Australian law, practice and policy (including Australian Labor Party policy) between lodgement of the Common Core Document in July 2007 and this submission in September 2008.

9. We consider that the Common Core Document is deficient in a number of ways. In particular, the Common Core Document omits a number of very significant human rights issues and largely fails to engage in a constructive assessment of the compatibility of Australian law, policy and practice with the *ICCPR* and the extent to which Australia has, or has not, made progress in the realisation of civil and political rights. We are also concerned about the lack of consultation and transparency in the former Australian Government's process of preparing the Common Core Document. In these respects, Australia's Common Core Document significantly fails to conform to many aspects of the *Harmonized Guidelines on Reporting under the International Human Rights Treaties*.<sup>2</sup>
10. It is disappointing that the former Australian Government did not use its Fifth Report under the *ICCPR* as an opportunity to conduct a comprehensive review of the measures it has taken to harmonise Australia's domestic law and policy with its international obligations. Periodic reports to UN treaty bodies should be used by Australian Governments to monitor progress made in promoting the enjoyment of fundamental human rights in Australia and to plan and develop appropriate policies to fully implement the rights contained in the treaties.

## OVERVIEW OF HUMAN RIGHTS FRAMEWORK IN AUSTRALIA

11. The *ICCPR* is not incorporated into Australian domestic law and many *ICCPR* rights are not justiciable or enforceable in Australian courts or tribunals. Australia remains the only developed state in the world without a national bill or charter of rights, although the current Australian Government has committed to a 'public consultation' about the need for enhanced legislative protection of human rights. To date, details of this public consultation have not been announced.
12. While Australia's domestic law contains a number of pieces of legislation that protect certain human rights, particularly the right to non-discrimination, they do not cover all rights provided for in the *ICCPR*. In the absence of a federal bill or charter of rights, there are very significant gaps in the protection of human rights. These gaps and other human rights issues are discussed below under each of the relevant rights.
13. Although Australia does have an independent national human rights institution in accord with the Paris Principles, the authority of the Australian Human Rights Commission (formerly the

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<sup>2</sup> Inter-Committee Technical Working Group, *Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Documents*, UN Doc HRI/MC/2006/3 (2006).

Human Rights and Equal Opportunity Commission (**HREOC**)<sup>3</sup> is limited to inquiry into complaints. The Commission cannot make enforceable determinations and there is no requirement that the Australian Government implement or even respond to its recommendations.

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<sup>3</sup> This report refers to activities and publications of the Australian Human Rights Commission as HREOC's where the relevant activities and publications were published before HREOC was renamed.

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	NSW Young Lawyers Human Rights Committee, International Human Rights Working Group
	People with Disability Australia Inc

Prisoners' Legal Service Inc (Qld)

Public Interest Advocacy Centre

Public Interest Law Clearing House (Vic) Inc

Redfern Legal Centre Ltd

Refugee Advice and Casework Service (Aust)  
Inc

Rights Australia Inc

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Sisters Inside

South Australian Council of Social Service Inc

Southern Communities Advocacy Legal &  
Education Service Inc (SCALES)

Tenants Advice Service Inc (WA)

The Shopfront Youth Legal Centre

Townsville Community Legal Service Inc

UnitingJustice Australia

Victorian Council of Social Service

Welfare Rights Centre Sydney

Women With Disabilities Australia

Women's Legal Centre (ACT & Region) Inc

Women's Legal Service Victoria

Women's Legal Services Australia

Women's Legal Services NSW

YWCA Australia

## List of Supporting Organisations

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This submission is supported, in whole or in part, by the following non-government organisations:

A Just Australia Inc	Australian Coalition for Equality
Aboriginal Disability Network NSW	Australian Council of Social Service Inc
Aboriginal Legal Rights Movement Inc	Australian Council of Trade Unions
Aboriginal Legal Service (NSW/ACT) Limited	Australian Federation of Disability Organisations
Aboriginal Legal Service of Western Australia Inc	Australian Federation of Islamic Councils Inc
Aboriginal Rights Coalition — Adelaide	Australian Human Rights Centre
Aboriginal Rights Coalition — Brisbane	Australian Institute for Employment Rights
Aboriginal Rights Coalition — Darwin	Australian Lawyers Alliance
Aboriginal Rights Coalition — Hobart	Australian Lawyers for Human Rights
Aboriginal Rights Coalition — Katherine	Australian Manufacturing Workers Union
Aboriginal Rights Coalition — Perth	Australian Marriage Equality Inc
Aboriginal Rights Coalition — Sydney	Australian Muslim Civil Rights Advocacy Network
Aboriginal Rights Coalition — Townsville	Australian Prisoners Union
Aboriginal Rights Coalition National Aboriginal Steering Committee	Australians for Native Title and Reconciliation
ACON (AIDS Council of NSW Inc)	Australians for Native Title and Reconciliation Victoria Inc
ACT Council of Social Service Inc	Berry Street Victoria Inc
Alternative Law Journal	Cape York Land Council Aboriginal Corporation
Anex Inc	Castan Centre for Human Rights Law, Monash University
Architects for Peace	Centre for Excellence in Child and Family Welfare Inc
Arts Access Australia Ltd	Centre for Human Rights Education, Curtin University
Asylum Seeker Resource Centre	Centre for Multicultural Youth Issues
Asylum Seekers Centre of NSW	Centre for Refugee Research, University of New South Wales
Aussies Against Capital Punishment, Inc	Chronic Illness Alliance Inc
Australian Action for Peace and Development in the Philippines	
Australian Association of Social Workers	
Australian Bahá'í Community	
Australian Centre for Human Rights Education	

Civil Liberties Australia Inc	Forum of Australian Services for Survivors of Torture and Trauma
Combined Community Legal Centres Group (NSW) Inc	Friends of the ABC Vic Inc
Communication Rights Australia	GetUp! Action for Australia
Communications Law Centre, Victoria University	Greek Orthodox Community of NSW Ltd
Concerned Psychologists Queensland for Children's Rights	Health Consumers' Council WA (Inc)
Conflict Resolution Network	Homelessness Australia
Connections UnitingCare	Hotham Mission — Asylum Seeker Project
Conservation Council (ACT Region)	Human Rights Act for Australia campaign Association Inc
Council of Social Service of NSW (NCOSS)	Human Rights Arts and Film Festival Inc
Council to Homeless Persons	Human Rights Coalition Inc.
CREATE Foundation Ltd	Human Rights Council of Australia Inc
Darebin Community Legal Centre Inc	Human Rights Law Resource Centre Ltd
Darwin Community Legal Service Inc	Human Rights Monitors
Deaf Australia Inc	Humanist Society of Qld Inc
Disability Discrimination Legal Service Inc (Vic)	Immigrant Women's Speakout Association NSW Inc
Edmund Rice Business Ethics Initiative	Indigenous Law Centre
Elizabeth Evatt AC	Inner City Legal Centre
Environment Defenders Office (Victoria) Limited	Intellectual Disability Rights Service Inc
Ethnic Child Care Family and Community Services Co-operative Ltd	International Commission of Jurists, Australian Section Inc
European Network for Indigenous Australian Rights	International Human Rights Law Working Group of the NSW Young Lawyers Human Rights Committee
Federation of Community Legal Centres (Vic) Inc	International Society for Human Rights — Australia Inc
Federation of Ethnic Communities' Council of Australia	Jesuit Refugee Service Australia
Financial & Consumer Rights Council Inc	Jobs Australia Ltd
Fitzroy Learning Network	JobWatch Inc
Fitzroy Legal Service	Just Peace Queensland Inc
Flemington & Kensington Community Legal Centre Inc	Just Rights Queensland
	Justice Action
	Kingsford Legal Centre

Koorie Women Mean Business Inc	Oxfam Australia
Liberty Victoria	Pax Christi Australia
Lingap Migrante	Peel Community Legal Services Inc
Meniere's Support Group of Victoria Inc	People with Disability Australia Inc
Mental Health Legal Centre Inc	Philippines-Australia Women's Association
Micah Projects Inc	PILCH Homeless Persons' Legal Clinic
Missionaries of the Sacred Heart Australia, Justice and Peace Centre	Preston-Reservoir Progress Association
Moreland Community Legal Centre Inc	Prisoners Action Group
Mornington Peninsula Human Rights Group	Prisoners' Legal Service Inc (Qld)
Multicultural Centre for Women's Health	Public Interest Advocacy Centre
Multicultural Disability Advocacy Association of NSW	Public Interest Law Clearing House (Vic) Inc
Music Council of Australia	Queensland Council of Social Service Inc
National Association for the Visual Arts	Queensland Working Women's Service Inc
National Association of Community Legal Centres	Reconciliation Banyule
National Children's & Youth Law Centre	Reconciliation Victoria
National Council of Women of Australia	Reconciliation Victoria Inc
National Council of Women of Western Australia	Redfern Legal Centre Ltd
National Employment Network of the National Association of Community Legal Centres	Refugee Advice & Casework Service (Aust) Inc
National Ethnic Disability Alliance	Refugee Council of Australia
National Human Rights Network of the National Association of Community Legal Centres	RepriveAustralia Inc
National Pro Bono Resource Centre	Research Unit, Jumbunna Indigenous House of Learning, University of Technology, Sydney
National Welfare Rights Network Inc	Right Now Human Rights Law in Australia Magazine
National Working Women's Centres	Rights Australia Inc
National Youth Advocacy Network	Robert Stary & Associates, Criminal Defence Lawyers
New South Wales Council for Civil Liberties	Rural Australians for Refugees
North Australian Aboriginal Justice Agency	Rural Housing Network Limited
Northern Community Legal Service Inc	SANE Australia
NSW Disability Discrimination Legal Centre Inc	Seniors Rights Victoria
	Sisters Inside Inc
	South Australian Council of Social Service Inc

Southern Communities Advocacy Legal and Education Service Inc (SCALES)

Springvale Monash Legal Service

St Kilda Legal Service Co-Op Ltd

St Mary's House of Welcome

Tasmanian Association of Community Legal Centres

Tasmanian Gay and Lesbian Rights Group

Tenants Advice Service Inc (WA)

Tenants Union of Victoria Ltd

Textile, Clothing and Footwear Union of Australia

The Justice Project Inc

Top End Women's Legal Service

Townsville Community Legal Service Inc

United Nations Australia Association of Australia Inc (WA Division)

United Nations Youth Association of Australia

UnitingJustice Australia, Uniting Church in Australia

Victorian Aboriginal Child Care Agency Co-op Ltd

Victorian Aboriginal Legal Service Co-operative Limited

Victorian Alcohol and Drug Association Inc

Victorian Council of Social Service

Victorian Foundation for Survivors of Torture Inc

Victorian Mental Illness Awareness Council

Villamanta Disability Rights Legal Service Inc

Welfare Rights Centre, Sydney

Western Suburbs Legal Service Inc

Wirringa Baiya Aboriginal Women's Legal Centre

Women With Disabilities Australia

Women's Legal Service Victoria

Women's Rights Action Network Australia

Women's Electoral Lobby Australia

Women's International League for Peace and Freedom (Australian)

Women's International League for Peace and Freedom (NSW)

Women's Legal Centre (ACT & Region) Inc

Women's Legal Services Australia

Women's Legal Services NSW

Working Women's Centre SA Inc

World Vision Australia

Youth Action & Policy Association NSW Inc

Youth Coalition of the ACT

Youthlaw

YWCA Australia

## Executive Summary

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14. Fundamental human rights issues have been at the core of national political and social policy and debate in Australia in the last decade. This submission documents areas in which Australia is falling short of its obligations under the *ICCPR* and focuses on areas that have been the subject of extensive NGO activity and research in Australia.
15. This Executive Summary sets out:
  - (a) key developments in the promotion of the *ICCPR* rights since the lodgement of the Common Core Document in July 2007; and
  - (b) key concerns in relation to *ICCPR* breaches and implementation failures in Australia's Fifth Report under the *ICCPR*.
16. This submission also contains the following appendices:
  - (a) [Appendix 1](#) provides a schedule of Proposed Questions to be included in the List of Issues relating to all the articles of the *ICCPR*; and
  - (b) [Appendix 2](#) provides a schedule of Proposed Recommendations to be included in the Concluding Observations relating to all articles of the *ICCPR*; and
  - (c) [Appendix 3](#) provides information on the extent to which the Common Core Document deals sufficiently with previous Concluding Observations of the Human Rights Committee.

### RECENT KEY DEVELOPMENTS IN THE PROMOTION OF *ICCPR* RIGHTS

17. Since its election in November 2007, the current Australian Government has taken a number of significant steps towards the realisation of *ICCPR* rights and the promotion of human rights generally, including:
  - (a) committing to a public consultation regarding the legal recognition and protection of human rights in Australia;
  - (b) issuing a formal parliamentary 'apology' to the Indigenous Stolen Generations;
  - (c) ratifying the *Convention on the Rights of Persons with Disabilities*;
  - (d) indicating an intention to accede to the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women* and the Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*;
  - (e) committing to more extensive and constructive engagement with the United Nations human rights mechanisms, including by issuing a standing invitation to the Special Procedures of the UN Human Rights Council and developing domestic mechanisms to review implementation of treaty body recommendations;
  - (f) undertaking key reforms of the immigration system, including:

- (i) ending the so-called ‘Pacific Solution’;
  - (ii) removing the system of temporary protection visas for asylum seekers; and
  - (iii) reforming Australia’s policy of mandatory immigration detention;
- (g) reconsidering the former Australian Government’s opposition to the UN Declaration on the Rights of Indigenous Peoples;
- (h) establishing a new Social Inclusion Unit within the Department of Prime Minister and Cabinet, and appointing a senior minister to the portfolio of Social Inclusion;
- (i) appointing an expert committee to prepare a strategy to tackle the problem of homelessness in Australia through the development of a comprehensive, long-term plan, as well as developing a ‘National Rental Affordability Scheme’ to address the issue of lack of housing availability and affordability;
- (j) reforming and repealing certain aspects of the Northern Territory Intervention;
- (k) reforming and repealing certain aspects of Australia’s industrial relations system known as ‘WorkChoices’;
- (l) directing the Productivity Commission to undertake an inquiry into the establishment of a national paid parental leave scheme;
- (m) introducing legislation to amend federal laws relating to same-sex couples and financial and related benefits;
- (n) committing to ‘overhaul’ the Indigenous native title system to make it more fair and efficient; and
- (o) committing to achieve equality of health status and life expectancy between Indigenous Australians and non-Indigenous Australians by 2030, including ensuring primary health care services and health infrastructure for Indigenous peoples that are capable of bridging the gap in health standards by 2018.

## **SIGNIFICANT CONCERNS REGARDING THE REALISATION OF *ICCPR* RIGHTS**

18. This section summarises key concerns in relation to *ICCPR* breaches and implementation failures since Australia’s Fourth Report under the *ICCPR*.

### ***Article 1 — Right of Self-Determination***

19. Indigenous Australians continue not to be afforded the right of self-determination and are inadequately politically represented. The Aboriginal and Torres Strait Islander Commission, the only national representative body for Indigenous Australians, was abolished in 2004.
20. Without national or regional Indigenous-controlled representative organisations, the ability of Indigenous people to contribute to the formulation of Indigenous policy is extremely limited.
21. There are currently no Indigenous representatives in the Australian Parliament.

22. The Australian Government's historical policy of merely 'consulting' with Indigenous Australians regarding policies which are particularly likely to affect them does not meet the standards of meaningful engagement, participation and empowerment required by the right of self-determination.
23. Australia was one of only four countries (along with the United States, Canada and New Zealand) to oppose the Declaration on the Rights of Indigenous Peoples when it was adopted by the UN General Assembly in September 2007. Since gaining office, the current Australian Government has consulted with Indigenous stakeholders about reversing Australia's opposition to the Declaration. Endorsement of the Declaration would improve engagement between government and Indigenous Australians and would provide a framework for the future recognition and protection of the civil, political, economic, social and cultural rights of Indigenous Australians, particularly the right to self-determination.
24. Although the current Australian Government has recently issued an 'Apology' to the 'Stolen Generations' (Indigenous children forcibly removed from their families during the 20<sup>th</sup> century), it has not committed to making adequate reparations for the harm and suffering caused by previous government policies and programs.
25. The current 'Emergency Intervention' into the Northern Territory violates the right of Indigenous self-determination through measures including the compulsory acquisition of land, the suspension and direction of representative community councils, and the quarantining of social security payments. The legislation was passed without adequate consultation with Indigenous communities and, in part, suspends the operation of the *Racial Discrimination Act 1975* (Cth).
26. The former Australian Government consistently rejected calls to entrench any form of constitutional rights protection for Indigenous Australians, taking the position that there is already sufficient rights protection in Australia. This is despite the fact that the 'race power' in the Australian Constitution has been held by the High Court of Australia to permit the Australian Government to pass both beneficial *and* detrimental legislation in relation to persons of a particular race.
27. Access to and control over traditional lands continues to be a major human rights issue for Indigenous Australians. The *Native Title Act 1993* (Cth) establishes an onerous standard and burden on Indigenous people seeking to gain recognition and protection of their native title. In July 2008, the Federal Attorney-General announced that the current Australian Government proposes to 'overhaul' the native title system to provide a flexible and less technical approach to native title.

#### **Articles 2 and 26 — Treaty Entrenchment and Non-Discrimination**

28. The *ICCPR* is not incorporated into Australian domestic law and is not directly justiciable or enforceable in Australia. Australia remains the only developed state in the world without a national bill or charter of rights.

29. The current Australian Government has committed to a national public consultation regarding the legal recognition and protection of human rights and responsibilities in Australia. The timing, scope and parameters of this proposed consultation have not yet been announced.
30. Australia is a party to the First Optional Protocol to the *ICCPR*. However, the Human Rights Committee's Views are not directly enforceable or justiciable under Australian law and no effective domestic mechanisms have been established to promote and monitor implementation of, and compliance with, the Human Rights Committee's Views. The former Australian Government considered the Human Rights Committee's Views to be non-binding and frequently rejected them outright.
31. While the death penalty is not currently available in any Australian state or territory (as a result of local legislation), or for federal crimes, the failure of the Australian Government to incorporate the Second Optional Protocol to the *ICCPR* into domestic law means that the reintroduction of capital punishment in Australia under state laws remains a possibility.
32. There are significant regulatory gaps in the human rights obligations of Australian corporations, particularly in respect of activities outside Australia.
33. Australia has yet to formulate a National Action Plan for human rights education. No formalised human rights education exists in any state or territory.
34. The right to non-discrimination is protected in a piecemeal way and Australian equal opportunity and anti-discrimination laws do not cover all areas outlined in Article 2 of the *ICCPR*. Furthermore, the laws fail to adequately address the issues of substantive equality, direct discrimination and systemic discrimination, and provide for numerous exceptions and exemptions that are inconsistent with the *ICCPR*.
35. There are a number of communities and groups that do not enjoy *ICCPR* rights on an equal basis in Australia, including particularly:
  - (a) Indigenous Australians;
  - (b) women;
  - (c) people with disability;
  - (d) people from non-English speaking backgrounds;
  - (e) homeless people;
  - (f) gay, lesbian, bisexual, transgender and intersex people;
  - (g) children and young people;
  - (h) diverse religious communities; and
  - (i) older persons.

### **Article 3 — Equal Rights of Men and Women**

36. Australian women remain significantly under-represented in many aspects of political and public life and at managerial and executive levels of business.

37. Women remain significantly disadvantaged compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation. Indigenous women, women from non-English speaking backgrounds and women with disability are particularly disadvantaged.
38. Violence against women continues to occur at appalling levels in Australia. While the Australian Government has implemented a 'Women's Safety Agenda' initiative, the resources allocated to both prevention of violence and assistance for women and children who experience violence are inadequate.

#### **Article 4 — Permissible Derogations in Time of Public Emergency**

39. Aspects of the Northern Territory Intervention and Australia's counter-terrorism laws substantially limit *ICCPR* rights, including non-derogable rights. These limitations have been justified by reference to an 'emergency' in Northern Territory Indigenous communities and the 'War on Terrorism' respectively. However, Australia has not complied with the requirements of Article 4, which provides for permissible derogations in times of public emergency.

#### **Article 6 — Right to Life**

40. The state of Indigenous health in Australia results from and represents serious human rights breaches. Indigenous Australians do not have an equal opportunity to be as healthy as non-Indigenous Australians. Many Indigenous Australians do not have the benefit of equal access to primary health care and many Indigenous communities lack basic determinants of the right to life, such as adequate housing, safe drinking water, electricity and effective sewerage systems. Average life expectancy for Indigenous Australians is 17 years shorter than that of non-Indigenous Australians.
41. The death of Indigenous Australians in custody continues to be of serious concern, despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody over 15 years ago. In 2003, 75 per cent of deaths in custody were of Indigenous Australians detained for minor infractions, such as public order offences.
42. In recent years, Australia has weakened its opposition to the death penalty in the Asia-Pacific region, including in relation to Australian citizens, taking the position that it is inappropriate to intervene in the internal affairs of a foreign country. The arrests and subsequent convictions of nine Australians for drug trafficking in Bali resulted from the provision of agency-to-agency assistance, intelligence and evidence by the Australian Federal Police (**AFP**). Three of the 'Bali Nine' currently face the death penalty in Indonesia.
43. Climate change is a significant threat to human rights, including the right to life, in Australia and the Asia-Pacific. Australia's response to climate change focuses primarily on the economic and environmental aspects of the threat and inadequately references the human rights issues and obligations, including particularly with respect to climate affected refugees.
44. At least 100,000 people across Australia are homeless every night. The incidence of homelessness has increased over the last decade, despite a sustained period of economic

growth and prosperity. People experiencing homelessness are subject to multiple and intersectional human rights violations that significantly curtail the ability of a person to live with dignity.

### **Articles 7 and 10 — Freedom from Torture and Other Cruel Treatment**

45. There are insufficient safeguards in Australia's counter-terrorism laws to ensure compliance with the *ICCPR*. Since the events of 11 September 2001, the Australian Government has introduced nearly 50 pieces of 'anti-terrorism' legislation. In the absence of a federal charter of rights, these laws have not been adequately assessed against, or counterbalanced by, human rights. Provisions that permit or enable prolonged solitary confinement and incommunicado detention — including orders that may prohibit and prevent a detainee from contacting *anyone* at *any time* while in custody — raise serious concerns under the prohibition against torture and ill-treatment.
46. The conditions of detention of a number of individuals charged with various offences under Australia's counter-terrorism laws raise serious issues with respect to humane treatment in detention. Of particular concern are the restrictiveness and austerity of the conditions of detention of terrorist accused, the reversed burden of proof in bail applications and the very limited circumstances in which bail can be granted.
47. Contrary to the absolute prohibition against torture, Australian law contains a number of exceptions permitting evidence obtained contrary to that prohibition to be used in a proceeding.
48. The Australian Government has refused to thoroughly investigate serious allegations of the torture of Australian citizens, including Mamdouh Habib and David Hicks. The Australian Government has adopted this position notwithstanding substantial evidence that, at least in the case of Mr Habib, Australian officials were consulted about Mr Habib's treatment by authorities after his arrest in Pakistan and his proposed rendition to Egypt by the United States.
49. From 1992 until July 2008, Australia maintained a policy of indefinite mandatory detention of asylum seekers. While the current Australian Government has recently outlined proposed reforms to Australia's asylum seeker policy, including an end to the policy of mandatory immigration detention, the *Migration Act 1958* (Cth) (***Migration Act***) has not yet been amended and continues to provide for mandatory immigration detention.
50. Aspects of immigration detention raise serious concerns relevant to the prohibition against torture and ill-treatment, including the prolonged and indeterminate period of detention, detainees' lack of access to legal advice and information, overcrowding, separation of families, deleterious mental health effects and lack of access to adequate health care.
51. The fundamental principle of non-return to face torture or death has not yet been enacted in Australian domestic law. For example, the *Migration Act* does not prohibit the return of a non-citizen to a place where that person would be at risk of torture or ill-treatment. This is of particular concern given that:

- (a) the Australian Government has repeatedly disclaimed any responsibility for the subsequent torture or cruel treatment of persons who are removed; and
  - (b) there is substantial evidence that asylum-seekers who have been returned by Australia to their country of origin have been tortured and even killed.
52. Immigration officials exercise extraordinary powers, often without adequate training, management or oversight.
53. Unacceptable conditions in Australian prisons, including overcrowding and lack of access to adequate health care treatment, raise issues in relation to the prohibition against torture and may constitute cruel, inhuman or degrading treatment or punishment.
54. In most Australian jurisdictions, there are no, or inadequate, independent prison inspectorates. In many states and territories, the correctional inspectorates are part of, and report to, the government departments responsible for prison administration and do not publish their reports or recommendations.
55. Prisoners as a group are characterised by significant social and psychological disadvantage. They face major health issues, including high rates of injecting drug use and high rates of sexually transmitted diseases. Despite this, most Australian prisons have not developed adequate harm minimisation strategies, including the provision of free condoms, and needle and syringe exchange programmes.
56. There is significant evidence that mental health care in Australian prisons is manifestly inadequate and may amount to a level of neglect that constitutes degrading treatment or punishment.
57. The widespread use of solitary confinement (or ‘segregation’ as it is also known) as a management tool for people incarcerated in Australian prisons is an issue of significant concern, particularly in regard to those incarcerated who are also suffering from a mental illness.
58. Women in prison present with significant and inadequately addressed health needs and face systemic and structural discrimination, including with respect to invasive and routine strip searches and oppressive disciplinary regimes.
59. Indigenous peoples in Australia are among the most highly incarcerated peoples in the world. Despite Indigenous Australians representing approximately two per cent of the Australian population, they comprise around 24 per cent of the prison population.
60. Electronic devices known as ‘Tasers’ have been deployed for use by officers of the AFP and the Western Australian police force, and are planned for use in New South Wales, Queensland and South Australia.

**Article 8 — Freedom from Slavery, Servitude and Forced Labour**

61. Australia has not formulated a comprehensive, effective strategy to combat the trafficking of women and children and to address exploitation resulting from sexual servitude or ‘debt bondage’.

62. Indigenous Australians have not been adequately compensated for ‘Stolen Wages’, being the wages of many Indigenous workers whose paid labour was controlled by governments for much of the 19<sup>th</sup> and 20<sup>th</sup> centuries.
63. Prisoners are not fairly remunerated for their work and are often penalised through loss of other opportunities or privileges for refusing to undertake paid work. They are not provided with adequate opportunities to acquire vocational skills to assist them to find post-release employment and are not equally protected in relation to workplace injury as compared with other workers.

### **Article 9 — Freedom from Arbitrary Detention**

64. From 1992 to July 2008, successive Australian Governments maintained a policy of mandatory immigration detention. This regime was manifestly arbitrary in that: there was no consideration of the particular circumstances of each detainee’s case; detention was not demonstrated or evidenced to be the least invasive means of achieving the government’s policy objectives; the detention was indefinite and often prolonged; and substantive judicial review of the lawfulness of detention was non-existent or inadequate.
65. In July 2008, the Australian Government outlined proposed reforms to Australia’s immigration detention scheme. While these reforms signal a significant and positive departure from the previous government’s immigration detention policies, three groups will continue to be subject to mandatory detention: all unauthorised arrivals, for management of health, identity and security risks to the community; unlawful non-citizens who present unacceptable risks to the community; and unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
66. The *Migration Act* continues to provide that a stateless asylum seeker who cannot be removed from Australia despite cooperating with authorities may be kept in immigration detention for the rest of their life.
67. Many aspects of Australia’s counter-terrorism measures raise serious concerns in relation to Article 9 of the *ICCPR*, in particular the regimes relating to preventative detention and control orders. Under the preventative detention regime, an individual can be held for up to 14 days on the basis of information that has been virtually untested, with limited contact with the outside world and no ability to appeal or challenge their detention.
68. Indigenous Australians continue to be disproportionately affected by mandatory sentencing legislation. Mandatory sentencing laws also continue to disproportionately affect children and young people.
69. Many disadvantaged and vulnerable groups experience being targeted by law enforcement officials. For example, in the Northern Territory, a significant proportion of policing targets Indigenous Australians for minor offences.

### **Article 12 — Freedom of Movement**

70. Control orders and preventative detention orders, particularly under Australia's counter-terrorism legislation, may subject a person to a wide range of restrictions of liberty, movement and association. Of particular concern is the fact that such orders are often administrative in nature and not the result of any court ruling.
71. Freedom of movement for people with disability is still, in some cases, restricted by many barriers to the built environment and various transportation methods.

### **Article 13 — Procedural Rights against Expulsion**

72. Pursuant to section 501 of the *Migration Act*, the Minister for Immigration may remove from Australia people who do not meet the 'character test', including long-term permanent residents. In 2006, a Commonwealth Ombudsman's investigation into the cancellation of long-term permanent residents' visas under section 501 identified significant errors, omissions and inaccuracies in the application of the test.
73. Under section 16 of the *Migration Act*, a foreign visitor to Australia can have their visa cancelled if they are assessed by the Australian Security Intelligence Organisation (**ASIO**) to be a risk to Australian national security. ASIO conducts security assessments in private and does not disclose reasons for, or information considered in making, a security assessment. Further, an independent merits review of an adverse security assessment by ASIO is not available to visa holders.

### **Article 14 — Right to a Fair Trial**

74. In Australia, legal advice and representation for marginalised and disadvantaged groups is provided primarily by legal aid commissions and community legal centres. Current legal aid funding arrangements, together with manifestly inadequate funding for community legal centres, constitute significant impediments to access to, and the administration of, justice.
75. Inadequate funding of legal aid commissions has led to a significant raising of applicant eligibility criteria, meaning that legal aid is, practically, only available to the very poor and predominantly in relation to criminal matters. Minimal assistance is available with respect to civil and administrative law matters, even where they pertain to fundamental human rights.
76. There are many aspects of Australia's counter-terrorism measures that raise concerns in relation to the right to a fair hearing and the rule of law, including particularly in respect of control orders, preventative detention orders, and questioning by ASIO.
77. A number of Australian jurisdictions have abolished the rule against double jeopardy.
78. Under Australian law, there is no enforceable right to compensation for unlawful arrest, conviction or detention. Contrary to expert recommendations, the Australian Government has not established an independent body to investigate, correct and compensate wrongful arrest, conviction and detention.

79. Prisoners are increasingly subject to restrictions and conditions that impair and interfere with their rights to a fair hearing and to access to justice, including with respect to judicial oversight of the conditions of detention, access to legal resources and access to legal representation.
80. Many Indigenous Australians who come into contact with the justice system have little comprehension of what is happening and how the legal system operates. This is compounded by the under-funding of Aboriginal and Torres Strait Islander Legal Services and lack of access to Indigenous interpreters.

#### ***Article 15 — Prohibition of Retroactive Criminal Laws***

81. Legislation in a number of Australian jurisdictions provides for the continued detention and supervision of certain prisoners beyond their sentence, including in circumstances where the legislation was not in force at the time of the conviction.
82. In New South Wales, a series of legislative amendments has resulted in the retrospective application of effective life sentences for certain offenders who were sentenced when they were juveniles.

#### ***Article 17 — Right to Privacy***

83. The legal safeguards of privacy in Australia remain limited. Neither the Australian Constitution nor any state or territory constitutions contain any express provisions relating to privacy.
84. The unauthorised collection and disclosure of information privacy is protected in a limited way by legislation and the common law.
85. A recent Australian Law Reform Commission report on privacy recommends 295 changes to privacy laws and practice and identifies 10 key areas of concern, including: children and young people; credit reporting; health; data breach notification (fraud and identity theft); emerging technologies; and creating a statutory action for serious invasion of privacy.
86. Proposals for a national 'access' (or identity) card contain inadequate privacy protections and would impact detrimentally on certain marginalised groups, including homeless people.
87. The use of closed circuit television cameras (**CCTV**) by both public authorities and private organisations is increasing. The use of CCTV in public places raises significant privacy issues and impacts disproportionately on homeless people, young people and other groups reliant on public space. There are significant gaps in the legislative framework regarding video surveillance in public places.
88. Police 'stop and search' powers are overly broad and inadequately regulated, resulting in disproportionate interferences with the right to privacy and alleged victimisation of groups such as Indigenous Australians, Muslims and African migrants.
89. Prisoners are subject to significant interferences with their right to privacy beyond those that are necessary by consequence of incarceration, including with respect to their bodily integrity, correspondence, and access to family and friends.

90. In a number of Australian jurisdictions, landlords may summarily evict tenants, including public housing tenants, without providing any reason for the eviction or attempting to assist the tenant to find alternative accommodation.

**Article 18 — Freedom of Thought, Conscience and Religion**

91. Australian legislation inadequately prohibits discrimination or vilification on the ground of religion.
92. Many aspects of Australia's counter-terrorism measures raise concerns in relation to Article 18 of the *ICCPR* and, in practice, impact disproportionately and detrimentally on Australia's Muslim and Arab population.
93. Following the events of 11 September 2001, anti-Muslim and anti-Arab prejudice has increased and Australia's Muslim and Arab community has reported 'a substantial increase in fear, a growing sense of alienation from the wider community and an increasing distrust of authority'.

**Articles 19 and 20 — Freedom of Expression**

94. The right to freedom of expression is not comprehensively protected under Australian law. Although the High Court of Australia has found an implied 'freedom of political communication' in the Australian Constitution, this is limited in its protection to communications pertaining to Australia's system of representative and responsible government.
95. A recent independent audit of the state of free speech in Australia disclosed that, in the absence of comprehensive constitutional or legislative protection of freedom of expression, free speech has been significantly eroded in Australia over the last 10 years.
96. While NGOs play an important role in the promotion and protection of human rights, including through advocacy and political activities, government funding programs and taxation laws operate to 'silence dissent', and substantially fetter the ability of NGOs to engage in lobbying and advocacy for human rights.
97. While anti-vilification legislation has been enacted in most Australian jurisdictions, there remain significant gaps and inconsistencies. Significantly, there is no federal prohibition against religious vilification.
98. Many of Australia's counter-terrorism measures, including the law of sedition and the overly broad definitions of 'terrorist acts' and 'terrorist organisations', interfere arbitrarily and disproportionately with the right to freedom of opinion and expression.
99. Many people with disability in Australia, including deaf and blind people and those with a hearing or vision impairment, do not enjoy the freedom to seek, receive and impart information and ideas on an equal basis with others.
100. In recent years, in some Australian jurisdictions, prisoners' access to certain publications and media has been arbitrarily and disproportionately limited.

**Articles 21 and 22 — Freedom of Assembly and Association**

101. Provisions of Australia's counter-terrorism laws are overly broad and criminalise mere association rather than conduct. The power of the Australian Government to proscribe or ban organisations under counter-terrorism laws is inadequately regulated.
102. A legislative practice has arisen, most recently and strikingly in New South Wales, by which the rights of freedom of assembly and association, together with freedom of expression, have been limited for the duration of major public events, and in the areas in which those events have been situated. Recent examples include the 2007 meeting of the Asia Pacific Economic Council, and the 2008 hosting of World Youth Day, both of which took place predominantly in Sydney, New South Wales.
103. While the former Australian Government's industrial relations policy, 'WorkChoices', protected the right of workers to join trade unions, it substantially limited the right to freedom of association, including by denying employees the right to engage in collective bargaining or the right to be represented by their union in negotiations.
104. The right to strike is not protected by Australian law and is denied to many workers in many situations.

**Article 23 — Protection of the Family**

105. Recent amendments to the *Family Law Act 1975* (Cth) concerning the care of children following family separation prioritise parents' claims to equal custody at the expense of the principle that the best interests of the child are paramount in deciding where a child will live and with whom the child will spend time.
106. Australia remains one of only two OECD countries without a national paid maternity leave scheme, although the Productivity Commission is currently conducting an inquiry into the introduction of such a scheme.
107. The Attorney-General's Department has identified at least 100 Australian laws that discriminate against same-sex couples and their families and have committed to make changes to ensure equality.
108. Australian immigration law, policy and practice may interfere substantially with the right to family, particularly in cases where:
  - (a) there are moves to deport a non-citizen family member;
  - (b) a family member is denied the ability to bring family members to Australia; or
  - (c) entry is denied to an individual seeking to join family members already residing in Australia.
109. Indigenous parents and parents with disability are disproportionately likely to have their children removed by child-protection services.
110. Australian prisoners frequently report difficulties in maintaining a relationship with their families and children.

**Article 24 — Protection of Children**

111. A major report by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, identified significant gaps in the legal rights and protection of children and young people in the legal system. The recommendations of this report have been inadequately enacted.
112. Mandatory sentencing laws have a particular impact on young people and disproportionately affect young Indigenous Australians, leading to a racially discriminatory impact on their rate of incarceration.
113. Other areas of the juvenile criminal justice system that do not adequately protect the rights of children include the availability and conditions of bail, the detention of juveniles in adult facilities, the public identification of children in criminal proceedings and the use of curfews and ‘move on’ laws.
114. Aspects of Australia’s counter-terrorism laws do not adequately protect the rights or interests of children, and permit juveniles to be detained and questioned for up to seven days without charge.
115. While recent reforms to Australia’s immigration policy are significant and positive, refugee and asylum seeker children and families remain inadequately protected. In particular, the non-detention of children is not legislatively guaranteed.
116. A range of groups confront significant barriers to education and do not have equal access to educational opportunities, including children with disability, Indigenous children, children from low income families, and children from rural and remote areas.
117. Further strategies and resources are required to address the issues of bullying, truancy and exclusion from schools.
118. The level of support provided for children with disabilities to attend mainstream schools is manifestly inadequate, resulting in much lower levels of secondary school completion.
119. Indigenous children and young people experience significant disadvantage in the substantive protection and realisation of their rights, including with respect to health, the criminal justice system and education.

**Article 25 — Rights of Political Participation**

120. Women, Indigenous Australians and people with disability are significantly under-represented in many aspects of public and political affairs.
121. The right to vote is not explicitly protected in the Australian Constitution or by any federal legislation. In 2006, amendments were made to the *Commonwealth Electoral Act 1918* (Cth) which further disenfranchise young people, homeless people, people with disability and prisoners.
122. Successive Australian governments, both federal and state and territory, and agencies have not taken adequate steps or measures to ensure practical realisation of the right to vote for certain vulnerable groups, including in particular homeless people and people with disability.

123. The current regulation of political funding in Australia is inadequate to ensure that the democratic process is accessible and accountable to the degree required by Article 25 of the *ICCPR*.

**Article 27 — Minority Rights**

124. A significant gap exists between Indigenous and non-Indigenous Australians relating to, among other things, standards of living and health, political participation, the right of self-determination, the administration of justice, land rights, access to adequate housing and education.
125. There is no prohibition of discrimination or vilification on the ground of religion at a federal level.
126. It has been reported that as a consequence of increasing anti-Muslim and anti-Arab prejudice, many Muslim and Arab communities feel alienated from the wider community and public authorities.
127. The former Australian Government made a number of negative and critical statements about the Sudanese community and the alleged inability of the community to integrate into mainstream Australian society.

**Article 50 — Federalism**

128. The legislative protection, enforceability and justiciability of *ICCPR* rights varies significantly across the Commonwealth and Australian states and territories.
129. The Australian Parliament has the constitutional power to give legislative effect to the *ICCPR* across the Commonwealth and all states and territories.
130. The State of Victoria and the Australian Capital Territory have each recently enacted legislation to give effect to many of the human rights contained in the *ICCPR*.
131. In the States of Tasmania and Western Australia, independent consultative committees, appointed by government, have recommended the enactment of specific human rights legislation. To date, however, neither the Tasmanian nor Western Australian governments have implemented these recommendations.
132. At the national level, the Australian Government has committed to a national public consultation regarding the legal recognition and protection of human rights and responsibilities in Australia. The timing, scope and parameters of this proposed consultation have not yet been announced.

## Article 1 — Right of Self-Determination

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### **Article 1:**

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
3. *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

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## **A. RIGHT OF SELF-DETERMINATION**

### **A.1 Recognition of Self-Determination for Indigenous Australians**

133. Article 1 of the *ICCPR* recognises that all peoples have the right to freely determine their political status and to freely pursue their economic, social and cultural development. While in office, the former Australian Government made no commitment to full self-determination for Indigenous Australians, but rather supported the principle that Indigenous peoples ‘should be consulted about decisions that are likely to impact on them in particular’.<sup>4</sup> The principle of consultation with Indigenous peoples falls well short of the right of self-determination.

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<sup>4</sup> Australian Government, *Common Core Document Forming Part of the Reports of States Parties Incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights* (June 2006) [202], available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination\\_CommonCoreDocument](http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_CommonCoreDocument) (Common Core Document).

134. The historic dispossession and disenfranchisement of Indigenous Australians was further perpetuated by the abolition in April 2004 of the Aboriginal and Torres Strait Islander Commission (**ATSIC**). Composed of elected Indigenous representatives, ATSIC was the main policy-making body in domestic Indigenous affairs and also represented the interests of Indigenous Australians internationally. ATSIC was replaced in late 2004 with a 'National Indigenous Advisory Council' whose members were appointed by the former Australian Government, not Indigenous people, and had only a limited role in monitoring government policy. In early January 2008, the current Australian Government disbanded the National Indigenous Advisory Council.
135. On 12 July 2008, the Aboriginal and Torres Strait Islander Social Justice Commissioner released an Issues Paper<sup>5</sup> outlining key considerations in the development of a new national Indigenous representative body. The Issues Paper examines what options are available for ensuring that a national body is sustainable, without proposing a particular model for such a body. To date, the current Australian Government has made no response to the Issues Paper.
136. The absence of a representative Indigenous body deprives Indigenous Australians of the right to participate meaningfully in policy formulation and public debate, which raises concerns in relation to Australia's fulfilment of Article 1 of the *ICCPR*. Without national or regional Indigenous-controlled representative organisations, the ability of Indigenous people to contribute to the formulation of Indigenous policy is extremely limited, which restricts their ability to pursue freely the development of their civil, political, economic, social and cultural rights. This issue is compounded by the fact that there is currently not one Indigenous person holding a seat in the Federal Parliament.<sup>6</sup>
137. In its previous Concluding Observations, the Human Rights Committee encouraged Australia to pursue efforts in the process of reconciliation with Indigenous Australians and to improve the disadvantaged situation they are in.<sup>7</sup> In addition, since 2000, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women have each expressed their concern that insufficient action has been taken in relation to Indigenous Australians exercising meaningful control over their affairs.<sup>8</sup>

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<sup>5</sup> Tom Calma, *Building a Sustainable National Indigenous Representative Body: An Issues Paper Prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner* (2008), available at [http://www.hreoc.gov.au/Social\\_Justice/rebody/index.html](http://www.hreoc.gov.au/Social_Justice/rebody/index.html).

<sup>6</sup> Currently, there are only nine Indigenous State and Territory Parliamentarians out of a total of 594 seats (1.5 per cent).

<sup>7</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN GAOR, 55<sup>th</sup> sess, 1967<sup>th</sup> mtg, [509], UN Doc A/55/40 (2000).

<sup>8</sup> See Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [25], UN Doc E/C.12/1/Add.50 (2000); Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, [11], UN Doc CERD/C/AUS/CO/14 (2005); Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, [17], UN Doc CEDAW/C/AUL/CO/5 (2006). The Committee on the Elimination of

## A.2 Declaration on the Rights of Indigenous Peoples

138. In September 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples.<sup>9</sup> Although non-binding, the adoption of the Declaration is an affirmation of the rights of Indigenous peoples at a time when they face daily threats to their well-being and survival. The Declaration emphasises the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations. However, Australia was one of only four countries (along with the United States of America, Canada and New Zealand) to oppose the Declaration. This lack of support for the recognition of the particular rights of Indigenous peoples raises concerns in relation to Australia's compliance with Article 1 of the *ICCPR*.
139. Since gaining office, the current Australian Government has consulted with Indigenous stakeholders about reversing Australia's opposition to the Declaration.<sup>10</sup> However, consultation with Indigenous peoples has been through the Human Rights and Equal Opportunity Commission (**HREOC**) process only. Endorsement of the Declaration would improve consultation between government and Indigenous Australians and would provide a framework for the future recognition and protection of the civil, political, economic, social and cultural rights of Indigenous Australians. The current Australian Government should be strongly encouraged to endorse the Declaration, which would represent an important acknowledgement of the right of Indigenous Australians to self-determination and freedom from discrimination.

## A.3 The Stolen Generations

140. In 1997, Australia's national human rights institution, HREOC, released a report entitled *Bringing Them Home*.<sup>11</sup> According to the report, at least 100,000 Indigenous children were removed forcibly or under duress from their families by various government agencies and church missions between approximately 1910 and 1970. This constituted between 10 and 30 per cent of all Indigenous children during that period. The group of children who were removed from their families has become known as the 'Stolen Generations'.
141. Some of the key findings of the *Bringing Them Home* report were that welfare officials failed in their duty to protect Indigenous wards from abuse and that many Indigenous children:
- (a) were denied the right to Indigenous culture, language, land or kinship;
  - (b) were placed in institutions, church missions, adopted or fostered;
  - (c) received little education;

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Discrimination against Women recommended that Australia consider the adoption of quotas and targets to increase the number of Indigenous women in political and public life: at [17].

<sup>9</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61<sup>st</sup> sess, Agenda Item 68, UN Doc A/61/L.67 (2007).

<sup>10</sup> See 'Government Preparing To Endorse UN Declaration', *The Age* (Melbourne), 17 February 2008.

<sup>11</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

- (d) were expected to perform low grade domestic and farming work, often without receiving wages for their labour; and
  - (e) suffered, or were at risk of suffering, physical, emotional and sexual abuse.
142. The *Bringing Them Home* report found that the destruction of a culture and a people through the practice of forced removal amounted to genocide. The report made 54 recommendations aimed towards restoring justice and dignity to the Stolen Generations and to rectify the ongoing inter-generational effects of family separation. However, many of the recommendations have not been implemented by the Australian Government. The inadequate response to the recommendations has contributed to many of the problems faced by Indigenous Australians in the realisation of their civil, political, economic, social and cultural rights.
143. Until early this year, the two key components of reparation, namely a formal apology and compensation for those affected, remained the major 'unfinished business' of the *Bringing Them Home* report. However, in February 2008, the current Australian Government formally apologised to Indigenous Australians for past injustices and especially for the forced removal of Indigenous Australian children from their families. The formal apology by the current Australian Government is to be congratulated. However, while the formal apology is a long-awaited gesture towards reconciliation, it must be recognised as only the first step of a long term commitment to meaningful reconciliation and efforts to improve the ongoing disadvantage experienced by Indigenous Australians in relation to many civil, political, economic, social and cultural rights.
144. It is concerning that no Australian Government has committed itself to establishing a compensation fund for the people and families of the Stolen Generations, although one state government is currently establishing a compensation scheme.<sup>12</sup> This was one of the key recommendations of the *Bringing Them Home* report and would provide substance to the current Australian Government's formal apology. While there has been funding promised for improving 'Link Up',<sup>13</sup> an Australian Government programme established in 1997 to assist in the reunification of Indigenous families who were separated as a result of government policies, there has been no such commitment to provide resources for healing and counselling services. Most significantly, there has been no commitment to explore options for individual compensation for the people of the Stolen Generations.
145. In 2008, Senator Andrew Bartlett introduced the *Stolen Generation Compensation Bill 2008* into the Australian Parliament. However, the Senate Standing Committee on Legal and Constitutional Affairs rejected the Bill. The Committee instead recommended the establishment of 'a National Indigenous Healing Fund to provide health, housing, ageing, funding for funerals, and other family support services for members of the stolen generation

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<sup>12</sup> In January 2008, the Tasmanian Government offered \$5 million of compensation to the 106 Aboriginal Tasmanians who were part of the Stolen Generations. See ABC, 'Tasmania Leads the Way on Stolen Generation Compensation', *PM*, 22 January 2008, available at <http://www.abc.net.au/pm/content/2007/s2144194.htm>.

<sup>13</sup> See Core Common Document, above n 4, [370].

as a matter of priority'.<sup>14</sup> Such a fund would not address one of the most powerful reasons for compensating individual members of the Stolen Generations, being recognition of the wrong that was committed against those individuals by the state.

#### **A.4 Intervention into Northern Territory Indigenous Communities**

146. In June 2007, the Northern Territory Government released a report on the protection of children from sexual abuse in Indigenous communities, entitled *Little Children Are Sacred*.<sup>15</sup> The report detailed the 'extent, nature and factors contributing to sexual abuse of Aboriginal children' and the obstacles and challenges associated with effective child protection mechanisms.<sup>16</sup> The report made 97 recommendations to the Northern Territory Government on how best to support and empower communities to prevent child sexual abuse now and in the future. The recommendations spanned a wide range of areas, including school education, awareness campaigns, improving family support services and the empowerment of Indigenous communities.
147. In response, the former Australian Government announced a 'national emergency intervention' into Indigenous communities in the Northern Territory and passed a legislative package<sup>17</sup> (**Northern Territory Intervention**) that raises significant concerns in relation to Australia's international obligations to respect and promote the human rights of Indigenous Australians. The Northern Territory Intervention consists of a range of extraordinary measures, including the compulsory acquisition of Indigenous land without adequate compensation, the 'quarantining' of social security payments, the banning of alcohol and the deployment of military and police in traditional lands. There was very little relationship between the recommendations to the Northern Territory Government contained in the *Little Children Are Sacred* report and the former Australian Government's 'national emergency intervention'.<sup>18</sup>
148. The Northern Territory Intervention legislation was passed without consultation with Indigenous representatives and affected communities, despite the former Australian Government's statement in the Common Core Document that it was committed to consulting and involving Indigenous peoples in decisions involving policies and programs that have an

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<sup>14</sup> Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, Stolen Generation Compensation Bill 2008 (2008) ix.

<sup>15</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007).

<sup>16</sup> *Ibid* 4.

<sup>17</sup> *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

<sup>18</sup> See, eg, Parliament of Australia Parliamentary Library, *Briefing Book for the 42<sup>nd</sup> Parliament: National Emergency Intervention in the Northern Territory* (2008), available at [http://www.aph.gov.au/library/Pubs/BriefingBook42p/18SocialPolicy-IndigenousAffairs/emergency\\_intervention.htm](http://www.aph.gov.au/library/Pubs/BriefingBook42p/18SocialPolicy-IndigenousAffairs/emergency_intervention.htm).

impact on them.<sup>19</sup> Of particular concern is the haste with which the Northern Territory Intervention legislation was prepared and enacted. The legislative process took just 10 days, despite the fact that it introduced 480 pages of new legislation.<sup>20</sup> The Northern Territory Intervention undermined the fundamental right of Indigenous peoples to participate meaningfully in decisions which affect them. This severely limits the opportunity for Indigenous peoples to freely pursue their political, civil, economic, social and cultural development.

149. In addition, the broad legislative measures target, and impact specifically on, Indigenous people. The legislation specifically suspends the operation of the *Racial Discrimination Act 1975* (Cth) in relation to the Northern Territory Intervention. This raises concerns in relation to the right to equality and freedom from discrimination enshrined in Article 2 of the *ICCPR* and is discussed in further detail under [Article 2: Indigenous Peoples](#). HREOC has described the Northern Territory Intervention measures as ‘punitive and racist’<sup>21</sup> and, in a recently released report, found that the ‘racially based legislation’ contravenes a number of international human rights conventions and the *Racial Discrimination Act 1975* (Cth).<sup>22</sup>
150. HREOC’s Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, the author of the report, has said that the legislation ‘contravened most of the international conventions Australia had signed up to’.<sup>23</sup> The Commissioner has also said that ‘all measures to address family violence and child abuse should themselves respect human rights. It would be outrageous to suggest that it is not possible to achieve this’.<sup>24</sup> Failure to respect human rights in this way is also a clear breach of Articles 4 and 5 of the *ICCPR*.
151. As well as the discriminatory nature of the legislation, there are a number of other human rights concerns which are raised by the Northern Territory Intervention:
- (a) the compulsory acquisition and control of specified Indigenous land and community living areas through renewable five-year leases raises concerns in relation to the right of self-determination, as well as Indigenous native title rights. This is discussed in further detail below under [Article 1: Native Title](#);
  - (b) the legislation introduces an income management regime, which includes measures such as quarantining 50 per cent of welfare payments for food and other essentials, and linking welfare payments to children’s school attendance;

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<sup>19</sup> Common Core Document, above n 4, [181].

<sup>20</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007) 209–11.

<sup>21</sup> Russell Skelton, ‘Rights Watchdog Proposes Overhaul of Howard’s Emergency Intervention’, *The Age* (Melbourne), 12 February 2008, available at <http://www.theage.com.au/news/national/pressure-to-overhaul-intervention/2008/02/11/1202578694335.html>.

<sup>22</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 20, 215–19.

<sup>23</sup> See Skelton, above n 21.

<sup>24</sup> Tom Calma, ‘Essentials for Social Justice: Protecting Indigenous Children’ (Speech delivered at the launch of the *Social Justice Report 2007* and *Native Title Report 2007*, Sydney, 31 March 2008).

- (c) powers given to the Australian Government to take over representative community councils in order to, for example, direct them to deliver services in a specific way, to transfer council-owned assets to the Commonwealth, to appoint observers or to suspend community councils or to appoint managers to run them. These powers raise concerns in relation to the right of self-determination;
  - (d) the abolition of the Community Development Employment Projects (subsequently partially re-instated), which employed Indigenous people in a wide variety of jobs directed towards meeting local community needs. This raises concerns in relation to the right of self-determination; and
  - (e) the failure to use a children’s rights framework to address the complex issue of the protection of children from sexual abuse in Indigenous communities. Notwithstanding its descriptor as a ‘national emergency intervention’, the former Australian Government made no effort to use children’s rights or human rights principles to frame its response. This is discussed in further detail under Article 24: Indigenous Children.
152. The Northern Territory Intervention also raises concerns in relation to Australia’s obligations under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, to which Australia is party, namely:
- (a) the right to work;
  - (b) the right to social security;
  - (c) the right to family;
  - (d) the right to an adequate standard of living;
  - (e) the right to health;
  - (f) the right to education; and
  - (g) cultural rights.
153. These concerns are examined in detail in a recent NGO Submission to the UN Committee on Economic, Social and Cultural Rights.<sup>25</sup>
154. The systematic breaches of human rights evident in the Northern Territory Intervention are particularly worrying as they represent a backward step at a time when, as discussed at paragraphs 134–137 above, there is no representative body for Indigenous people in Australia.
155. The former Australian Government consistently rejected calls to entrench any form of constitutional rights protection for Indigenous Australians, taking the position that there is already sufficient rights protection in Australia. The Committee on the Elimination of Racial Discrimination has previously expressed its concern about the absence of any entrenched

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<sup>25</sup> National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre, *Freedom Respect Equality Dignity: Action - NGO Submission to the UN Committee on Economic, Social and Cultural Rights: Australia* (2008) (**ICESCR NGO Report**), available at <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/HRLRC.pdf>.

guarantee against racial discrimination that would override the law of the Commonwealth.<sup>26</sup> The current 'race power' that exists in the Australian Constitution has been held by the High Court of Australia to permit the Australian Government to pass both beneficial *and* detrimental legislation in relation to persons of a particular race.<sup>27</sup> The human rights issues which have resulted from the Northern Territory Intervention are further evidence that such an entrenched guarantee is needed.

156. The current Australian Government is presently undertaking a review of the first 12 months of the operation of the Northern Territory Intervention.<sup>28</sup> The current Australian Government is also working on a reformed version of the Community Development Employment Projects programme in the Northern Territory and has promised to introduce these reforms as swiftly as possible.<sup>29</sup> However, to date, no details of the form of these proposed reforms have been released. Of particular concern is the fact that the 12-month review is only a pragmatic review of the operation of the Northern Territory Intervention and is not an assessment by reference to human rights standards.

#### **A.5 Native Title**

157. In its Concluding Observations in 2000, the Human Rights Committee expressed concern that in many areas native title rights and interests remain unresolved and that amendments in 1998 to the *Native Title Act 1993 (Cth)* (***Native Title Act***) affect Indigenous peoples' interests in their native lands.<sup>30</sup> These concerns were also expressed by the Committee on Economic, Social and Cultural Rights, which recommended that necessary steps be taken to restore and protect the titles and interests of Indigenous Australians in their native lands, including by further amending the *Native Title Act*.<sup>31</sup>

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<sup>26</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005).

<sup>27</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

<sup>28</sup> Australian Government, *Northern Territory Emergency Response Review* (2008) <http://www.nterreview.gov.au>.

<sup>29</sup> Australian Broadcasting Corporation, 'CDEP Reforms To Be Introduced as Quickly as Possible: Macklin', *ABC News*, 7 March 2008, available at <http://www.abc.net.au/news/stories/2008/03/07/2183090.htm>.

<sup>30</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN GAOR, 55<sup>th</sup> sess, 1967<sup>th</sup> mtg, [508] UN Doc A/55/40 (2000).

<sup>31</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [11], UN Doc E/C.12/1/Add.50 (2000).

158. Despite these recommendations, access to and control over traditional lands continue to be major human rights issues for Indigenous Australians. While there were significant judicial developments in the recognition of Indigenous land rights in the early 1990s, legislation now requires Indigenous Australians to satisfy onerously high standards of proof to obtain recognition of their relationship with their traditional lands. The *Native Title Act* requires claimants to demonstrate a continuing connection, under traditional laws and customs, with the land, and to demonstrate that native title has not been extinguished by any inconsistent government act. The high evidentiary barrier required by the *Native Title Act* has been confirmed by the High Court of Australia's interpretation of the Act.<sup>32</sup>
159. The Aboriginal and Torres Strait Islander Social Justice Commissioner has repeatedly made reference to the significant evidentiary difficulties faced by Indigenous peoples seeking to establish the elements of native title in the *Native Title Act*.<sup>33</sup> The standard and burden of proof required place particular burdens on Indigenous people seeking to gain recognition and protection of their native title. The Committee on the Elimination of Racial Discrimination has also expressed concerns in relation to this high standard of proof.<sup>34</sup>
160. In July 2008, federal, state and territory government ministers responsible for native title met to discuss 'Making Native Title work better'. Following that meeting, the Federal Attorney-General announced that the current Australian Government intends to 'overhaul' the current native title system to provide a flexible and less technical approach to native title through measures such as:<sup>35</sup>
- (a) addressing the 'unacceptable' length of time currently involved in resolving native title claims;
  - (b) facilitating broader regional native title settlements comprising a range of practical benefits for Indigenous people;
  - (c) the Australian Government providing financial assistance to states and territories to deal with native title compensation; and
  - (d) Ministers meeting more regularly to assess the progress of resolving native title issues around Australia faster and more effectively.

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<sup>32</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 .

<sup>33</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002* (2002) 22, 135-6, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005* (2005); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (2007).

<sup>34</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, [17], UN Doc CERD/C/AUS/CO/14 (2005).

<sup>35</sup> Robert McClelland, 'Native Title communiqué' (Press Release, 18 July 2008), available at <http://www.alp2004.com/media/0708/msag180.php>. See also 'Ministers Discuss Native Title Overhaul', *The Sydney Morning Herald* (Sydney) 18 July 2008, available at <http://news.smh.com.au/national/ministers-discuss-native-title-overhaul-20080718-3hft.html>.

**Case Study: Northern Territory**

Section 43 of the *Lands Acquisition Act 1978* (NT) enables the Northern Territory's Minister for Lands, Planning and Environment to acquire private land, including land covered by native title, for 'any purpose whatsoever'. This power has been exercised by the Minister to compulsorily acquire native title lands claimed by Indigenous peoples on more than 90 occasions, including to grant land to a private person for private profit (as distinct from a public purpose). In relation to private land other than native title, the Northern Territory's power to acquire property has only been used in relation to a public purpose. Just terms compensation must be paid.

In 2000, the Minister for Lands, Planning and Environment issued three notices of proposed acquisition of land of the Ngaliwurru-Nungali peoples. The proposed uses of the land to be acquired were 'goat breeding, hay production, market garden and ancillary', 'a cattle husbandry facility' and a 'commercial/tourism development'. In each case, native title would be compulsorily acquired, Crown leases granted and, upon completion of the development, it was proposed that the lease would be exchanged for freehold title.

Following notification of each of the proposals, the Ngaliwurru-Nungali peoples commenced proceedings for a determination of native title under the *Native Title Act*. However, the High Court of Australia confirmed that the extraordinarily broad power conferred on the Minister by section 43 of the *Lands Acquisition Act 1978* (NT) includes the power to acquire any private land, including native title land, to give to a private person for private profit.<sup>36</sup>

Prior to this decision, the power to compulsorily acquire private land in the Northern Territory had only ever been used for a public purpose — not a private purpose — such as a school, railway or road. Since a change of government in 2001, the Northern Territory has not initiated compulsory acquisition of native title other than by agreement with Indigenous groups.<sup>37</sup>

161. Of particular concern are the provisions of the Northern Territory Intervention which grant the Australian Government five-year leases over Indigenous townships without the permission of the landowners. Indigenous landowners are not given the opportunity to negotiate the terms of the leases, which confer exclusive possession on the Australian Government and do not guarantee a right of residence for the affected peoples. The Australian Government may undertake any building and demolition work, and is not required to pay rent to the landowners. It was the former Australian Government's position that the compulsory leases 'will allow the Government to improve conditions in communities without having to go through long approval processes'.<sup>38</sup>

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<sup>36</sup> *Griffiths v Minister for Lands, Planning and Environment* (2008) 246 ALR 218.

<sup>37</sup> Information provided by the Northern Land Council, Darwin, Northern Territory.

<sup>38</sup> Department of Families, Community Services and Indigenous Affairs, *Fact Sheet 25: Why Is the Australian Government Acquiring Leases over Townships?* (2007).

162. The compulsory acquisition of Indigenous townships vests all decision-making power in the Australian Government and thus deprives the traditional owners of the right to make decisions about the use of the land. This is contrary to the right of self-determination, which requires that Indigenous peoples be involved in any decision-making process affecting their land. The different needs and cultures of Indigenous groups also require that decisions relating to each society be made separately and specifically.

**Case Study**

Pursuant to powers granted in the Northern Territory Intervention, the Australian Government took over culturally sensitive areas of the Warlpiri nation, including a men's ceremonial area and a cemetery.<sup>39</sup>

**Case Study**

In November 2007, a government contractor involved in the Northern Territory Intervention built a pit toilet on a culturally important site at Numbulwar, 600 kilometres south-east of Darwin.<sup>40</sup>

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<sup>39</sup> Lindsay Murdoch, 'Stop interfering: angry elders take a stand against changes', *The Sydney Morning Herald* (Sydney), 25 October 2007, available at <http://www.smh.com.au/news/national/stop-interfering-angry-elders-take-a-stand-against-changes/2007/10/24/1192941153373.html>.

<sup>40</sup> Australian Broadcasting Commission, 'Claims pit toilet built on NT cultural site', *ABC News*, 12 November 2007, available at <http://abc.net.au/news/stories/2007/11/12/2088464.htm>.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 1)**

- Please provide information on the steps that the Australian Government is taking to promote the right of Indigenous Australians of self-determination.
- Please provide details of any policies and measures being developed by the Australian Government to establish a representative Indigenous body to ensure that Indigenous persons are able to meaningfully participate in and contribute to relevant policy and decision-making processes.
- Please advise as to the Australian Government’s response to the *National Indigenous Representative Body* Issues Paper prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner.
- Please provide information on the steps that the Australian Government is taking to improve consultation with affected communities and to support the development of better Indigenous governance structures, particularly in light of the abolition of the Aboriginal and Torres Strait Islander Commission and particularly in relation to the Northern Territory Intervention.
- Does the Australian Government propose to implement the remaining recommendations contained in the HREOC’s *Bringing Them Home* report that are not already implemented? In particular, what measures are being taken to provide an effective remedy to the Stolen Generations through reparations?
- Please provide information on the steps the Australian Government is taking to implement the recommendations of HREOC to ensure that the Northern Territory Intervention is compatible with domestic and international human rights standards, including by fully reinstating the *Racial Discrimination Act 1975* (Cth).
- Please update the Human Rights Committee as to the Australian Government’s position on the Declaration on the Rights of Indigenous Peoples.
- Please provide details as to the steps and measures being taken to make the native title system more fair, effective and efficient following the July 2008 announcement of an ‘overhaul’ of the system.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 1)**

THAT the recent formal apology to Indigenous Australians be congratulated.

THAT Australia continue its efforts in the process of reconciliation with Indigenous Australians and its efforts to improve their disadvantaged situation.

THAT the Australian Government provide resources for healing and counselling services for those affected by the Stolen Generations and for reparation options.

THAT all of the recommendations contained in HREOC's *Bringing Them Home* report be implemented.

THAT, in light of the abolition of the Aboriginal and Torres Strait Islander Commission, the Australian Government establish an Indigenous body that consists of elected Indigenous representatives who can contribute to policy-making in domestic Indigenous affairs.

THAT the Australian Government repeal those aspects of the Northern Territory Intervention legislation that are incompatible with domestic and international human rights standards and fully reinstate the operation of the *Racial Discrimination Act 1975* (Cth).

THAT the Australian Government positively consider endorsing the Declaration on the Rights of Indigenous Peoples.

THAT the Australian Constitution be amended to enshrine the prohibition against racial discrimination and to provide that the 'race power' may only be used to the benefit, and not to the detriment, of persons of a particular race.

## Articles 2 and 26 — Treaty Entrenchment and Non-Discrimination

### **Article 2:**

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
3. *Each State Party to the present Covenant undertakes:*
  - (a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
  - (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
  - (c) *To ensure that the competent authorities shall enforce such remedies when granted.*

### **Article 26:**

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

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## B. ENTRENCHMENT OF BASIC HUMAN RIGHTS

163. Article 2 of the *ICCPR* creates obligations on the part of the Australian Government to guarantee all of the civil and political rights in the Covenant through the adoption of domestic legislative measures and appropriate remedies. In this respect, Article 2 contains a number of provisions relating to:

- (a) the personal and territorial scope of the rights enshrined in the *ICCPR*;
- (b) the obligation to respect and to ensure those rights;
- (c) the prohibition on discrimination (examined further below under Article 2: Non-Discrimination);
- (d) the obligation to take legislative and other measures of implementation;
- (e) the right to an effective and, if possible, judicial remedy for violations of the Covenant; and
- (f) the duty to provide actual relief in the event of a violation.

164. These provisions are explored in detail below.

### B.1 Federal Charter of Human Rights

165. Australia remains the only developed nation without comprehensive constitutional or legislative protection of basic human rights at a federal level. Australian governments have failed to provide clear and effective protection of many of the individual rights contained in both the *ICCPR* and the *ICESCR*. In its previous Concluding Observations, the Human Rights Committee expressed particular concern about Australia’s lack of constitutional protection of human rights, or a constitutional provision giving effect to the *ICCPR*.<sup>41</sup> Similar concerns about Australia’s lack of entrenched institutional protection for human rights have

<sup>41</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN GAOR, 55<sup>th</sup> sess, 1967<sup>th</sup> mtg, [514], UN Doc A/55/40 (2000): ‘there remain lacunae in the protection of Covenant rights in the Australian legal system’.

recently been expressed by the Committee on Economic, Social and Cultural Rights,<sup>42</sup> the Committee against Torture<sup>43</sup> and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.<sup>44</sup>

166. Following his appointment as Commonwealth Attorney-General in December 2007, the Hon Robert McClelland MP confirmed that, during its first term, the current Australian Government intends to conduct a national public consultation regarding the need for a federal charter of human rights. This commitment was a key plank of the Australian Labor Party's national policy on 'Respecting Human Rights and a Fair Go for All', which provided that 'Labor will initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians'.<sup>45</sup> It is also consistent with the commitment in the Labor Party's National Platform to 'adhere to Australia's international human rights obligations' and to 'seek to have them incorporated into the domestic law of Australia'.<sup>46</sup> Details of the public consultation have not yet been announced, although \$2.099 million has been allocated to the Attorney-General's Department's 2008-09 budget for a federal consultation on human rights.<sup>47</sup> The budget paper described 'supporting national community consultation on the most appropriate methods of protecting human rights' as a 'priority' for the Department for 2008-09.<sup>48</sup>
167. As identified in the Common Core Document,<sup>49</sup> at state and territory levels, charters of human rights have been enacted in both the Australian Capital Territory and Victoria.<sup>50</sup> These instruments contain many of the civil and political rights that are protected by the *ICCPR*. Recently, both the Tasmanian and Western Australian governments conducted public consultations on the need for specific human rights legislation in those states. Both consultations recommended that human rights legislation be enacted and that these instruments should enshrine economic, social and cultural rights, as well as civil and political

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<sup>42</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [14], [36], UN Doc E/C.12/1/Add.50 (2000).

<sup>43</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [9]–[10], UN Doc CAT/C/AUS/CO/1 (2008).

<sup>44</sup> Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism*, [10], UN Doc A/HRC/4/26/Add.3 (2006).

<sup>45</sup> Australian Labor Party, *ALP National Platform and Constitution* (2007) ch 13, [7].

<sup>46</sup> *Ibid* [4].

<sup>47</sup> Australian Government, *Attorney-General's Portfolio Overview* (2008) 28, available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(084A3429FD57AC0744737F8EA134BACB\)~02+pbs08-09\\_AGD\\_final.pdf/\\$file/02+pbs08-09\\_AGD\\_final.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~02+pbs08-09_AGD_final.pdf/$file/02+pbs08-09_AGD_final.pdf).

<sup>48</sup> *Ibid* 19.

<sup>49</sup> Common Core Document, above n 4.

<sup>50</sup> *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

rights.<sup>51</sup> To date, neither the Tasmanian nor Western Australian governments have implemented these recommendations.

168. The consequence of the lack of protection of civil and political rights at both a federal and state and territory level is that it is difficult to achieve the full realisation of many of these rights in Australia because:

- (a) those rights are not legally enforceable or justiciable; and
- (b) moreover, there is no domestic law requirement that the Australian Government act compatibly with, or even give proper consideration to, human rights.

169. The lack of effective, institutionalised protection of civil and political rights at both a federal and state and territory level means that Australia falls short of its obligation under Article 2 to adopt such legislative or other measures as may be necessary to give full effect to all the rights recognised by the *ICCPR*.

## **B.2 Domestic Judicial Remedies**

170. Several judgments of the High Court of Australia have reduced or may reduce the availability of remedies for government actions that breach any of the *ICCPR* rights. For example, in *Teoh's* case,<sup>52</sup> the majority of the High Court held that treaties ratified by Australia but not implemented into domestic law create a procedural legitimate expectation that government decision-makers will act compatibly with those treaties. However, the High Court's more recent decision in *Lam's* case<sup>53</sup> undermines *Teoh's* authoritative weight, and places the 'legitimate expectations' doctrine into question. Indeed, in *Lam's* case, all but one member of the High Court indicated that they were prepared to depart from the principle.

171. In addition to the uncertainty created by *Lam's* case, it is clear that there is no directly enforceable effective remedy available to individuals at the domestic level — either under legislation or at common law — for breaches of *ICCPR* rights.<sup>54</sup> Recent authority by the Federal Court of Australia has confirmed that the *ICCPR* has not been implicitly incorporated

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<sup>51</sup> See, eg, Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007), available at [http://www.law.utas.edu.au/reform/docs/Human\\_Rights\\_A4\\_Final\\_10\\_Oct\\_2007\\_revised.pdf](http://www.law.utas.edu.au/reform/docs/Human_Rights_A4_Final_10_Oct_2007_revised.pdf); Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Final Report* (2007), available at [http://www.justice.wa.gov.au/files/Human\\_Rights\\_Final\\_Report.pdf](http://www.justice.wa.gov.au/files/Human_Rights_Final_Report.pdf).

<sup>52</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>53</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

<sup>54</sup> Of course, there may be certain remedies available touching *ICCPR* rights, if analogues to these rights exist independently in domestic Australian law. For example, the right to a fair trial, which is guaranteed by Article 14(1), corresponds in part to Australia's common law right to a fair trial, and to that extent, a domestic analogue can provide certain remedies in respect of violations to the *ICCPR* right. See, eg, the judgment of Bongiorno J in the recent Victorian case of *R v Benbrika (Ruling No 20)* [2008] VSC 80 (Unreported, Supreme Court of Victoria, Bongiorno J, 20 March 2008). Nevertheless, these scattered, independent analogues do not provide direct effective judicial remedies for *ICCPR* rights themselves and as such offer no substitute for a genuinely effective, institutional remedy.

into Australia's domestic law by reason of its inclusion as Schedule 2 to the *Human Rights and Equal Opportunity Act 1986* (Cth).<sup>55</sup>

172. Australia's failure to take steps to provide effective remedies for alleged violations of *ICCPR* rights is discussed throughout this submission where relevant to each of the substantive rights.

### **B.3 Optional Protocols to the *ICCPR***

173. Australia is a party to both the First Optional Protocol and the Second Optional Protocol to the *ICCPR*.<sup>56</sup>

#### **(a) First Optional Protocol to the *ICCPR***

174. The First Optional Protocol to the *ICCPR* gives the Human Rights Committee competence to examine individual complaints alleging violations of the *ICCPR* by States Parties to the Optional Protocol. The ability of individuals to complain about the violation of their rights in an international arena brings real meaning to the rights contained in the human rights treaties.
175. The Human Rights Committee's views are not enforceable or justiciable under Australian law and no effective domestic mechanisms have been established to ensure and monitor implementation of and compliance with views. In the absence of such institutional mechanisms, Australian Governments have given mixed responses to adverse findings by the Human Rights Committee. For example, the case of *Toonen*,<sup>57</sup> a decision issued by the Committee in 1992, provoked a legislative response from the Australian Government within 12 months<sup>58</sup> (although private action was required to achieve the complete abolition of the law the subject of the communication).<sup>59</sup>
176. In contrast, in more recent cases, Australian Governments have demonstrated a definite reluctance to take any action in relation to concerns identified by the Human Rights Committee in response to individual communications. For example, in *A's case*,<sup>60</sup> the Australian Government refused to accept that a contravention had even occurred.<sup>61</sup> Since *A's case*, the Human Rights Committee has made 12 findings of violations by Australia of rights contained in the *ICCPR*. In each case, the Australian Government has rejected the Human

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<sup>55</sup> *Sales v Minister for Immigration and Citizenship* (2007) 99 ALD 523, [21] (Flick J).

<sup>56</sup> *First Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991). Australia signed the First Optional Protocol on 25 December 1995 and the Second Optional Protocol on 1 July 1991.

<sup>57</sup> *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

<sup>58</sup> *Human Rights (Sexual Conduct) Act 1994* (Cth).

<sup>59</sup> *Croome v State of Tasmania* (1997) 191 CLR 119.

<sup>60</sup> *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

<sup>61</sup> See further Hilary Charlesworth, 'Human Rights: Australia versus the UN' Discussion Paper 22/06, Democratic Audit of Australia, (2006) 2, available at [http://democratic.audit.anu.edu.au/papers/20060809\\_charlesworth\\_aust\\_un.pdf](http://democratic.audit.anu.edu.au/papers/20060809_charlesworth_aust_un.pdf).

Rights Committee's finding, emphasising the non-binding nature of the Committee's Views and even refusing to engage the Committee in further dialogue regarding the Views.<sup>62</sup>

**(b) Second Optional Protocol to the ICCPR**

177. The Second Optional Protocol to the *ICCPR* extends the scope of the substantive obligations required under the *ICCPR* as they relate to the right to life, by prohibiting the application of the death penalty.
178. While the death penalty is not currently available in any Australian state or territory (as a result of local legislation), or for federal crimes, the failure of the Australian Government to incorporate the Second Optional Protocol into domestic law means that the reintroduction of capital punishment in Australia under state laws remains a possibility. Under Australia's constitutional arrangements, if the Australian Government incorporated the Second Optional Protocol, all states and territories would be prevented from reintroducing the death penalty. The Australian Government's failure to close off this possibility is most concerning.
179. Indirectly, the incorporation of the Second Optional Protocol would also give Australia's law enforcement agencies clearer guidance on the appropriateness of sharing with foreign law enforcement agencies evidence or information which could ultimately result in the imposition of the death penalty against the person the subject of such information.<sup>63</sup> The issue is explored further under [Article 6: Death Penalty](#).

**(c) Other Optional Protocols**

180. On a positive note, since late 2007, the current Australian Government has stated its intention to engage more positively with international human rights bodies. To this end, it has announced an intention to become a party to the Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>64</sup> the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>65</sup> and the Optional Protocol to the *Convention on the Rights of Persons with Disabilities*.<sup>66</sup>

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<sup>62</sup> Ibid.

<sup>63</sup> See, eg, *Rush v Commissioner of Police* (2006) 150 FCRA 165, 168 (Finn J); New South Wales Council for Civil Liberties, *The Australian Federal Police and Capital Punishment*, available at [http://www.nswccl.org.au/issues/death\\_penalty/afp.php](http://www.nswccl.org.au/issues/death_penalty/afp.php).

<sup>64</sup> Cynthia Banham, 'Australia To Sign Torture Treaty that Howard Spurned', *The Sydney Morning Herald* (Sydney), 1 March 2008, available at <http://www.smh.com.au/news/national/australia-to-sign-torture-treaty-that-howard-spurned/2008/02/29/1204226991242.html>.

<sup>65</sup> Robert McClelland, Attorney-General and Tanya Plibersek, Minister for Housing and the Status of Women, Australian Government, 'Rudd Government Acts To Promote the Rights of Women in Australia' (Press Release, 23 May 2008), available at [http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Media\\_Releases](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Media_Releases).

<sup>66</sup> Robert McClelland, 'Strengthening Human Rights and the Rule of Law' (Speech delivered at the Human Rights Law Resource Centre seminar, Melbourne, 7 August 2008), available at [http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2008\\_7August2008-StrengtheningHumanRightsandtheRuleofLaw](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_7August2008-StrengtheningHumanRightsandtheRuleofLaw).

#### **B.4 Extra-Territorial Application of the ICCPR**

181. Significant issues arise with respect to Australia's extra-territorial obligations under the *ICCPR*, particularly with respect to:
- (a) Australian defence forces and intelligence organisations; and
  - (b) Australian transnational corporations operating overseas.
182. Serious allegations have recently arisen in relation to the conditions in which the Australian Defence Force detained prisoners of war in Afghanistan.

#### **Case Study**

Allegations have recently come to light that Australian Defence Force soldiers in Afghanistan captured four suspected Taliban members and placed them in pens that had previously been used for dogs.<sup>67</sup> This is deeply offensive to the Muslim detainees, as it is considered degrading and unclean to keep a human being in a dog's house according to Islamic culture. The Australian Government's lack of recognition of the offence caused is particularly troubling, with the former Minister for Defence defending the treatment by saying that they were fighting an enemy who would use any tactics, including using children as shields.<sup>68</sup>

183. There is no clear framework of human rights obligations that applies to Australian corporations in their relationships overseas with host state governments or populations.<sup>69</sup> Similarly, Australia has failed to take steps to properly ensure corporate accountability for activities carried out outside Australia.

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<sup>67</sup> 'Diggers Detain Suspected Militants in Dog Pens', *The Age* (Melbourne), 2 September 2008, available at <http://www.theage.com.au/national/diggers-detain-suspected-militants-in-dog-pens-20080902-47cc.html>.

<sup>68</sup> Brendan Nicholson, 'Minister Denies Taliban Held in Dog Kennels', *The Age* (Melbourne), 3 September 2008.

<sup>69</sup> M Sornarajah, *The International Law on Foreign Investment* (2004) 18–22; Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 460.

184. Many Australian corporations operate in areas where there is permissive or no regulation or where host governments lack the will or capacity to monitor corporate conduct or to enforce standards in their jurisdictions.<sup>70</sup> The dominance and power of corporations can enable them to operate as ‘independent states outside of the effective control of [host] countries’,<sup>71</sup> particularly developing countries.<sup>72</sup>
185. Some Australian companies, particularly mining companies, are having a severe impact on the human rights of people in many parts of the world. The Australian Government’s failure to adequately monitor and regulate the activities of Australian corporations overseas, including by failing to enact legislation regarding the extra-territorial human rights obligations of Australian transnational corporations, raises concerns with Article 2 of the *ICCPR*.
186. The Australian Parliament recently rejected an opportunity to legislate to ensure that Australian companies do not breach international human rights standards overseas. The *Corporate Code of Conduct Bill 2000* (Cth), introduced into Parliament by the Australian Democrats, would have required Australian companies that employed more than 100 people overseas to meet international human rights obligations, as well as international environment and labour standards.<sup>73</sup> However, the Bill was derided by both major Australian political parties and abandoned.<sup>74</sup>

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<sup>70</sup> Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004) 11–12; Jordan J Paust, ‘Human Rights Responsibilities of Private Corporations’ (2002) 35 *Vanderbilt Journal of Transnational Law* 801, 808.

<sup>71</sup> Morehead Dworkin, ‘Whistleblowing, MNCs and Peace’ (2002) 35 *Vanderbilt Journal of International Law* 457, 460; see also Karsten Nowrot, ‘New Approaches to the International Legal Personality of Multinational Corporations: Towards a Rebuttable Presumption of Normative Responsibilities’ (Paper presented at ESIL Research Forum on International Law, Geneva, 26 – 28 May 2005) 1, available at <http://www.esil-sedi.eu/english/pdf/Nowrot.PDF>.

<sup>72</sup> Sarah Joseph, ‘An Overview of the Human Rights Accountability of Multinationals Enterprises’ in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2000) 78.

<sup>73</sup> Corporate Code of Conduct Bill 2000 (Cth).

<sup>74</sup> Rachel Ball, *Boom Watch: Holding the Australian Extractive Industry Accountable for the Human Rights Impacts of their Overseas Operations* (2008) 18 (copy with authors).

**Case Study: Anvil Mining**

Australian based company, Anvil Mining, supplied air and ground transport to the army of the Democratic Republic of Congo for an operation that allegedly resulted in the slaughter of more than 100 people. Anvil's air services and land vehicles were used to mobilise Congolese troops to suppress a reported rebel incursion at a town near Anvil's Dikulushi mine.<sup>75</sup>

The Australian Federal Police (**AFP**) investigated the actions of Anvil Mining in September 2005, but did not lay any charges. The AFP has not made public its reasons for failing to prosecute the company.<sup>76</sup>

**Case Study: Didipio**

Australasian Philippines Mining Inc (**APM**) is a wholly-owned subsidiary of Australian company OceanaGold, which failed to obtain the consent of the local community to establish its gold and copper mine in the Philippines. It is alleged that APM intimidated and harassed local landowners, bribed local officials and misrepresented the degree of support for the project.<sup>77</sup> Oxfam produced a damning report about the project, however APM continues its operations unaffected.<sup>78</sup>

**B.5 Australia's Reservations to the ICCPR**

187. Despite its stated intention to engage more positively with international human rights bodies, the current Australian Government continues to maintain the reservations that Australia has previously made in relation to the *ICCPR*. To give meaningful effect to all the rights contained in the *ICCPR*, the Australian Government must withdraw these reservations.
188. Australia currently maintains reservations in respect of the following articles:

Articles	Reservation
10(2)(a) and (b)	Practices that may affect the segregation of accused persons and prisoners, and the separation of accused adults and accused juveniles
10(3) (second sentence)	Practices that may affect the segregation of juvenile and adult prisoners
14(6)	Practices that may affect compensation for wrongful conviction

<sup>75</sup> Peter Gonnella, 'CONGO: Anvil Mining Hammered Over Military Assistance', *Corp Watch*, 8 June 2005, available at <http://www.corpwatch.org/article.php?id=12361>.

<sup>76</sup> Ball, above n 74, 12.

<sup>77</sup> Oxfam Australia, *Mining Ombudsman Case Report: Didipio Gold and Copper Mine*, (2007), available at <http://www.oxfam.org.au/campaigns/mining/ombudsman/cases/didipio/docs/2007-Didipio-Case-Report.pdf>.

<sup>78</sup> Ball, above n 74, 23.

Articles	Reservation
20	Practices that may affect the prohibition on war propaganda and/or the advocacy of national, racial and religious hatred

**(a) Article 10(2)(a)**

189. In relation to Article 10(2)(a), Australia has only accepted the principal of segregation as an objective that should be achieved progressively. Though there are specific provisions that require the separation of children from adults in most states and territories,<sup>79</sup> the Australian Government and two states — Queensland and Western Australia — have not enacted any such protection.

**(b) Article 10(2)(b) and (3) (second sentence)**

190. Under its reservation to these Articles, Australia has accepted the obligation to segregate juvenile and adult prisoners only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.<sup>80</sup> Thus, defendants who are detained prior to conviction and convicted criminals do not necessarily have to be segregated. Similarly, adults and children detainees can be integrated in light of Australia's reservation to these articles.

191. The failure to segregate accused individuals held in pre-trial custody from convicted criminals denies the accused individuals treatment that is appropriate to their unconvicted status. The particular context of individuals accused of terrorism-related offences is discussed under Articles 7 and 10: Conditions of Detention of Remand Prisoners.

192. The segregation of adults from children in detention is also vital because of children's inherent vulnerability in a prison environment. Young inmates in adult prisons are at heightened risk of abuse.<sup>81</sup> Research suggests that juveniles incarcerated with adults are five times more likely to report being victims of sexual assault than youth in juvenile detention facilities.<sup>82</sup> This issue is discussed in further detail under Article 24: Juvenile Justice System.

<sup>79</sup> See, eg, *Children and Young People Act 2008* (ACT) s 99; *Juvenile Justice Act 1983* (NT) s 32(5); *Children (Detention Centres) Act 1987* (NSW) s 9(4); *Young Offenders Act 1993* (SA) s 15(3); *Youth Justice Act 1997* (Tas) s 25(3); *Children, Youth and Families Act 2005* (Vic) s 347(2)(a).

<sup>80</sup> See *International Covenant on Civil and Political Rights* [1980] ATS 23, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>, for the full list of reservations.

<sup>81</sup> See, eg, Human Rights Watch, *No Escape: Male Rape in US Prisons* (2001); Stop Prisoner Rape, *Fact Sheet: Incarcerated Youth at Extreme Risk of Sexual Abuse* (October 2007); Stop Prisoner Rape, *Fact Sheet: The Basics on Rape behind Bars* (2000).

<sup>82</sup> Jeffrey Fagan et al, 'Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy' (1989) 2 *Juvenile & Family Court Journal* 9.

**(c) Article 14(6)**

193. Australia has made the reservation, with respect to Article 14(6), that ‘the provision of compensation for miscarriage of justice ... may be by administrative procedures rather than pursuant to specific legal provision’.<sup>83</sup>
194. With the exception of the Australian Capital Territory, there is no statutory right to compensation in Australia where a miscarriage of justice has occurred.<sup>84</sup> In all other jurisdictions, there is only the possibility of *ex gratia* payments.<sup>85</sup> Concerningly, sometimes compensation for a miscarriage of justice will only follow a public inquiry.<sup>86</sup> Although guidelines exist in certain jurisdictions to govern when such payments will be made, none have been published.<sup>87</sup> This is discussed in further detail under Article 14: Compensation for Miscarriage of Justice.

**(d) Article 20**

195. In its reservation to Article 20, Australia asserts that ‘the Commonwealth and the constituent States, having legislated with respect to the subject matter of the Article in matters of practical concern in the interests of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters’.<sup>88</sup>
196. While it is true that certain forms of vilification have been outlawed, there is generally little consistency in the treatment of racial and religious vilification across jurisdictions. The absence of a single, federal standard — which could be achieved by incorporating Article 20 into domestic legislation — inevitably leads to fragmentation and uncertainty. This issue is discussed in further detail under Articles 19 and 20: Anti-Vilification Laws.

**B.6 Human Rights Education**

197. The requirement under Article 2 of the *ICCPR* to take ‘other measures as may be necessary to give effect to the rights recognized in the [*ICCPR*]’ includes an obligation to provide education about human rights. This includes an obligation to create a human rights culture through human rights education at all levels and in all sectors of society.<sup>89</sup> In its Concluding

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<sup>83</sup> See *International Covenant on Civil and Political Rights* [1980] ATS 23, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>, which contains the full list of reservations.

<sup>84</sup> Section 23 of the *Human Rights Act 2004* (ACT) provides that anyone who is punished pursuant to a final criminal conviction that amounts to a miscarriage of justice has the right to be compensated ‘according to law’.

<sup>85</sup> Adrian Hoel, ‘Compensation for Wrongful Conviction’ (2008) *Trends and Issues in Crime and Criminal Justice*, No 356, Australian Institute of Criminology, available at <http://www.aic.gov.au/publications/tandi2/tandi356t.html>.

<sup>86</sup> See, eg, the Lindy Chamberlain case: *Re Conviction of Chamberlain* (1988) 93 FLR 239.

<sup>87</sup> Hoel, above n 85.

<sup>88</sup> See *International Covenant on Civil and Political Rights* [1980] ATS 23, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>, which contains the full list of reservations.

<sup>89</sup> See, eg, Human Rights Committee, *Comments of the Human Rights Committee: Hungary*, [11], UN Doc CCPR/C/79/Add.22 (1994). See also Human Rights Committee, *Concluding Observations of the Human*

Observations on Australia, the Committee on Economic, Social and Cultural Rights directly called upon Australia to take effective steps to ensure that human rights education is included in primary and secondary school curricula.<sup>90</sup>

198. Australia has yet to formulate a National Action Plan for human rights education. No formalised human rights education exists in any state or territory. Where it is touched upon, it is due to the concerted efforts of individual teachers and schools rather than the result of a national unified policy.

### **B.7 Statistical Data**

199. The Statistical Annex to the Common Core Document provides extensive detail in certain areas, however, it is particularly concerning that the Australian Government has again failed to provide disaggregated data. Such data is an important source in assessing direct and indirect discrimination in relation to the realisation of the *ICCPR* rights.

## **C. NON-DISCRIMINATION**

200. Discrimination is both a cause and consequence of poverty and social exclusion. Recognising this, Article 2 of the *ICCPR* provides that the Covenant rights are to be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
201. While Article 2 of the *ICCPR* is concerned primarily with non-discrimination in the enjoyment of rights, Article 26 guarantees a general right of equality. This right of *substantive* equality requires equality before the law, equal protection of the law, prohibition of discrimination and protection against discrimination.
202. In partial accordance with Article 2, Australia has enacted laws to prevent discrimination on the basis of race, age, sex and disability. These laws include the *Human Rights and Equal Opportunity Act 1986* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth), together with state and territory anti-discrimination legislation.<sup>91</sup>
203. Despite these legislative protections, there are a number of groups within Australian society that remain vulnerable to both direct and systemic discrimination and are therefore particularly disadvantaged in their enjoyment of *ICCPR* rights, contrary to Article 2. Moreover, as much of the federal and state and territory anti-discrimination legislation is complaint-based, it fails to effectively promote substantive equality or adequately address issues of direct and systemic discrimination as required by Article 26.

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*Rights Committee: Ecuador*, [21], UN Doc CCPR/C/79/Add.92 (1998); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Philippines*, [18], UN Doc CCPR/CO/79/PHL (2003).

<sup>90</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [35], UN Doc E/C.12/1/Add.50 (2000).

<sup>91</sup> *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA).

### C.1 Indigenous Peoples

204. A significant gap exists between Indigenous and non-Indigenous Australians relating to many of the rights contained in the *ICCPR*. The particular concerns with the realisation of the human rights of Indigenous Australians discussed throughout this submission are:
- (a) the failure to recognise the self-determination of Indigenous Australians and to ensure adequate political representation (see [Article 1: Recognition of Self-Determination for Indigenous Australians](#));
  - (b) Australia's opposition to the UN Declaration on the Rights of Indigenous Peoples (see [Article 1: Declaration on the Rights of Indigenous Peoples](#));
  - (c) the failure to provide compensation for those affected by the 'Stolen Generations' (see [Article 1: The Stolen Generations](#));
  - (d) the 'emergency response intervention' into Indigenous communities in the Northern Territory (see [Article 1: Intervention into Northern Territory Indigenous Communities](#));
  - (e) the protection of the titles and interests of Indigenous Australians in their native lands (see [Article 1: Native Title](#));
  - (f) the state of Indigenous health, including life expectancy, infant mortality rates and susceptibility to diseases (see [Article 6: Indigenous Health](#));
  - (g) the continued high number of deaths of Indigenous Australians in custody (see [Article 6: Indigenous Deaths in Custody](#));
  - (h) issues in the justice system, including the disproportionate impact of certain criminal laws such as mandatory sentencing (see [Articles 7 and 10: Indigenous Australians](#));
  - (i) the 'stolen wages' of Indigenous workers whose paid labour was controlled by Australian governments (see [Article 8: Indigenous Stolen Wages](#));
  - (j) issues relating to the right to a fair hearing, including the inability of many Indigenous Australians to understand how the legal system operates and what is happening in criminal proceedings against them (see [Article 14: Access to Interpreters](#));
  - (k) particular protection of Indigenous children, including:
    - (i) the Northern Territory Intervention (see [Article 24: Indigenous Children](#));
    - (ii) the impacts of the juvenile justice system on Indigenous children (see [Article 24: Juvenile Justice](#));
    - (iii) significantly lower levels of education provided to Indigenous children (see [Article 24: Indigenous Education](#)); and
  - (l) particular protections required for Indigenous Australian by virtue of Article 27 of the *ICCPR* (see [Article 27: Indigenous Australians](#));

This substantive inequality raises serious concerns in relation to Articles 2 and 26 of the *ICCPR*.

205. Indigenous Australians also face many issues in the realisation of their economic and social rights, including:

- (a) the right to work;
  - (b) the right to social security;
  - (c) the right to an adequate standard of living;
  - (d) the right to health; and
  - (e) the right to education.
206. These concerns are examined in detail in a recent NGO Submission to the UN Committee on Economic, Social and Cultural Rights on Australia's compliance with the *ICESCR*.<sup>92</sup>
207. Further, Australia has not only failed to ensure similar realisation of civil and political rights for Indigenous peoples, but has actively discriminated against Indigenous people in relation to the Northern Territory Intervention (see Article 1: Intervention into Northern Territory Indigenous Communities). As provided for in Articles 4 and 5 of the *ICCPR*, a State Party's laws may limit rights only insofar as they are compatible with the *ICCPR* and only for the purpose of promoting the general welfare in a democratic society. Contrary to Article 2 of the *ICCPR*, legislative measures associated with the Northern Territory Intervention contain provisions exempting them from the application of the federal *Racial Discrimination Act 1975* (Cth) and Northern Territory anti-discrimination legislation.<sup>93</sup>
208. The Northern Territory Intervention legislation states that the responses are 'special measures' and therefore not unlawful discrimination.<sup>94</sup> However, such 'special measures' are supposed to benefit, rather than disadvantage, the targeted group. In providing evidence to a Senate Committee inquiry into the intervention, the President of the Human Rights and Equal Opportunity Commission (**HREOC**) raised concerns regarding the measures being exempted from the *Racial Discrimination Act 1975* (Cth), particularly in respect of the failure of the former Australian Government to consult with Indigenous communities prior to the intervention.<sup>95</sup>

## C.2 Racial Discrimination

209. In addition to the concerns expressed above with respect to Indigenous Australians, many other aspects of Australia's law, policy and practice raise concerns with respect to the right to freedom from discrimination on the basis of race. The particular concerns discussed throughout this submission include:
- (a) the particular impact of Australia's counter-terrorism measures on the Muslim and Arab population, discussed under Article 18: Freedom of Thought, Conscience and Religion;

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<sup>92</sup> ICESCR NGO Report, above n 25.

<sup>93</sup> *Anti-Discrimination Act 1992* (NT).

<sup>94</sup> *Northern Territory National Emergency Response Act 2007* (Cth) s 132.

<sup>95</sup> Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Northern Territory National Emergency Response Bill 2007 & Related Bills, Parliament of Australia, Canberra, 10 August 2007, 49 (John von Doussa, President of the Human Rights and Equal Opportunity Commission).

- (b) the impact of sedition laws on the right to freedom of opinion and expression (see [Articles 19 and 20: Sedition Laws](#)); and
- (c) issues facing particular groups of newly arrived immigrants (see [Article 27: African Communities](#)).

This substantive inequality raises serious concerns in relation to Articles 2 and 26 of the *ICCPR*.

### **C.3 Women**

210. Australia has taken steps to fulfil its obligations under Article 2 of the *ICCPR* with respect to women. Most significantly, Australia's ratification of the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* was the major impetus for the passage of the *Sex Discrimination Act 1984* (Cth) and the *CEDAW* text is attached as a Schedule to the Act. However, the *Sex Discrimination Act 1984* (Cth) does not implement *CEDAW* in its totality. Instead, it seeks only to implement certain of the rights contained in *CEDAW*.<sup>96</sup>
211. In general, the *Sex Discrimination Act 1984* (Cth) is limited in the fields of activity that it covers and the types of conduct to which it applies.<sup>97</sup> The failure of the *Sex Discrimination Act 1984* (Cth) to reflect the full scope of *CEDAW* has been noted by the Australian Law Reform Commission, HREOC and numerous other bodies.<sup>98</sup> Indeed, in 2006, the Committee on the Elimination of All Forms of Discrimination against Women expressed concern in its Concluding Comments on Australia about the 'absence of an entrenched guarantee prohibiting discrimination against women'.<sup>99</sup> The *Sex Discrimination Act 1984* (Cth) fails to provide the legislative framework necessary to address direct or systemic discrimination and promote substantive equality for women.
212. Women continue to be significantly disadvantaged in relation to the realisation of many of the rights contained in the *ICCPR*. Particular concerns discussed throughout this submission include:
- (a) the lack of representation of women in both the public and private sectors (see [Article 3: Representation of Women](#));
  - (b) the widespread issue of violence against women (see [Article 3: Violence against Women](#));
  - (c) the continuing pay gap that exists between women and men (see [Article 3: Failure to Ensure Equal Pay](#));

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<sup>96</sup> *Sex Discrimination Act 1984* (Cth) s 3(1).

<sup>97</sup> Elizabeth Evatt, 'Falling Short on Women's Rights: Mis-Matches between SDA and the International Regime' (Speech delivered at the Castan Centre for Human Rights Law, Monash university, Melbourne, 3 December 2004).

<sup>98</sup> See, eg, Australian Law Reform Commission, *Equality before the Law: Justice for Women (Part I)*, Report No 69 (2003); Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984* (1992).

<sup>99</sup> Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, [12], UN Doc CEDAW/C/AUL/CO/5 (2006).

- (d) the trafficking of women, particularly trafficking of women into sexual slavery (see [Article 3: Trafficking of Women](#));
  - (e) the absence of a national paid maternity leave scheme (see [Article 23: Paid Maternity Leave](#)); and
  - (f) particular issues relating to child care, including the ‘baby bonus’ and child support payments (see [Article 23: Child Care](#)).
213. Women in Australia also face many issues in the realisation of their economic and social rights, including:
- (a) the right to work and conditions of work;
  - (b) the right to social security;
  - (c) the right to family;
  - (d) the right to an adequate standard of living; and
  - (e) the right to health.
214. These concerns are examined in detail in a recent NGO Submission to the UN Committee on Economic, Social and Cultural Rights on Australia’s compliance with the *ICESCR*.<sup>100</sup>
215. This substantive inequality of women raises serious concerns in relation to Articles 2 and 26 of the *ICCPR*.
216. In June 2008, the current Australian Government announced an inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality.<sup>101</sup> The inquiry, to be undertaken by the Senate Standing Committee on Legal and Constitutional Affairs, is due to report to the Senate by 12 November 2008.

#### **C.4 Religion**

217. Federal legislation does not prohibit discrimination or vilification on the ground of religion. However, all states and territories, except New South Wales and South Australia, make religious discrimination unlawful.<sup>102</sup>
218. While the law in New South Wales does cover people who have been discriminated against or vilified on the basis of their ‘ethno-religious origin’,<sup>103</sup> it is unlikely that this extends to people who have been treated badly solely because they are Muslim. This gap is particularly

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<sup>100</sup> ICESCR NGO Report, above n 25.

<sup>101</sup> Senate Legal and Constitutional Affairs Committee, ‘Information about the Inquiry’, *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, available at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/sex\\_discrim/info.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/info.htm).

<sup>102</sup> *Discrimination Act 1991* (ACT) s 66(1); *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) s 19(a); *Racial and Religious Tolerance Act 2001* (Vic) s 7(1); *Criminal Code Act 1913* (WA) ss 76–80.

<sup>103</sup> *Anti-Discrimination Act 1977* (NSW) s 20C(1).

problematic given that approximately half of Australia's Muslim population lives in New South Wales.<sup>104</sup>

219. In 2004, HREOC released a report, entitled *Ismaε — Listen*, that involved national consultations on eliminating prejudice against Arab and Muslim Australians.<sup>105</sup> The *Ismaε — Listen* report found that the majority of respondents had experienced some form of harassment and prejudice because of their religion.<sup>106</sup> In addition, Muslim women experience significantly higher levels of discrimination due to being easily identified as Muslim by their dress.<sup>107</sup>
220. The *Ismaε — Listen* report recommended, among other things, that a federal law be introduced making discrimination and vilification on the grounds of religion or belief unlawful.<sup>108</sup> To date, this recommendation has not been adopted.
221. The particular concerns regarding disadvantage and discrimination on the ground of religious belief or activity discussed throughout this submission include:
- (a) the particular impact of Australia's counter-terrorism measures on the Muslim and Arab population, discussed under Article 18: Freedom of Thought, Conscience and Religion;
  - (b) the impact of sedition laws on the right to freedom of opinion and expression (see Articles 19 and 20: Sedition Laws);
  - (c) issues facing particular groups of Australian society, such as the Muslim and Arab population (see Article 27: Arab and Muslim Communities); and
  - (d) issues facing particular groups of newly arrived immigrants (see Article 27: African Communities).

This substantive inequality raises serious concerns in relation to Articles 2 and 26 of the ICCPR.

### **C.5 National or Social Origin — Citizenship Test**

222. In 2007, the former Australian Government introduced a requirement that all persons who wish to obtain Australian citizenship have to successfully complete a 'citizenship test'.<sup>109</sup> The

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<sup>104</sup> Australian Bureau of Statistics, 'Religious Affiliation by Sex: Australia', *Census Tables* (2006); Australian Bureau of Statistics, 'Religious Affiliation by Sex: NSW', *Census Tables* (2006), available at <http://www.censusdata.abs.gov.au/>.

<sup>105</sup> Human Rights and Equal Opportunity Commission, *Ismaε — Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004) (*Ismaε — Listen report*).

<sup>106</sup> *Ibid* 3.

<sup>107</sup> *Ismaε — Listen* consultation participants reported numerous incidents of women in hijabs being spat at, of objects being thrown at them from passing cars and of their hijabs being forcibly removed. See also Scott Poynting and Greg Noble, 'Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence since 11 September 2001' (Report to the Human Rights and Equal Opportunity Commission, Centre for Cultural Research, University of Western Sydney, 2004) 6, available at [http://www.humanrights.gov.au/racial\\_discrimination/isma/research/uwsreport.pdf](http://www.humanrights.gov.au/racial_discrimination/isma/research/uwsreport.pdf).

<sup>108</sup> Human Rights and Equal Opportunity Commission, *Ismaε — Listen report*, above n 105, 129.

- written test requires applicants for citizenship to demonstrate that they have adequate English language skills, an adequate knowledge of Australian society, culture and history, and the rights and responsibilities of citizenship.
223. Australian citizenship should not be granted or withheld on a discriminatory basis. Refugee and humanitarian entrants face significant barriers in passing such a test, particularly because they have issues with literacy and often learning difficulties caused by, for example, experiences of torture or trauma.
224. In April 2008, the Minister for Immigration and Citizenship appointed an independent committee to conduct a review of the Australian citizenship test.<sup>110</sup> The committee's report, recently provided to the Minister but not yet released publicly, found the citizenship test to be flawed, intimidatory and discriminatory.<sup>111</sup> Many of the submissions to the review considered that the standard of English required by the citizenship test was too high and discriminated against non-English speaking migrants.
225. In the six months to the end of March 2008, 25,000 people sat the citizenship test, with 95 per cent passing the test. But while 99 per cent of skilled migrants passed, only 82 per cent of those from the humanitarian program did so. In addition, the number of people seeking citizenship has fallen since the introduction of the test because people have been deterred by a fear of failure.<sup>112</sup>
226. The Human Rights Committee has recognised that States Parties to the *ICCPR* are obliged to ensure that any criteria for citizenship, including any language criteria, are not unduly onerous, and to ensure that unsuccessful applicants have rights of review.<sup>113</sup> The introduction of a citizenship test has put particular groups of people, including groups defined by reference to language, nationality, social origin and birth, at a disadvantage when applying for Australian citizenship.
227. Citizenship is important as it gives a sense of belonging, especially to these vulnerable people (particularly as many would otherwise be stateless). The citizenship test runs contrary to Australia's international obligations, which state that Australia should 'facilitate' the acquisition of citizenship by refugees and stateless persons.<sup>114</sup> Some human rights, such as the right to vote, are only available to citizens and Australian governments are increasingly making

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<sup>109</sup> *Australian Citizenship Act 2007* (Cth) s 21(2A).

<sup>110</sup> Australian Government, *Message from the Chair of the Committee* (2008) Citizenship Test Review, available at <http://www.citizenshiptestreview.gov.au/content/message.htm>.

<sup>111</sup> News Ltd, 'Citizenship Test To Be Overhauled', *News.com.au* (29 August 2008), available at <http://www.news.com.au/story/0,23599,24260095-29277,00.html>.

<sup>112</sup> Michelle Grattan, 'Bradman Sidelined In Citizen Rethink', *The Age* (Melbourne), 11 August 2008, available at <http://www.theage.com.au/national/bradman-sidelined-in-citizen-rethink-20080810-3t2g.html>.

<sup>113</sup> See, eg, Human Rights Committee, *Concluding Observations of the Human Rights Committee: Estonia*, [12] UN Doc CCPR/C/79/Add. 59 (1995).

<sup>114</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 34 (entered into force 22 April 1954); *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117, art 32 (entered into force 6 June 1960).

citizenship a pre-requisite for access to other rights, such as access to government-funded education places.<sup>115</sup>

### C.6 People with Disability and Mental Illness

228. Article 2 of the *Convention on the Rights of Persons with Disabilities* defines discrimination on the basis of disability as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>116</sup>
229. The *Disability Discrimination Act 1992* (Cth) provides protection from discrimination and harassment for people with disability in areas of employment, education, and the provision of goods and services.<sup>117</sup> However, it does not provide any protection from vilification. Tasmania is the only state in Australia that provides protection from vilification for people with disability.<sup>118</sup>
230. The stigma associated with mental illness, such as schizophrenia, is particularly pervasive, and often results in discrimination in housing, education and employment, as well as hindering optimal recovery.<sup>119</sup> During 2007-2008, 360 complaints were made to SANE StigmaWatch regarding inaccurate, sensationalist or negative representations of mental illness and suicide in the media.<sup>120</sup> Federal legislative protection from vilification on the ground of mental illness would greatly assist to reduce the stigma and discrimination that this vulnerable group suffers.

#### Case Study

Olga has an intellectual disability which impairs her speech. She is a regular visitor to her local public library. Lately, a group of young men who also frequent the library have subjected her to continual teasing, verbal insults and imitation of her speech. On visiting her local community legal centre, Olga was informed that, unfortunately, she was not entitled to redress for this behaviour under either state or federal anti-discrimination law.<sup>121</sup>

<sup>115</sup> *Higher Education Support Act 2003* (Cth) s 90-1(a).

<sup>116</sup> Article 5 of the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2006] ATNIF 15 (entered into force 3 May 2008), prohibits discrimination on the basis of disability. The current Australian Government ratified the Convention on 17 June 2008.

<sup>117</sup> *Disability Discrimination Act 1992* (Cth) ss 35–40.

<sup>118</sup> *Anti-Discrimination Act 1998* (Tas) s 19. New South Wales provides protection against vilification on the basis of HIV/AIDS status: *Anti-Discrimination Act 1977* (NSW) s 49ZXB(1).

<sup>119</sup> Barbara Hocking, 'Reducing Mental Illness Stigma and Discrimination – Everybody's Business' (2003) *Medical Journal of Australia* 178 (9 Suppl) 47–48.

<sup>120</sup> SANE Australia, *SANE StigmaWatch 2008: Portrayal of Mental Illness and Suicide in the Australian Media 2007-2008*, available at <http://www.sane.org/StigmaWatch/StigmaWatch/StigmaWatch.html>.

<sup>121</sup> Case study provided by the Disability Discrimination Legal Centre, New South Wales.

231. People with disability also face many issues in the realisation of their economic and social rights, including:
- (a) the right to social security;
  - (b) the right to family;
  - (c) the right to an adequate standard of living;
  - (d) the right to health; and
  - (e) the right to education.
232. These concerns are examined in detail in a recent NGO Submission to the UN Committee on Economic, Social and Cultural Rights on Australia's compliance with the *ICESCR*.<sup>122</sup>

### **C.7 Homelessness and Social Status**

233. The international norm of non-discrimination prohibits unfair, unjust or less favourable treatment in law, in fact and in the realisation of all human rights, including homelessness.<sup>123</sup> Discrimination against people who are experiencing homelessness is currently widespread in all Australian jurisdictions.<sup>124</sup> Research shows that discrimination is a major causal factor of homelessness and can systematically exclude people from access to goods, services, the justice system, health care, housing and employment.<sup>125</sup> Despite this, it remains lawful to discriminate against people on the basis of their housing status in all Australian jurisdictions.
234. In 2006, the UN Special Rapporteur on the Right to Adequate Housing gave special mention of the need for Australian governments to take proactive measures, including changing legislation, to address discrimination on the basis of inadequate housing and other forms of social status.<sup>126</sup> The current lack of prohibition of discrimination on the basis of homelessness or social status presents a significant impediment in the realisation of civil and political rights for many disadvantaged and marginalised Australians.
235. People experiencing homelessness remain among the most marginalised and powerless groups in Australia. Indeed, people experiencing homelessness are subject to multiple and intersectional human rights violations, including violations of the right to non-discrimination, violations of the right to dignity and respect, the right to participate and vote, freedom of

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<sup>122</sup> ICESCR NGO Report, above n 25.

<sup>123</sup> See, eg, *Cavalcanti Araujo-Jongens v Netherlands*, Communication No 418/90, UN Doc CCPR/C/49/D/418/1990 (1993), which found that a difference between employed and unemployed persons constituted discrimination on the basis of 'other status'.

<sup>124</sup> See, eg, research conducted by the Homeless Persons' Legal Clinic, Public Interest Clearing House, Submission to the Human Rights Committee, *Homelessness and Human Rights in Victoria* (2005); Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008) 3, available at [http://www.hreoc.gov.au/human\\_rights/housing/homelessness\\_2008.html](http://www.hreoc.gov.au/human_rights/housing/homelessness_2008.html)

<sup>125</sup> World Health Organization, *Health and Freedom from Discrimination: WHO's Contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) [3.2].

<sup>126</sup> Special Rapporteur on the Right to Adequate Housing, *Report of the Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia*, 4<sup>th</sup> sess, Prov Agenda Item 2, UN Doc A/HRC/4/18/Add.2 (2007) Recommendation 130.

expression, the right to privacy, and the prohibition against cruel and degrading treatment. The realisation of these rights for people who are homeless is discussed throughout this submission.

236. People who are homeless, or at risk of homelessness, also face many issues in the realisation of their economic and social rights, including:
- (a) the right to work and conditions of work;
  - (b) the right to social security;
  - (c) the right to family;
  - (d) the right to an adequate standard of living; and
  - (e) the right to health.
237. These concerns are examined in detail in a recent NGO Submission to the UN Committee on Economic, Social and Cultural Rights on Australia's compliance with the *ICESCR*.<sup>127</sup>

**Case Study**

Not long after a new hostel for backpackers opened up in Warrnambool, Victoria, a few years ago, the proprietor personally visited all the welfare providers in town and advised them not to refer anyone to him because he didn't want 'those kind of people' in his place.<sup>128</sup>

**Case Study**

Homeless people are discriminated against because of their status and appearance. Anthony is homeless and has a mental illness. He is often asked to leave services due to his appearance, which is perceived to be threatening and upsetting to other service users. Services that discriminate against people because of their appearance include Centrelink (the Australian Government statutory agency), hospitals, police, schools, banks and boarding houses.<sup>129</sup>

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<sup>127</sup> ICESCR NGO Report, above n 25.

<sup>128</sup> Case study provided by Salvation Army Social Housing Service, Warrnambool.

<sup>129</sup> Case study provided by Community Development Worker, St Mary's House of Welcome, Melbourne.

### C.8 Sexual Orientation and Gender Identity

238. Most state and territory governments have amended their anti-discrimination legislation to prohibit direct and indirect discrimination on the grounds of sexual orientation and gender identity.<sup>130</sup> However, same-sex couples continued to be discriminated against in many aspects of public and private life, including in relation to the recognition of marriage and financial and work-related benefits and entitlements. These are discussed in further detail under Article 23: Same-Sex Couples and their Families.

### C.9 Age Discrimination

239. While discrimination on the basis of age is protected at the federal level, the *Age Discrimination Act 2004* (Cth) fails to adequately protect age discrimination in many areas. Discrimination on the basis of age is only protected under legislation where it is the *dominant* reason for doing the potentially discriminatory act.<sup>131</sup> At the time that the Act was passed, HREOC expressed its concern regarding this provision.<sup>132</sup>

240. Age discrimination manifests itself mostly in the workplace. Discrimination, often as a consequence of stereotypes, is experienced by both unemployed job-seekers and those currently employed.<sup>133</sup> In particular, older workers:

- (a) are targeted for redundancies;
- (b) are over-represented in unemployment statistics;
- (c) take longer to re-enter the labour market;
- (d) are offered training opportunities at a much lower rate than other workers; and
- (e) are being encouraged to consider taking on less onerous job roles.<sup>134</sup>

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<sup>130</sup> All states and territories have prohibited discrimination on grounds of sexual orientation, though in New South Wales this is limited to homosexuality. All states and territories have prohibited discrimination on grounds of gender identity.

<sup>131</sup> Section 16 of the *Age Discrimination Act 2004* (Cth) provides that where a potentially discriminatory act is done for several reasons, it is taken to be done for the reason of a person's age only if it is the dominant reason for doing the act.

<sup>132</sup> See Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Age Discrimination Bill 2003* (2003) ch 3 available at [http://www.aph.gov.au/senate/Committee/legcon\\_cte/completed\\_inquiries/2002-04/age03/report/report.pdf](http://www.aph.gov.au/senate/Committee/legcon_cte/completed_inquiries/2002-04/age03/report/report.pdf).

<sup>133</sup> Rob Ranzijn, 'Discrimination against the Older Worker: Psychology and Economics' (Speech delivered at 'Of Working Age — A Seminar on Age Discrimination in the Workplace', Human Rights and Equal Opportunity Commission, Sydney, 10 May 2005), available at <http://www.hreoc.gov.au/age/workingage/speeches/ranzijn.html>.

<sup>134</sup> Chris Kossen, 'Barriers to Employment for Marginalised Mature Age Workers' (Speech delivered at 'Of Working Age — A Seminar on Age Discrimination in the Workplace', Human Rights and Equal Opportunity Commission, Sydney, 10 May 2005) available at <http://www.hreoc.gov.au/age/workingage/speeches/kossen.html>.

241. The *Age Discrimination Act 2004* (Cth) also fails to address the issue of youth wages, which are exempt from the provision of the Act. Younger workers receive statutorily protected lower pay, which also results in lack of job security as they reach the age of full pay rates.

#### **C.10 Exceptions and Exemptions to Discrimination Legislation**

242. Despite the existence of anti-discrimination legislation at both federal and state and territory levels, Australia has recently permitted exemptions from the operation of those laws. Both state and federal anti-discrimination laws contain numerous exceptions and exemptions that render otherwise discriminatory conduct or policies lawful. Many of these exceptions and exemptions, such as for clubs, voluntary bodies, religious institutions and sporting bodies, are anachronistic and perpetuate exclusive and discriminatory structures and practices. There is no requirement under domestic law that such exceptions and exemptions be reasonable, necessary and objective as required by international human rights law. Such exemptions raise issues in relation to Articles 2 and 26 of the *ICCPR*.

#### **Case Study**

ADI Limited and various related companies, who are major defence contractors, were granted an exemption from the provisions of the *Equal Opportunity Act 1994* (WA), the *Anti-Discrimination Act 1977* (NSW) and the *Equal Opportunity Act 1995* (Vic) relating to race in order to fulfil their obligations under defence contracts they have with the Australian Government.<sup>135</sup> Fulfilment of those contracts required ADI to access American technology, which was only possible by complying with American regulations prohibiting ‘nationals’ of some countries — including Iran, Syria, North Korea and Sudan — from accessing that technology. ADI is therefore now able to demand birth and citizenship details from prospective and existing employees and contractors, and ‘mark’ the nationality of employees by the use of badges.<sup>136</sup>

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<sup>135</sup> *Re ADI Limited and Commissioner for Equal Opportunity Commission* [2005] WASAT 259 (Unreported, State Administrative Tribunal of Western Australia, Eckert J, 28 September 2005). See also *Re ADI Limited (Exemption)* [2004] VCAT 1963 (Unreported, Victorian Civil and Administrative Tribunal, 24 June 2004) and the exemption notice in *New South Wales Government Gazette*, No 81, 1 July 2005, 3495.

<sup>136</sup> *Ibid.*

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLES 2 AND 26)**

- Please provide information as to how the *ICCPR* is incorporated into Australian domestic law, including its enforceability and justiciability before domestic courts and tribunals.
- Please provide information as to the nature, timing, scope and parameters of the proposed national public consultation regarding the legal recognition and protection of human rights, including particularly the steps and measures that will be taken to ensure participation by marginalised and disadvantaged individuals and groups.
- Please update the Human Rights Committee as to the status of the implementation of the recommendations of the Consultative Committees regarding the enactment of human rights legislation in Tasmania and Western Australia.
- Does the Australian Government consider the Views of the Human Rights Committee under the First Optional Protocol to the *ICCPR* to be binding? What measures and mechanisms, including legislative, administrative and parliamentary measures, are in place to ensure domestic implementation of, and compliance with, Human Rights Committee's Views?
- Does the Australian Government propose to maintain all of the existing reservations to the *ICCPR*? Please update the Human Rights Committee as to the reasons for, and status of, these reservations.
- Please provide information as to the steps being taken to develop a national action plan on human rights education and to ensure that human rights are a formal component of the curriculum at a primary or secondary level in every Australian state and territory.
- What steps, including legislative measures, is the Australian Government taking to address issues of substantive inequality, direct discrimination and systemic discrimination against vulnerable communities and groups, including Indigenous Australians, women, people with disability, people from non-English speaking backgrounds and all religions, homeless people, gay, lesbian, bisexual, transgender and intersex people, children and young people, and older persons?
- Please explain how exemptions to Australian anti-discrimination law which permit discrimination on grounds including race and nationality in the field of employment are compatible with the prohibition against discrimination under the *ICCPR*.
- The current Australian Government has recently recognised that homelessness is a major issue in Australian society. What additional measures, both legislative and educative, have or will the Australian Government introduce to address discrimination based on socio-economic and housing status?

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLES 2 AND 26)**

THAT Australia incorporate comprehensive legislative protection of the rights contained in the *ICCPR* and ensure that Covenant rights are applicable, enforceable and justiciable in domestic courts.

THAT the Australian Government establish effective domestic mechanisms to ensure and monitor implementation of and compliance with Views under the First Optional Protocol to the *ICCPR* and *Concluding Observations of the Human Rights Committee*.

THAT the Australian Government legislate to ensure that Australian corporations respect human rights, including in respect of their extraterritorial activities.

THAT all Australian jurisdictions enact legislation to prohibit vilification on the ground of disability or impairment.

THAT the Australian Government legislate to comprehensively prohibit discrimination on the grounds of sexual orientation and gender identity, and THAT Australia implement the recommendations of HREOC's *Same-Sex: Same Entitlements* report.

THAT the Australian Government legislate to provide for a legal right to equality, as required by Article 26 of the *ICCPR*.

THAT the Australian Government legislate to address issues of substantive inequality, direct discrimination and systemic discrimination against vulnerable communities and groups.

THAT the Australian Government legislate to ensure that any exemptions or exceptions permitted under domestic anti-discrimination law are compatible with the prohibition against discrimination under the *ICCPR*.

THAT Australia implement the recommendations of HREOC's *Ismael — Listen* report, to address the issue of discrimination against and vilification of Arab and Muslim Australians.

THAT the Australian Government enact legislation to prohibit religious discrimination or vilification.

## Article 3 — Equal Rights of Men and Women

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**Article 3:**

*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.*

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### D. EQUAL RIGHTS OF MEN AND WOMEN

243. Article 3 of the *ICCPR* commits Australia to ensure that all civil and political rights in the Covenant are enjoyed equally by men and women.

#### D.1 Representation of Women

244. Australian women remain significantly under-represented in many aspects of political and public life. In 2006, only 30.3 per cent of federal and state politicians were women.<sup>137</sup> Only the third female High Court judge in Australia's history was appointed in September 2007 and, overall, just 23 per cent of the Australian judiciary is female.<sup>138</sup>

245. Women are also significantly under-represented at managerial levels in business, reflecting a lack of family-friendly working policies and conditions, such as paid maternity leave (discussed in further detail under [Article 23: Paid Maternity Leave](#)). In 2006, women held just:

- (a) 12 per cent of executive manager positions;<sup>139</sup>
- (b) 129 of 1,487 (9 per cent) company board directorships;<sup>140</sup> and

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<sup>137</sup> Australian Bureau of Statistics, *Australian Labour Market Statistics*,. ABS Catalogue No 6105.0 (2006) table 2.3.

<sup>138</sup> Kathy Mack and Sharyn Roach Anleu, 'National Survey of Australian Judges: Preliminary Findings', (Paper presented at the Judicial Conference of Australia, Sydney, 5-7 October 2007).

<sup>139</sup> Equal Opportunity for Women in the Workplace Agency, Australian Government, *2006 EOWA Census of Women in Leadership* (2006), 5.

<sup>140</sup> *Ibid* 24.

- (c) six of the Chief Executive Officer positions with the Australian Stock Exchange's top 200 companies (3 per cent).<sup>141</sup>
246. Women in top earning positions in the Australian Stock Exchange's top 200 companies also earn much less than their male counterparts.<sup>142</sup>
247. The abolition of the Aboriginal and Torres Strait Islander Commission (**ATSIC**) (discussed under Article 1: Recognition of Self-Determination for Indigenous Australians) in 2004 has resulted in the removal of a directly elected voice for Indigenous women. Despite this, ATSIC had previously been criticised for its 'failure to recognise the role played by Indigenous women' and its inadequate leadership development of women.<sup>143</sup>
248. Women with disability have also reported significant barriers which restrict participation in political and public life, as well as a lack of leadership, development and mentoring programs specifically targeting women with disability.<sup>144</sup>
249. Similarly, women from culturally and linguistically diverse communities face additional complex structural barriers to participation in political and public life. Impediments to equality for women of culturally and linguistically diverse communities may include:
- (a) 'the formality of strict corporate governance structures';<sup>145</sup>
  - (b) not belonging to long-term networks from which many appointments to leadership roles in the community are sought;<sup>146</sup>
  - (c) family responsibilities related to differing conceptions of family and lack of support of extended family due to migration;<sup>147</sup> and
  - (d) increasing racial and religious discrimination.<sup>148</sup>

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<sup>141</sup> Ibid 17.

<sup>142</sup> Equal Opportunity for Women in the Workplace Agency, Australian Government, *Gender Income Distribution of Top Earners in ASX200 Companies: 2006 EOWA Census of Women in Leadership* (2008).

<sup>143</sup> John Hannaford, Bob Collins and Jackie Huggins, *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper* (2003) [4.22].

<sup>144</sup> See, eg, Women with Disabilities Australia, *WWDA Policy Paper: The Role of Advocacy in Advancing the Human Rights of Women with Disabilities in Australia* (2008); Women with Disabilities in Australia, *'Taking the Lead': A Leadership and Mentoring Kit for Women with Disabilities* (2000).

<sup>145</sup> WomenSpeak, 'Response to Australian Government Inquiry into Women's Representation on Rural and Regional Bodies of Influence' (2006) 6, available at <http://www.ywca.org.au/pdfs/WomenSpeak%20submission%20to%20Inquiry%20into%20Women's%20Representation%20on%20Rural%20&%20Regional%20Bodies%20of%20Influence%202006.doc>.

<sup>146</sup> Women on Boards, *Women and Board Positions* (2005) 17, available at [http://www.womenonboards.org.au/pubs/r05\\_survey0507.htm?print=1](http://www.womenonboards.org.au/pubs/r05_survey0507.htm?print=1).

<sup>147</sup> Women's Rights Action Network Australia, *Our Rights, Our Voices: The Victorian Community Report on Women* (2004) 17, available at <http://home.vicnet.net.au/~wrana/WRC%20Project/Final%20Reports%20for%20Web/Vic%20Report.doc>.

<sup>148</sup> Ibid.

250. As a result of unique lifestyles, responsibilities and apparently embedded gender stereotypes in rural and regional Australia, the representation of women in rural and regional Australia is particularly low. Anecdotal evidence suggests that ‘the ratio of women’s representation declines with the movement from metropolitan to regional to rural’.<sup>149</sup>

## D.2 Violence against Women

251. While the federal and state and territory governments have prioritised addressing the issue of violence against women, including in particular through the ‘Women’s Safety Agenda’ initiative, violence against women continues to occur at appalling levels in Australia. Statistics indicate that:

- (a) 19 per cent of all women experience sexual violence during their lifetime;<sup>150</sup>
- (b) 33 per cent of all women experience at least one incident of physical violence during their lifetime,<sup>151</sup> and
- (c) approximately half of female homicide victims are killed as a result of a domestic dispute.<sup>152</sup>

252. These figures are likely to be much higher due to the fact that reporting of violence against women and sexual assault remains low: in 2005, it was estimated that only 36 per cent of female victims of physical assault and 19 per cent of female victims of sexual assault report the incident to police.<sup>153</sup>

253. Violence against women is a serious issue in many Indigenous communities. In the Northern Territory, the rate of domestic violence against Indigenous females recorded by the Northern Territory Police is nearly 17 times greater than the rate for non-Indigenous females.<sup>154</sup> In Queensland, Western Australia, South Australia and the Northern Territory, it is estimated that Indigenous females are around 35 times more likely to be hospitalised as a result of family violence and ten times more likely to die from assault than non-Indigenous females.<sup>155</sup>

254. The primary government response to domestic violence requires women to leave their homes. While legislative provisions exist in all states and territories for the perpetrator of domestic

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<sup>149</sup> WomenSpeak, above n 145.

<sup>150</sup> Australian Bureau of Statistics, *Personal Safety Survey Australia 2005* (2005), ABS Catalogue No 4906.0 (2005). See also Janet Phillips and Malcolm Park, ‘E-Brief: Measuring Domestic Violence and Sexual Assault against Women: A Review of the Literature and Statistics’, (2004) Parliament of Australia Parliamentary Library, available at <http://www.aph.gov.au/library/intguide/SP/ViolenceAgainstWomen.htm>.

<sup>151</sup> Ibid.

<sup>152</sup> Jenny Mouzos, ‘Homicide in Australia: 2003–2004 National Homicide Monitoring Program (NHMP) Annual Report’ (2005) Australian Institute of Criminology.

<sup>153</sup> Australian Bureau of Statistics, *Personal Safety Survey Australia 2005*, above n 150.

<sup>154</sup> Productivity Commission’s Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2007* (2007) 119, available at <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2007>.

<sup>155</sup> Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, *Family violence among Aboriginal and Torres Strait Islander peoples* (2006) 54, 66, available at <http://www.aihw.gov.au/publications/index.cfm/title/10372>.

- violence to leave, in practice many of these measures are not implemented.<sup>156</sup> This causes particular issues for Indigenous women living in remote or rural communities who may be required to leave their family and communities, which is often untenable.<sup>157</sup>
255. Significant funds have been committed to address violence against women through the 'Women's Safety Agenda' initiative, including through the creation of a National Council to Reduce Violence Against Women and Children. However, the level of government resources provided remains inadequate. Despite the large number of women escaping domestic violence who are assisted, only the needs of a small proportion of women in need are met by temporary housing refuges. In particular, women from culturally and linguistically diverse communities, women with disability and Indigenous women are not appropriately supported in the majority of refuges.
256. Further, women who leave their homes often struggle to find adequate accommodation. The 'Supported Accommodation Assistance Program', referred to in the Common Core Document as 'Australia's primary service response to homelessness',<sup>158</sup> only addresses emergency accommodation rather than long-term housing solutions for women escaping domestic violence. More than 350 people a day are turned away from homelessness services across Australia because of a lack of capacity and resources, with women and children the most likely to be rejected.<sup>159</sup> There is also no systemic program to meet the needs of children who enter refuges with their mothers or who have experienced domestic violence, raising concerns in relation to the right to protection of the family and protection of children contained in Articles 23 and 24 of the *ICCPR* respectively.
257. In establishing the National Council to Reduce Violence Against Women and Children, the current Australian Government has taken some important steps in preventing violence against women. It has recognised the links between homelessness and family violence and committed to a 'comprehensive' approach to address homelessness.<sup>160</sup> The National Council to Reduce Violence Against Women and Children is currently developing a National Plan of Action to Reduce Violence Against Women and Children.
258. However, in order to eliminate violence against women, it is essential that the National Plan of Action be adequately resourced. In addition, the Plan should:
- (a) operate within a human rights framework;

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<sup>156</sup> Robyn Edwards, 'Staying Home/Leaving Violence: Promoting Choices for Women Leaving Abusive Partners' (2004) 11 *Developing Practice: The Child, Youth and Family Work Journal* 40.

<sup>157</sup> In a recent survey, 22 per cent of Indigenous women reported that they had been the victims of violence or threatened violence in the preceding 12 months: Australian Bureau of Statistics, *The Health and Wellbeing of Aboriginal and Torres Strait Islander Women: A Snapshot, 2004–05*, ABS Catalogue No 4722.0 (2007), available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4722.0.55.001>.

<sup>158</sup> Common Core Document, above n 4, [356].

<sup>159</sup> Australian Institute of Health and Welfare, Australian Government, *Demand for SAAP Accommodation by Homeless People 2005–06: A Report from the SAAP National Data Collection* (2007) 6, 56-7, available at <http://www.aihw.gov.au/publications/index.cfm/title/10491>.

<sup>160</sup> Australian Government, *Homelessness: A New Approach* (2008) available at [http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/new\\_approach/\\$File/homelessness\\_a\\_new\\_approach.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/new_approach/$File/homelessness_a_new_approach.pdf).

- (b) be based on international best practice;
- (c) provide an integrated approach that includes a variety of sectors, government departments and ministerial portfolios;
- (d) include quantifiable targets and assign responsibilities;
- (e) support a client-focused approach to service provision;
- (f) address and resource service provision in the areas of housing, health, access to support services, education and the reduction of poverty, in addition to policing and legal services, which has been the focus of funding to date;
- (g) involve consultation with Indigenous women and services, in rural and remote as well as metropolitan areas;
- (h) provide for better resourcing of, and improved access to, legal and other services for Indigenous women; and
- (i) prioritise establishing a domestic violence death review process.

### **D.3 Failure to Ensure Equal Pay**

259. While substantial gains have been made over past decades to reduce the pay gap between men and women, women continue to receive lower wages than men in Australia.
260. There are a number of issues in Australia in relation to pay inequity between men and women which raise concern under Article 3 of the *ICCPR*, including that:
- (a) women earn on average 18.4 per cent less than men;<sup>161</sup>
  - (b) women are almost twice as likely to be under-employed than men;<sup>162</sup>
  - (c) women have \$3 for every \$10 men have in their superannuation accounts;<sup>163</sup>
  - (d) women are over-represented in industries characterised by casual, part-time and low paid employment;<sup>164</sup>
  - (e) women hold just seven per cent of the top earner positions (80 positions out of 1,136), compared with 93 per cent held by men;<sup>165</sup>
  - (f) female Chief Financial Officers and Chief Operating Officers earn just half the wage of their male equivalents and even in human resources positions, where women are more common, the pay gap is still 43 per cent;<sup>166</sup>

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<sup>161</sup> Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, ABS Catalogue No 6310.0 (2007).

<sup>162</sup> Australian Bureau of Statistics, *Australian Labour Market Statistics*, above n 137.

<sup>163</sup> Ross Clare, *Are retirement savings on track?* (2007) Association of Superannuation Funds of Australia, available at [http://www.superannuation.asn.au/ArticleDocuments/116/rc0706\\_retirement\\_savings.pdf.aspx](http://www.superannuation.asn.au/ArticleDocuments/116/rc0706_retirement_savings.pdf.aspx).

<sup>164</sup> Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, above n 161.

<sup>165</sup> Equal Opportunity for Women in the Workplace Agency, above n 142, 6.

<sup>166</sup> *Ibid* 10.

(g) in Chief Executive Officer positions, women earn two thirds of the salary earned by their male counterparts.<sup>167</sup>

261. These concerns are examined in greater detail in a recent NGO Submission to the UN Committee on Economic, Social and Cultural Rights on Australia's compliance with the *ICESCR*.<sup>168</sup>

262. In addition to the pay gap that exists between men and women, Australia remains one of only two OECD countries in the world not to have introduced a national paid maternity leave scheme. This is discussed in further detail under Article 23: Paid Maternity Leave.

#### **D.4 Trafficking of Women**

263. The issue of trafficking of women, particularly trafficking of women into sexual slavery, raises concerns under Article 3 of the *ICCPR*.<sup>169</sup> This issue is discussed in further detail under Article 8: Trafficking in Human Beings: Sexual Servitude.

#### **PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 3)**

- What concrete steps, including legislative, budgetary and administrative steps, is Australia taking to address the significant disadvantage of women compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation?
- Please outline the steps and measures that Australia is taking to ensure that women and children who are victims of domestic violence are able to remain in the family home and do not become homeless.
- Please indicate whether the resources allocated to both prevention of violence and assistance for women and children who experience violence, including through the 'Women's Safety Agenda' initiative, are anticipated to meet the demand for services.
- How will the Australian Government support a structure for Indigenous women to have input into deciding on appropriate services and solutions to violence in their own communities?

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<sup>167</sup> Ibid.

<sup>168</sup> ICESCR NGO Report, above n 25.

<sup>169</sup> OECD, *OECD Family Database — PF7: Key Characteristics of Parental Leave Systems* (2007), available at <http://www.oecd.org/dataoecd/45/26/37864482.pdf>.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 3)**

THAT Australia take concrete steps, including legislative, budgetary and administrative steps, to address the significant disadvantage of women compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation.

THAT, in addition to addressing the underlying causes of domestic violence, Australia increase funding to shelters and support services that are appropriate to women fleeing situations of domestic violence.

THAT Australia ensure that Indigenous women are properly consulted in relation to appropriate services and solutions to address violence in their communities.

THAT Australia take immediate steps to reduce the significant gender wage gap that exists in the Australian workforce.

## Article 4 — Derogations

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### **Article 4:**

1. *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
2. *No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*
3. *Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*

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### **E. DEROGATIONS**

264. Article 4 of the *ICCPR* provides that States may take measures derogating from their obligations under the *ICCPR* so far as such measures are strictly necessary to respond to an officially proclaimed state of emergency threatening the life of the nation itself. Even in a state of emergency, such measures must not limit non-derogable rights, such as the prohibition against torture and cruel treatment under Articles 7 and 10 and aspects of the right to a fair hearing under Article 14. Further, derogating measures must not involve discrimination solely on grounds such as race, thus prohibiting measures which intentionally target particular racial populations or groups.
265. Any State Party seeking to avail itself of the right of derogation must immediately inform all other States Parties to the *ICCPR*, thereby establishing a limited form of international supervision.

**E.1 Northern Territory Intervention**

266. As discussed under [Article 1: Intervention into Northern Territory Indigenous Communities](#), in 2007, the former Australian Government announced a ‘national emergency intervention’ into Indigenous communities in the Northern Territory. The Northern Territory Intervention legislation, passed without consultation with Indigenous representatives and affected communities, includes a range of draconian measures targeted specifically at Indigenous people and communities, including suspension of the operation of the *Racial Discrimination Act 1975* (Cth). As discussed above, it is not permissible in circumstances for a derogating measure to discriminate solely on the ground of race.
267. Notwithstanding that aspects of the Northern Territory Intervention clearly derogate from Australia’s obligations under the *ICCPR*, contrary to the requirements of Article 4 neither the former Australian Government nor the current Australian Government has:
- (a) demonstrably established that the situation in Indigenous communities constitutes such a ‘public emergency’ as to ‘threaten the life of the nation’;
  - (b) limited any derogating measures under the Northern Territory Intervention to the extent strictly required to respond to the ‘emergency’;
  - (c) notified all other States Parties to the *ICCPR* of the derogation; or
  - (d) ensured that the derogating measures do not discriminate solely on the ground of race.

**E.2 Counter-Terrorism Measures**

268. As discussed under [Articles 7 and 10: Counter-Terrorism Measures](#), [Article 9: Counter-Terrorism Measures](#) and [Article 14: Counter-Terrorism Measures](#), since 11 September 2001 Australia has enacted more than forty pieces of legislation to address terrorism and related activities. In the absence of a federal charter of rights, these laws have not been assessed against, or counterbalanced by, a legislative human rights framework. A range of aspects of the laws are incompatible with non-derogable provisions of the *ICCPR*, including Articles 7, 10 and 14, providing for such measures as incommunicado detention, prolonged solitary confinement, prolonged detention without charge, very restrictive conditions of detention, admission of improperly obtained evidence, and very limited judicial oversight or review.
269. Notwithstanding that aspects of Australia’s counter-terrorism laws, policy and practice clearly derogate from Australia’s obligations under the *ICCPR*, contrary to the requirements of Article 4 neither the former Australian Government nor the current Australian Government have:
- (a) demonstrably established that the so-called ‘War on Terror’ constitutes such a ‘public emergency’ as to ‘threaten the life of the nation’;
  - (b) limited any derogating counter-terror laws or measures to the extent strictly required to respond to the ‘emergency’; or
  - (c) notified all other States Parties to the *ICCPR* of the derogation.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 4)**

- Does the Australian Government consider the ‘emergency’ in Northern Territory Indigenous communities to constitute an ‘emergency which threatens the life of the nation’ and, if so, what steps has Australia taken to permissibly derogate from provisions of the *ICCPR* under Article 4 with respect to the Northern Territory Intervention?
- Does the Australian Government consider the ‘War on Terror’ to constitute an ‘emergency which threatens the life of the nation’ and, if so, what steps has Australia taken to permissibly derogate from provisions of the *ICCPR* under Article 4 with respect to counter-terrorism laws and measures?

## Article 6 — Right to Life

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**Article 6:**

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
2. *In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
3. *When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

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### **F. RIGHT TO LIFE**

270. The right to life is regarded as the supreme human right. Every person has a right not to be arbitrarily or unlawfully deprived of life by the State or its agents. Furthermore, Article 6 imposes a proactive duty on States to take measures to enable a person to live with dignity.

## F.1 Indigenous Peoples

### (a) Indigenous Health

271. The state of Indigenous health in Australia results from and represents serious human rights breaches. Indigenous Australians do not have an equal opportunity to be as healthy as non-Indigenous Australians. Many Indigenous Australians do not have the benefit of equal access to primary health care and many Indigenous communities lack basic needs, such as adequate housing, safe drinking water, electricity and effective sewerage systems. This raises concerns in relation to the right to life.
272. The crisis in Indigenous health in Australia is reflected in the following statistics:
- (a) Life expectancy for Indigenous Australian males is 56.3 years, almost 21 years less than the 77.0 years expected for all Australian males, and for Indigenous Australian females it is 62.8 years, almost 20 years less than the expectation of 82.4 years for all Australian females.<sup>170</sup> These statistics are attributed to poor health at all levels and age groups within the Indigenous population and apply equally to both urban and rural and remote Indigenous populations. In 2006, the Committee on the Elimination of Discrimination against Women noted its concern about the lower life expectancy among Indigenous women.<sup>171</sup>
  - (b) Life expectancy for Indigenous Australians is between eight and 15 years less than that of Indigenous populations in Canada, the United States and New Zealand.<sup>172</sup>
  - (c) The median age at death for Indigenous Australians is currently about 53 years, which is 25 years less than that for non-Indigenous Australians.<sup>173</sup> This is considerably lower than the median age at death for Indigenous peoples in other Western countries.
  - (d) In 1999–2003, the infant mortality rate for Indigenous infants was 2.5 times that of non-Indigenous infants.<sup>174</sup>
  - (e) Indigenous Australians are eight times more likely to die from diabetes, three times more likely to die from circulatory disease, eight times more likely to die from chronic kidney disease and have one of the highest rates of rheumatic heart disease in the world.<sup>175</sup>

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<sup>170</sup> Australian Bureau of Statistics and Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003*, ABS Catalogue No 4704.0 (2003) ch 7, available at <http://www.aihw.gov.au/publications/index.cfm/title/9226>.

<sup>171</sup> Committee on the Elimination of all Forms of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of all Forms of Discrimination against Women: Australia*, [30] UN Doc CEDAW/C/AUL/CO/5 (2006).

<sup>172</sup> Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2006) ch 4(e), available at [http://www.hreoc.gov.au/social\\_justice/statistics/index.html](http://www.hreoc.gov.au/social_justice/statistics/index.html).

<sup>173</sup> Australian Bureau of Statistics and Australian Institute of Health and Welfare, above n 170, 183.

<sup>174</sup> *Ibid* 184.

<sup>175</sup> *Ibid* 132–3, 139, 193–4.

- (f) In 1999–2003, two of the three leading causes of death for Indigenous peoples in Queensland, South Australia, Western Australia and the Northern Territory were chronic diseases of the circulatory system and cancer.<sup>176</sup>
273. The Committee on the Elimination of Racial Discrimination has previously recommended that Australia intensify its efforts to eradicate the disparities faced by Indigenous peoples in relation to, among other areas, health.<sup>177</sup> The Committee also recommended that decisive steps be taken to ensure that a sufficient number of health professionals provide services to Indigenous people. The crux of the problem is that Indigenous health services are severely under-funded by Australian governments and have been for decades. Further, policies are not based on clear goals or targets to meet the requisite human rights standards and there are no individual or group remedies for these failures.
274. Indigenous women continue to experience much higher levels of ill-health, disease and death than non-Indigenous women.<sup>178</sup> For example, the prevalence of low-birth weight babies (which, at 13 per cent for Indigenous mothers, is twice the rate of six per cent which appears in the general population) did not improve between 1991 and 2005.<sup>179</sup> Communicable and chronic diseases are diagnosed at much higher rates than for non-Indigenous women, and health risk factors<sup>180</sup> and mental health problems are also apparent on a much greater scale among Indigenous women than in the broader community.<sup>181</sup>
275. Indigenous women are more likely to have an unhealthy standard of living, and to suffer from intersecting social issues, including larger families and overcrowded housing, less access to water and utilities, less access to medical and other services, and to experience more stressors such as eviction, job loss, violence and death of family members.<sup>182</sup>
276. These issues all raise serious concerns in relation to the right to life of Indigenous Australians. Recently, the current Australian Prime Minister, Kevin Rudd, committed
- within a decade to halve the appalling gap in infant mortality rates between Indigenous and non-Indigenous children and, within a generation, to close the equally appalling 17-year life gap between Indigenous and non-Indigenous in when it comes to overall life expectancy.<sup>183</sup>

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<sup>176</sup> Ibid 133.

<sup>177</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, [19] UN Doc CERD/C/AUS/CO/14 (2005).

<sup>178</sup> Human Rights and Equal Opportunity Commission, *A Statistical Overview, A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (August 2006) above n 172, ch 4.

<sup>179</sup> Ibid ch 4(a).

<sup>180</sup> Health risk factors include smoking and obesity: ibid ch 4(f).

<sup>181</sup> For a simple analysis of the comparative health statistics, see Australian Bureau of Statistics, *The Health and Wellbeing of Aboriginal and Torres Strait Islander Women: A Snapshot, 2004–05* (2007) available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4722.0.55.001>.

<sup>182</sup> Ibid.

<sup>183</sup> Commonwealth of Australia, *Apology to Australia's Indigenous Peoples*, House of Representatives, 13 February 2008 (Kevin Rudd, Prime Minister).

277. In furtherance of this goal, a National Indigenous Health Equality Summit was held in March 2008. At the Summit, the Prime Minister, the Minister for Health and Ageing, the Opposition Leader and leaders of peak Indigenous health bodies and peak mainstream health bodies signed a 'Close the Gap Statement of Intent' in which they agreed to:
- (a) work together to achieve equality in health status and life expectancy between Indigenous and non-Indigenous Australians by the year 2030;
  - (b) ensure that health care services and infrastructure for Indigenous Australians are capable of bridging the gap in health standards by 2018; and
  - (c) measure, monitor, and report on their joint efforts in accordance with a range of sub-targets and benchmarks.<sup>184</sup>
278. These commitments are significant steps towards ensuring Indigenous health equality.
- (b) Indigenous Deaths in Custody**
279. The death of Indigenous Australians in custody continues to be of serious concern, despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody which were made over 15 years ago.<sup>185</sup> Many of the recommendations related to the criminal justice system, and required ongoing liaison between different government agencies, with the principal thrust of recommendations being directed towards the elimination of disadvantage and the growth of empowerment and self-determination of Indigenous Australians. Many of the Royal Commission's recommendations have never been implemented.
280. In 2003, 25 per cent of all deaths in custody continued to be Indigenous Australians.<sup>186</sup> The striking over-representation of Indigenous Australians in prison (discussed under Articles 7 and 10: Indigenous Australians), together with the percentage of Indigenous deaths in custody, raise serious concerns in relation to Article 6 of the *ICCPR*.

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<sup>184</sup> *The Close the Gap Statement of Intent*, signed 20 March 2008, available at [http://www.humanrights.gov.au/social\\_justice/health/targets/closethegap/part2\\_1.html](http://www.humanrights.gov.au/social_justice/health/targets/closethegap/part2_1.html).

<sup>185</sup> Commonwealth of Australia, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991) vols 1–5.

<sup>186</sup> Marissa McCall, 'Deaths in Custody in Australia: 2003 National Deaths in Custody Program (NDICP) Annual Report' (2004) Australian Institute of Criminology available at <http://www.aic.gov.au/publications/tbp/tbp012/tbp012.pdf>.

**Case Study: Ian Ward**

On 27 January 2008, a respected Warburton Aboriginal elder, Mr Ian Ward, was placed in the back of a prison transport van for up to four and a half hours while temperatures outside exceeded 40 degrees. Mr Ward was being transferred from Laverton to Kalgoorlie in remote Western Australia to face a charge of drink driving. Mr Ward was found unconscious in the back of the van, having collapsed and vomited. He subsequently died in hospital. It is suspected that the van's air-conditioning system was faulty.<sup>187</sup>

Police and the Western Australian Government are refusing to release details of Mr Ward's post-mortem.<sup>188</sup>

**Case Study: Cameron Doomadgee**

In November 2004, Mr Cameron Doomadgee was walking home, inebriated, when he passed a police officer. He made a smart remark — either a sworn insult or a line of a song, 'Who let the dogs out?' — and was arrested and thrown in the back of a police van. Mr Doomadgee was found dead in his cell the following morning with injuries that resembled being involved in a fatal car accident. The arresting police officer said that Mr Doomadgee suffered the severe injuries when he fell on the steps of the police station. The Queensland Deputy State Coroner recommended that the police officer involved be charged with manslaughter.<sup>189</sup>

**F.2 Death Penalty**

281. By becoming a party to the Second Optional Protocol to the *ICCPR*, Australia has committed itself not to expose a person to the real risk of the application of the death penalty.<sup>190</sup> The last use of the death penalty in Australia was in Victoria in 1967 and it was removed from federal and state and territory statute books in 1985. However, as discussed under Article 2: Second Optional Protocol to the *ICCPR*, the failure of the Australian Government to pass legislation at

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<sup>187</sup> Paige Taylor, 'Drink Driver Dies in Custody', *The Australian* (Sydney), 28 January 2008.

<sup>188</sup> Tiffany Laurie, 'Silence on Cause of Elder's Death in Custody Van', *The West Australian* (Perth), 1 February 2008; Ronan O'Connell, 'Guards Unaware of Van Trauma', *The West Australian* (Perth), 4 February 2008.

<sup>189</sup> *Inquest into the Death of Mulrunji* (Unreported, Coroner's Court of Queensland, 27 September 2006), available at <http://www.courts.qld.gov.au/mulrunji270906.pdf>; Jo Case, 'Writing Wrongs' (2008) 307 *The Big Issue* 16.

<sup>190</sup> In *Judge v Canada*, Communication No 829/1998, [10.4], UN Doc CCPR/C/78/D/829/1998 (5 August 2002), the Human Rights Committee decided that Canada had breached its obligations under Article 6(1) of the *ICCPR* by deporting Mr Judge 'without ensuring that the death penalty would not be carried out.' The Committee stated: 'For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence will not be carried out.': [10.4] (emphasis in original).

the federal level comprehensively abolishing the death penalty leaves open the possibility that it could be re-introduced by states and territories.

282. Moreover, over the last few years, Australia has weakened its stance in relation to the application of the death penalty to individuals, including Australian citizens, in other countries. The current Australian Government has indicated that it is inappropriate to intervene in the affairs of a foreign country.<sup>191</sup>

#### **Case Study**

Nine Australian citizens (known as the 'Bali Nine') were arrested in Bali, Indonesia for alleged involvement in heroin trafficking. The arrests resulted from intelligence provided by members of the Australian Federal Police (AFP). Presently, three members of the 'Bali Nine' face execution as a result of their respective convictions for drug trafficking offences. The death penalty may therefore be applied to these Australian citizens as a direct result of the actions of the AFP.

283. This case study represents an example of the Australian Government's failure to protect the fundamental human rights of Australian citizens by exposing them to a real risk of the death penalty being applied. In addition, the former Australian Government condoned the application of the death penalty to members of the 'Bali Nine' in Indonesia. Former Australian Prime Minister John Howard said at the time that the '[Bali Nine] should be dealt with in accordance with Indonesian law. ...and if [the death penalty] is what the law of Indonesia provides, well, that is how things should proceed. There won't be any protest from Australia'.<sup>192</sup>
284. In addition, there are a number of pieces of legislation and policies in place that proscribe cooperation by Australian authorities with countries where the death penalty may be imposed:
- (a) The *Extradition Act 1988* (Cth) does contain a presumption against extradition where the offence is punishable by the death penalty.<sup>193</sup> However, the Attorney-General retains an overriding discretion to extradite a person where it is considered that the person should be surrendered in relation to the offence.<sup>194</sup>
  - (b) The *Mutual Assistance in Criminal Matters Act 1987* (Cth) provides that a request by a foreign country for mutual assistance must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that

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<sup>191</sup> See, eg, Interview with Kevin Rudd, Prime Minister, and Senator Penny Wong, Minister for Climate Change and Water (Doorstop interview, Bulimba State School, Brisbane, 18 July 2008) available at [http://www.pm.gov.au/media/interview/2008/interview\\_0368.cfm](http://www.pm.gov.au/media/interview/2008/interview_0368.cfm).

<sup>192</sup> ATV Channel 7, Interview with John Howard (Part 2) (Television interview on *Sunday Sunrise*, 16 February 2003).

<sup>193</sup> *Extradition Act 1988* (Cth) s 22(3)(c).

<sup>194</sup> *Extradition Act 1988* (Cth) s 22(3)(f).

the assistance requested should be granted.<sup>195</sup> ‘Special circumstances’ is not defined in Act.

- (c) The AFP’s *Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* provides that the AFP can assist foreign countries on a police-to-police basis where no charges have been laid, regardless of whether the foreign country may be investigating offences that attract the death penalty.<sup>196</sup>

285. The protections that are in place have not been effective in preventing the Australian Government from acting in a way that is inconsistent with its obligations under Article 6 of the *ICCPR*.

### F.3 Violence against Women

286. The high rate of domestic violence in Australia raises concerns in relation to Article 6 of the *ICCPR*. This issue is discussed in further detail under [Article 3: Violence against Women](#).

### F.4 Climate Change

287. The current Australian Government has recognised,<sup>197</sup> in line with mainstream science, that climate change, being the predicted consequences of an increase in ‘greenhouse gas’ emissions into the Earth’s atmosphere,<sup>198</sup> is most likely human-induced<sup>199</sup> and is a global problem requiring a global solution.<sup>200</sup> As a result of this it has pledged to take action to reduce Australia’s greenhouse gas emissions, adapt to climate change which cannot be avoided and help shape a global solution to climate change ‘that both protects the planet and advances Australia’s long-term interests’.<sup>201</sup>

288. Climate change is predicted to threaten the right to life both directly and indirectly. Greenhouse gas emissions contribute to the prolonged retention of heat in the atmosphere leading to disruptions in the Earth’s weather patterns and a melting of polar ice, in turn resulting in a rise in the sea level.<sup>202</sup> The changed weather patterns are predicted to include

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<sup>195</sup> *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 8(1A).

<sup>196</sup> Australian Federal Police, *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (2007).

<sup>197</sup> Garnaut Climate Change Review, Commonwealth of Australia, *Draft Report* (2008).

<sup>198</sup> For further discussion of the definition of climate change and the role of greenhouse gas emissions, see *ibid* 53–9.

<sup>199</sup> This has also recognised by the Human Rights Council in *Resolution on Human Rights and Climate Change*, UN HRC Res 7/23, 7<sup>th</sup> sess, 41<sup>st</sup> mtg, UN Doc A/HRC/RES/7/23 (2008), citing Intergovernmental Panel on Climate Change, United Nations, *Fourth Assessment Report (AR4)* (2007). See also Garnaut Climate Change Review, above n 197, ch 3.

<sup>200</sup> See also *Resolution on Human Rights and Climate Change*, UN HRC Res 7/23, 7<sup>th</sup> sess, 41<sup>st</sup> mtg, UN Doc A/HRC/RES/7/23 (2008).

<sup>201</sup> Department of Climate Change, Australian Government, *Carbon Pollution Reduction Scheme: Green Paper* (2008) 8.

<sup>202</sup> Garnaut Climate Change Review, above n 197, 114.

altered rainfall distribution patterns<sup>203</sup> and severe weather events, including droughts and cyclones.<sup>204</sup> Secondary impacts may include bushfires,<sup>205</sup> the spread of the distribution of infectious disease,<sup>206</sup> increases in the number and distribution of ‘pest’ species,<sup>207</sup> diminished food production requiring changes to traditional agricultural practices,<sup>208</sup> increases in air pollution<sup>209</sup> and mental health consequences of social, economic and demographic dislocation.<sup>210</sup>

289. The threat that these impacts pose to the right to life may be immediate, for instance as a result of ‘climate change induced disasters’ such as flooding and cyclones, and also more gradual as a result of ongoing ‘deterioration in health, diminishing access to safe drinking water and susceptibility to disease increases’.<sup>211</sup> In Australia, one manifestation of climate change is predicted to be an increase in the number of heatwaves and hot days which could lead to approximately 4,000 more deaths in Queensland annually.<sup>212</sup>
290. In other parts of the world certain people are particularly ‘climate-vulnerable’ due to their proximity to already-marginal lands (for example North Africa),<sup>213</sup> occupation of low-lying islands likely to be inundated by sea rise (for example Pacific islands),<sup>214</sup> or location in valleys that will flood from increased storm severity (for example around the Bay of Bengal).<sup>215</sup>
291. The current Australian Government took the first key step to addressing climate change, and thus indirectly protecting the right to life, by ratifying the Kyoto Protocol on 3 December 2007. Additionally, the current Australian Government (whilst in Opposition) commissioned a review of the implications of climate change on Australia’s economy which resulted in the publication

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<sup>203</sup> Ibid 117–18, 262–4.

<sup>204</sup> Ibid 71–2.

<sup>205</sup> Ibid 179.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid 182.

<sup>208</sup> Ibid 179.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid. See also comments of Dr Kyung-Wha Kang, UN Deputy High Commissioner for Human Rights, cited in Andreas Sandre von Warburg, ‘Human Rights Council Addresses Climate Change as a Global Threat’, *The Gstaad Project*, 1 April 2008, available at <http://gstaadblog.wordpress.com>; Laura MacInnis, ‘Climate Change Threatens Human Rights of Millions — UN’, *Reuters* (Geneva), 20 February 2008, available at <http://www.reuters.com/article/environmentNews/idUSL1912377820080219>.

<sup>211</sup> Human Rights and Equal Opportunity Commission, *Background Paper — Human Rights and Climate Change* (2008) 4, referring to comments of the UN Deputy High Commissioner of Human Rights.

<sup>212</sup> Garnaut Climate Change Review, above n 197, 193.

<sup>213</sup> See Greenpeace, *Desertification: Climate Change and the Mediterranean Region*, available at <http://archive.greenpeace.org/climate/science/reports/desertification.html>.

<sup>214</sup> See Department of Climate Change, above n 201, iii.

<sup>215</sup> See A Ali, ‘Vulnerability of Bangladesh to Climate Change and Sea Level Rise through Tropical Cyclones and Storm Surges’ (1996) 92 *Water, Air, & Soil Pollution* 171.

of the *Garnaut Climate Change Review Draft Report* in early July 2008 (**Garnaut Draft Report**).<sup>216</sup>

292. When in office, in response to the Garnaut Draft Report, the current Australian Government released the Carbon Pollution Reduction Scheme Green Paper in July 2008 (**Green Paper**).<sup>217</sup> The Green Paper outlines the Government's preferred approach to implementing the Kyoto Protocol and to implementing a Carbon Pollution Reduction Scheme to reduce greenhouse gas emissions in Australia.
293. The Draft Report does not expressly address the interaction of climate change with the right to life. However it does acknowledge that climate change may impose high costs on human civilisation<sup>218</sup> and calls for strong and early mitigation action to be taken by all major economies.<sup>219</sup> It encourages Australia not to delay in taking action and to introduce an emissions trading scheme in 2010. It also highlights that Australia has a 'larger interest in a strong mitigation outcome than other developed countries' due to its unique climate and physical proximity to developing countries.<sup>220</sup>
294. Similarly, the Green Paper is not based on a human rights framework, despite the recommendations of the Human Rights and Equal Opportunity Commission in this respect.<sup>221</sup> Rather, it focuses on the economic and environmental imperatives and impacts of climate change. These do however include recognition of the impacts on food production, agriculture, water supplies, the Great Barrier Reef and the Kakadu wetlands and their associated tourism industries.<sup>222</sup> Thus whilst the Green Paper is not couched in human rights terms, the issues that are addressed as subsets of the economic and environmental impact of climate changes are directly related to the right to life.
295. Additionally, the Green Paper recognises that climate change is a global problem and that Australia must assume a leading role in tackling it. The move to introduce a domestic emissions trading scheme ahead of most other nations is seen as a chance to set a responsible example in this area and to enable the Australian Government to have greater influence when negotiating an international response to climate change.<sup>223</sup>
296. The Green Paper also alludes to the need for global commitments to reduce emissions to differ between nations and recognises that developed countries should take the lead because they have contributed to the majority of existing greenhouse gas emissions.<sup>224</sup> This indicates some level of recognition of the interaction of the right to life with the right to development.

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<sup>216</sup> Garnaut Climate Change Review, above n 197

<sup>217</sup> See Department of Climate Change, above n 201.

<sup>218</sup> Garnaut Climate Change Review, above n 197, 48.

<sup>219</sup> Ibid 269.

<sup>220</sup> Ibid 2.

<sup>221</sup> Human Rights and Equal Opportunity Commission, *Background Paper — Human Rights and Climate Change*, above n 211, 12.

<sup>222</sup> See Department of Climate Change, above n 201, III.

<sup>223</sup> Ibid 8–9.

<sup>224</sup> Ibid.

However, this complex issue needs to be given much greater consideration in order to meet the United Nations requirement that ‘the right to development must be fulfilled so as to equitably meet the development and environmental needs of present and future generations’.<sup>225</sup>

297. Despite these positive elements of the current Australian Government’s climate change policy, there are many more direct steps the Government could take to protect the right to life. The consequences of climate change have been described as ‘calamitous’<sup>226</sup> and as a ‘human rights tragedy in the making’<sup>227</sup> which, if allowed to manifest, would constitute ‘a systemic violation of the human rights of the poor and of future generations’.<sup>228</sup> Thus, climate change necessitates putting in place appropriate programs to protect more directly the right to life, ‘including providing safe housing, ensuring good sanitation and water-drinking supplies, and making sure citizens have access to information and legal redress and take part in decision making’.<sup>229</sup> The Green Paper does not address these issues either on a domestic or an international scale.
298. Further, the Green Paper does not adequately address the question of Australia’s responsibility to more climate-vulnerable nations. Because climate change is recognised as a global phenomenon and is widely regarded as the result of *historical* greenhouse gas emissions, it is arguable that each country has a positive duty to protect the right to life of these climate-vulnerable people as well as the people within their own territory. This concept of a ‘duty of care’ on emitting nations is justified in part by the geographic dislocation between the *emitters* of greenhouse gases on one hand, and the *climate-vulnerable people*, on the other hand, who may not be in a position to influence the emitters or have any opportunity to reduce the emissions themselves.
299. Finally, although the Green Paper recognises that a certain level of adaptation to the impact of climate change will be required,<sup>230</sup> this is limited to adaptation *within* Australia and does not consider any assistance required by climate-vulnerable nations. For example, it does not address the issue of Australia’s response to a new class of climate affected refugees.<sup>231</sup> Whilst this issue may be outside the scope of the Green Paper, it is arguable that avoiding the creation of such a class of refugees should be a key motivation for the proposed Carbon Pollution Reduction Scheme. Alternatively, in acknowledging that adaptation to climate change may be required, it may be appropriate to factor into the economic model of the

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<sup>225</sup> *Resolution on Human Rights and Climate Change*, UN HRC Res 7/23, 7<sup>th</sup> sess, 41<sup>st</sup> mtg, UN Doc A/HRC/RES/7/23 (2008).

<sup>226</sup> von Warburg, above n 210, citing the UN Deputy High Commissioner for Human Rights.

<sup>227</sup> Human Rights and Equal Opportunity Commission, *Background Paper — Human Rights and Climate Change*, above n 211, 24 (emphasis in original).

<sup>228</sup> Ibid, citing the United Nations Development Programme, *Human Development Report 2007/2008 — Fighting Climate Change: Human Solidarity in a Divided World* (2007) 4.

<sup>229</sup> MacInnis, above n 210 .

<sup>230</sup> Department of Climate Change, above n 201, 68 (‘Pillar 2: Adapting to Unavoidable Climate Change’).

<sup>231</sup> For a discussion of the concept of climate affected refugees, see Garnaut Climate Change Review, above n 197, 192.

current Australian Government's response increases in migration to Australia due to climate change.

### F.5 Homelessness

300. People experiencing homelessness are subject to multiple and intersectional human rights violations that significantly curtail the ability of a person to live with dignity. The causes of homelessness in Australia are complex and varied, however, they are generally acknowledged to include poverty, severe financial hardship and lack of access to adequate income support, unemployment, lack of affordable housing, domestic and family violence, mental illness, lack of access to health care, drug and alcohol disorders, lack of access to drug treatment services, problem gambling, discrimination, disability and evictions.<sup>232</sup> In many cases of homelessness, these causes are intersectional and inter-related.
301. According to the Australian Bureau of Statistics, 105,000 people were experiencing homelessness across Australia on census night in 2006.<sup>233</sup> This compares with 99,900 people in 2001, but represents a static percentage of Australia's population. This figure includes:
- (a) over 16,000 people sleeping rough or in squats (which is an increase of 16 per cent on the 2001 figures);
  - (b) 27,000 people in families with children (an increase of 17 per cent on the 2001 figures);
  - (c) almost 20,000 in crisis accommodation or refuges;
  - (d) almost 22,000 in boarding houses;
  - (e) nearly 47,000 people staying with friends or relatives; and
  - (f) more than 17,000 people who are marginal residents of caravan parks.<sup>234</sup>
- Indigenous people were over-represented in all sections of the homeless population.<sup>235</sup>
302. The current Australian Government commissioned a Green Paper on Homelessness which invited submissions from the community on how Australia should address homelessness over the next decade.<sup>236</sup> Disappointingly, the Green Paper failed to consider homelessness through a human rights framework nor did it recognise Australia's obligations to protect the

<sup>232</sup> See generally Australian Bureau of Statistics, *Counting the Homeless, 2001*, ABS Catalogue No 2050.0 (2003); Australian Institute of Health and Welfare, Australian Government, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2003–04* (2005); Senate Community Affairs References Committee, Parliament of Australia, *A Hand Up Not a Hand Out: Renewing the Fight against Poverty* (2004).

<sup>233</sup> Australian Bureau of Statistics, *Counting the Homeless, 2001*, above n 232, [3.6]

<sup>234</sup> *Ibid.*

<sup>235</sup> Overall, 2.4 per cent of people identified as Indigenous at the 2006 Census, but 9 per cent of the homeless were Indigenous. *Ibid.* ix.

<sup>236</sup> Australian Government, *Homelessness: A New Approach* (2008) 7, available at [http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/new\\_approach/\\$File/homelessness\\_a\\_new\\_approach.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/new_approach/$File/homelessness_a_new_approach.pdf).

right to life. Rather, the Green Paper adopted the language of ‘social inclusion’ to frame its thoughts on homelessness. Approaching homelessness from a human rights perspective should be the starting point for any effective national response aimed at tackling homelessness and promoting social inclusion.<sup>237</sup> Only when the right to adequate housing and other inter-related rights are recognised and enshrined in law will national goals and targets for the reduction of homelessness sit within a robust policy framework. The Green Paper will be followed by a White Paper and a plan for action, which is expected to be completed by the end of September 2008.

303. The barriers experienced by homeless persons in Australia in enjoying and exercising their human rights are, in turn, a barrier to them effectively dealing with the causes of their homelessness and their ability to transition out of homelessness and to live lives of human dignity.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 6)**

- Please details the steps being taken to review, update and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and substantially reduce the incidence of Indigenous deaths in prison.
- Please provide information regarding the measures, including particularly legislative measures, in place to ensure that Australia in no way cooperates or assists with the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed or which may result in a person being subject to cruel, inhuman or degrading treatment or punishment.
- Please provide information as to how Australia’s law, policy and practice on climate change promotes and protects human rights, including the right to life, particularly with respect to climate affected refugees.
- Please provide information as to how Australia’s law, policy and practice in response to homelessness ensures full realisation of the right to life, including the right to live with dignity.

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<sup>237</sup> Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008).

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 6)**

THAT Australia take immediate steps to ensure that Indigenous Australians have an equal opportunity to be as healthy as non-Indigenous Australians, including by ensuring that Indigenous Australians have equal access to primary health care and that the basic health needs of Indigenous communities are met through the provision of adequate housing, safe drinking water, electricity and effective sewerage systems.

THAT the Australian Government take immediate steps to review, update and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and substantially reduce the incidence of Indigenous deaths in prison.

THAT the Australian Government comprehensively legislate, at the national level, to prevent the introduction of the death penalty in any Australian state or territory, or for federal crimes.

THAT Australia desist from cooperating with or assisting with the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed or which may result in a person being subject to cruel, inhuman or degrading treatment or punishment.

THAT Australia's policy and practice in relation to climate change respond to the human rights issues and obligations associated with climate change, including particularly with respect to climate affected refugees.

THAT the Australian Government's policy and practice in response to homelessness ensure that people are able to live with dignity and realise all of their civil, political, economic, social and cultural rights.

## Articles 7 and 10 — Freedom from Torture and Other Cruel Treatment

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### **Article 7:**

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

### **Article 10:**

1. *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*
2.
  - (a) *Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;*
  - (b) *Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.*
3. *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

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### **G. FREEDOM FROM TORTURE AND OTHER CRUEL TREATMENT**

304. Article 7 provides freedom from torture, inhumane or degrading treatment or punishment. This right is absolute and therefore cannot be subject to any conditions or restrictions. Article 7 also extends to the conducting of scientific or medical experiments without full and free consent.
305. Article 10 can be regarded as an elaboration of Article 7 that is focused toward detainees. As detainees represent a particularly vulnerable class given the deprivation of their liberty,

Article 10 seeks to provide extra protection against treatment which falls short of torture and the other protections under Article 7.

306. Additionally, Article 10 effectively regulates the conditions of detention and therefore complements Article 9 which is concerned with the reasons and process for detention.

### G.1 Counter-Terrorism Measures

307. Following the events of 11 September 2001, the former Australian Government introduced more than 40 new pieces of legislation to address terrorism and related activities.<sup>238</sup> In the absence of a federal charter of rights, these laws have not been assessed against, or counterbalanced by, a legislative human rights framework. The enactments have been heavily criticised both domestically<sup>239</sup> and internationally<sup>240</sup> for their failure to allow for adequate judicial oversight and redress mechanisms. In particular, the Committee against Torture's recent Concluding Observations on Australia expressed concern in relation to certain aspects of Australia's counter-terrorism measures, including:<sup>241</sup>

- (a) increased powers provided to the Australian Security and Intelligence Organisation (**ASIO**), including the possibility of detaining a person for renewable periods of seven days for questioning;
- (b) the lack of a right to a lawyer of choice to be present during questioning and the right to seek judicial review of the validity of detention;
- (c) the lack of judicial review and the character of secrecy surrounding imposition of preventative detention and control orders; and
- (d) the harsh conditions of detention of unconvicted remand prisoners charged with terrorism-related offences.

Many of these issues also raise serious concerns in relation to other *ICCPR* rights, including the rights to freedom from arbitrary detention (see [Article 9: Counter-Terrorism Measures](#)), freedom of movement (see [Article 12: Counter-Terrorism Measures](#)) and the right to a fair trial (see [Article 14: Counter-Terrorism Measures](#)).

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<sup>238</sup> A comprehensive list of the 'legislative suite' can be found at Australian Government, *Australian Laws to Combat Terrorism* (2006), available at <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument>.

<sup>239</sup> For example, there was vociferous opposition in the Federal Parliament to the ASIO Legislation Amendment Bill 2003 (Cth). The Chairman of the Joint Committee which reviewed the Bill described it as 'the most draconian legislation ever to come before parliament': Sophie Morris and Rebecca DiGirolamo, 'Williams Backs Off over Terror Laws', *The Australian* (Sydney), 19 June 2002.

<sup>240</sup> See, eg, Martin Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006).

<sup>241</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/1 (2008).

**(a) Incommunicado Detention and Prolonged Solitary Confinement**

308. Amendments introduced under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) and the *ASIO Legislation Amendment Act 2006* (Cth) raise concerns in relation to Articles 7 and 10 of the *ICCPR*, as well as the prohibition of arbitrary detention in Article 9. The amendments provide that a person can be detained without charge under an ASIO warrant for up to 168 hours, or 7 days.<sup>242</sup> A separate warrant can be issued at the end of the 168 hours if new material justifies it.<sup>243</sup> A person may thus be held in detention indefinitely for rolling periods of 7 days, without any charge having been made out against them in accordance with conventional criminal procedure.
309. Further, under this legislation:
- (a) the person may be prohibited and prevented from contacting anyone at any time while in custody;<sup>244</sup>
  - (b) the person may be questioned in the absence of a lawyer;<sup>245</sup>
  - (c) the person's lawyer may be denied access to information regarding the reasons for detention and also in relation to the conditions of detention and treatment of the person;<sup>246</sup>
  - (d) the person is prohibited from disclosing information relating to their detention at risk of five years imprisonment;<sup>247</sup> and
  - (e) the person's lawyer, parents and guardian may be imprisoned for up to five years for disclosing any information regarding the fact or nature of the detention.<sup>248</sup>
310. These secrecy provisions prevent the press, academics and human rights advocates from independently monitoring the use of ASIO questioning and detention powers. As Amnesty International noted, '[t]he level of secrecy and lack of public scrutiny provided for by this Bill has the potential to allow human rights violations to go unnoticed in a climate of impunity'.<sup>249</sup>
311. The legislation does provide that a detainee should be treated with humanity and with respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.<sup>250</sup> However, the legislation does not provide for any offence or penalties for contravening conduct. These provisions raise concerns in relation to Articles 7 and 10 of the *ICCPR*, as

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<sup>242</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34S.

<sup>243</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34F(6), 34G(2).

<sup>244</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34K.

<sup>245</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZP.

<sup>246</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZT.

<sup>247</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZS(2).

<sup>248</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZS(1).

<sup>249</sup> Amnesty International Australia, *Concerns Regarding the ASIO Legislation Amendment Bill 2003* (2003), available at <http://www.amnesty.org.au/airesources/report-03-12-03.html>.

<sup>250</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34T(2).

well as the prohibition of arbitrary detention in Article 9 and the right to a fair trial in Article 14 of the *ICCPR*.

**(b) Conditions of Detention of Remand Prisoners**

312. The type, length, conditions and effects of the detention of a number of individuals charged with various offences under Australia's counter-terrorism laws amount to serious ongoing human rights violations. Of particular concern is the situation of 12 detainees who have been charged with various terrorist offences under the anti-terror provisions of the *Criminal Code Act 1995* (Cth) (***Criminal Code***).
313. Nine of the detainees have been held since November 2005 and the remaining three since March 2006. It is anticipated that they will be held on remand for at least three years by the conclusion of their trial.
314. At its 48th session in May 2007, the UN Working Group on Arbitrary Detention considered the situation of the 12 detainees who, despite being unconvicted remand prisoners at the time, were being held in a maximum security prison.<sup>251</sup> The Working Group expressed significant concerns in relation to:
- (a) the 'particularly severe' conditions of detention, especially taking into account that the detainees have not yet been declared guilty and are therefore presumed to be innocent;<sup>252</sup>
  - (b) the 'extraordinarily restrictive conditions' of detention prescribed for any person charged with a terrorist offence,<sup>253</sup> and
  - (c) the lack of sufficient discretion for judges to decide on bail applications in such matters due to the fact that the *Criminal Code* establishes a presumption against bail for a person charged with a terrorism offence; the onus is on the accused to demonstrate exceptional circumstances justifying bail.<sup>254</sup>
315. The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has also expressed serious concern about the conditions of detention of terrorist accused and the reversal of the onus and very high threshold for the granting of bail in Australia.<sup>255</sup>
316. The conditions of detention of the 12 detainees have also recently been the subject of highly adverse judicial comment in Victoria:
- [The conditions of detention] are extremely onerous, involving, as they do, confinement in conditions normally reserved for criminals convicted of the most heinous crimes — convicted

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<sup>251</sup> *Opinions Adopted by the Working Group on Arbitrary Detention*, UN HRC, 7<sup>th</sup> sess, Item 3, 69 (Opinion No 7/2007 (Australia), 9 May 2007), UN Doc A/HRC/7/4/Add.1 (2008).

<sup>252</sup> *Ibid* 73, [22].

<sup>253</sup> *Ibid* 73, [26]

<sup>254</sup> *Ibid*.

<sup>255</sup> See Martin Scheinin, Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN HRC, 4<sup>th</sup> sess, Item 2, [46]–[47], UN Doc A/HRC/4/26/Add.3 (2006).

contract killers and the like. The court has heard and accepted evidence in other cases that the [conditions of detention] are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing.<sup>256</sup>

317. The presumption against bail, the length of pre-trial detention and the oppressive conditions of detention raise significant issues under Articles 7, 9, 10 and 14 of the *ICCPR*, as well as various provisions of the *Standard Minimum Rules for the Treatment of Prisoners*<sup>257</sup> and the *Basic Principles for the Treatment of Prisoners*.<sup>258</sup>

**(c) Admission of Confessional Evidence**

318. Contrary to the absolute prohibition against torture, Australian law contains a number of exceptions permitting evidence obtained contrary to the prohibition being used in a proceeding. For example:
- (a) under the common law, evidence obtained improperly or illegally may be admitted if a court determines it is in the public interest (weighing the public interest in apprehending criminals against the public interest in maintaining institutional integrity in the criminal justice system),<sup>259</sup>
  - (b) section 138 of the *Evidence Act 1995* (Cth) provides that evidence obtained improperly or in contravention of Australian law may be admitted where, in the opinion of the court, the desirability of admission outweighs the undesirability of excluding it;
  - (c) section 25A of the *Foreign Evidence Act 1994* (Cth), which applies to evidence obtained from a foreign country for use in Australia, provides that, in matters relating to terrorism and national security, evidence may only be excluded where it would have a substantial adverse effect on the right of a defendant to a fair hearing; and
  - (d) the *Mutual Assistance in Criminal Matters Act 1987* (Cth) does not contain any prohibition on the provision of government-to-government assistance where such assistance may expose a person to torture or other cruel, inhuman or degrading treatment or punishment. Although section 8(1A) of the Act does provide that mutual assistance should be refused in capital cases, such assistance may be provided if 'special circumstances' exist.

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<sup>256</sup> *Raad v Director of Public Prosecutions* [2007] VSC 330 (Unreported, Supreme Court of Victoria, Bongiorno J, 6 September 2007) [6], available at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/330.html>.

<sup>257</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, annex 1(A), UN Doc A/CONF/6/1 (1956), and approved in *Recommendations of the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, ESC Res 663(C), 24<sup>th</sup> sess, 994<sup>th</sup> plen mtg, UN Doc E/3048 (1957); *Extension of the Standard Minimum Rules for the Treatment of Prisoners to Persons Arrested or Imprisoned without Charge*, ESC Res 2076, 63<sup>rd</sup> sess, plen mtg, UN Doc E/5964 and Corr.1 (1977).

<sup>258</sup> GA Res 45/111, 45<sup>th</sup> sess, 68th plen mtg, UN Doc A/RES/45/111 (1990).

<sup>259</sup> *Bunning v Cross* (1978) 141 CLR 54.

319. Officers of the Australian Federal Police (**AFP**) and ASIO have been involved in obtaining confessional evidence from detainees as the result of a long period of ill-treatment in detention and without the presence of a lawyer.

**Case Study: Jack Thomas**

In the case of Jack Thomas,<sup>260</sup> confessional evidence obtained by the AFP and ASIO in Pakistan during a period of six months detention was used for charges to be brought against him on his return to Australia. During the six months of detention, Mr Thomas was held for extended periods in solitary confinement, including being detained in 'dog-kennel' like conditions and deprived of food and water for up to three days. He was hooded, shackled, manacled, and threatened with electrocution and execution. On one occasion he was strangled with the cord of his hood so that he could not breathe. He was threatened with lashings and the rape of his wife. He was told that his testicles were going to be crushed and was urged to cooperate fully with Pakistani and US interrogators who told him, 'We're outside the law. No one will hear you scream.'

Upon his return to Australia, Mr Thomas was convicted of terrorist-related offences on the basis of his confessional evidence, although the evidence was subsequently excluded and the conviction quashed by an appellate court. Mr Thomas was, however, immediately made subject to a control order (see Case Study on page 133) and is currently being retried.<sup>261</sup>

**(d) Definition of Torture**

320. Ministers of the former Australian Government made disturbing comments denying that techniques such as sleep deprivation amount to torture.<sup>262</sup> The Ministers argued that such techniques are only prohibited if they are used in combination with other techniques and over a long period of time.<sup>263</sup> At no time did the Ministers acknowledge that these techniques, or other techniques authorised by the former Australian Government, constitute torture or other cruel, inhuman or degrading treatment. These comments were not denounced at the time by members of the current Australian Government, who were then in Opposition.

**(e) Failure to Investigate Allegations of Torture**

321. The Australian Government has refused to thoroughly investigate serious allegations of the torture of Australian citizens, or to accept any responsibility for the advice of the Australian

<sup>260</sup> *R v Thomas* (2006) 14 VR 475.

<sup>261</sup> Martin Scheinin, Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN HRC, 4<sup>th</sup> sess, Item 2, [38], UN Doc A/HRC/4/26/Add.3 (2006).

<sup>262</sup> ABC Television, 'Quick Trial for Hicks Essential: Ruddock', *Insiders* (1 October 2006), available at <http://www.abc.net.au/insiders/content/2006/s1752836.htm>; Richard Sproull, 'Sleep Deprivation Is Not Torture: Ruddock', *The Australian* (Sydney), 2 October 2006, 2.

<sup>263</sup> Michelle Grattan, 'PM Rises To Sleep Debate', *The Age* (Melbourne), 6 October 2006, 6. See also Evidence to Senate Legal and Constitutional Committee, Parliament of Australia, Canberra, 31 October 2006, 68-9 (Senator Chris Ellison).

military lawyer who endorsed the interrogation techniques at Abu Ghraib prison as consistent with the *Geneva Conventions*. In these cases, Australia claims it has no jurisdiction, notwithstanding that it was consulted about the treatment and proposed rendition of Mamdouh Habib and David Hicks.

**Case Study: Mamdouh Habib**

In October 2001, Mamdouh Habib, a dual Australian–Egyptian citizen, was detained in Pakistan, where he alleges that he was tortured and ill-treated. When Mr Habib complained to Australian law enforcement and intelligence officers in Pakistan about this abuse, they did not investigate the complaints.

Mr Habib was extraordinarily rendered by US officials to Egypt, where he was tortured for six months.<sup>264</sup> Mr Habib was routinely beaten. He was handcuffed and taken to a small room that was slowly filled with water until it was just under his chin. He was subjected to electric shocks to all parts of his body, including his genitals. He was told that his family had been murdered. He was told that he would be attacked by dogs trained to rape people. Australia has not officially accepted that Mr Habib was held in Egypt.

On the basis of ‘confessions’ obtained under torture in Egypt, Mr Habib was then rendered to Guantanamo Bay, where he was abused again. When Mr Habib was interviewed by Australian officials at Guantanamo Bay, he complained about his torture and mistreatment. Australia referred the allegations to the United States for investigation. Mr Habib was released without charge from Guantanamo Bay in 2005.

Mr Habib alleges that Australian officials were present when he was rendered from Pakistan and, on at least one occasion, when he was being interrogated by Egyptian security officers. Very recently, there have been revelations that at least three Australian Government Departments were aware of the proposed rendition of Mr Habib and that ASIO was consulted prior to it occurring.<sup>265</sup>

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<sup>264</sup> Phil Mercer, ‘Fresh Guantanamo Torture Claims’, *BBC News* (United Kingdom), 13 February 2005. See also New South Wales Council for Civil Liberties, *Shadow Report prepared for the United Nations Committee against Torture on the Occasion of Its Review of Australia’s Third Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* (2007) [6.2.1], available at <http://www2.ohchr.org/english/bodies/cat/docs/ngos/NSWCCL.pdf>.

<sup>265</sup> Jason Dowling, ‘Turning a Blind Eye to Torture’, *The Age* (Melbourne), 8 August 2008, available at <http://www.theage.com.au/opinion/turning-a-blind-eye-to-torture-20080807-3rq3.html?skin=text-only>.

In this respect, the Australian Government has failed to:

- investigate or indict any individual for complicity in the torture of Mr Habib;
  - refer Mr Habib's serious allegations to the appropriate mechanism for investigating such extraordinary allegations, such as a Royal Commission,<sup>266</sup>
  - acknowledge that Mr Habib was tortured;
  - apologise to Mr Habib or compensate him for his ill-treatment; or
- condemn the practice of extraordinary rendition.

### **Case Study: David Hicks**

David Hicks was detained shortly after UN troops entered Afghanistan in 2001. Mr Hicks has made allegations of torture and mistreatment while in the custody of the US military in Afghanistan, on board US naval vessels and at Guantanamo Bay.<sup>267</sup> In a sworn affidavit in August 2004, Mr Hicks alleged that he was beaten many times while blindfolded and handcuffed, shackled, deprived of sleep, held in solitary confinement for approximately nine months, and threatened with firearms and other weapons.<sup>268</sup>

All of these allegations were referred by Australia to the US for investigation. US officials found no wrongdoing and the former Australian Government accepted these findings.

In 2007, having been detained at Guantanamo Bay for almost six years, Mr Hicks was released into the custody of Australia after pleading guilty before a US Military Commission to a charge of providing material support for terrorism. As a condition of release, Mr Hicks was required to sign a document stating that he had never been mistreated by US officials and renouncing all previous claims of torture or ill-treatment. Mr Hicks was released from a South Australian prison in December 2007 and immediately made subject to a control order (see Case Study on page 133).

## **G.2 Immigration Law, Policy and Practice**

322. Australia's law, policy and practice with respect to immigration and asylum seekers raises serious concerns in relation to Articles 7 and 10 of the *ICCPR*. Many aspects also raise issues with:

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<sup>266</sup> Commonwealth of Australia, *Second Periodic Report to the Committee against Torture: Australia*, [13], UN Doc CAT/C/25/Add.11 (2000).

<sup>267</sup> In 2002, Mr Hicks submitted a report to the International Committee of the Red Cross outlining abuses by US officials that he suffered in Guantanamo. Information accessed on Amnesty International, <http://news.amnesty.org/pages/torture-case-eng> at 6 February 2007.

<sup>268</sup> 'Affidavit of David Hicks', *The Sydney Morning Herald* (Sydney), 5 August 2004, available at <http://www.smh.com.au/news/World/David-Hicks-affidavit/2004/12/10/1102625527396.html>. See also Tom Allard, 'Hicks: My Life of Terror and Torture', *The Sydney Morning Herald* (Sydney) 2 March 2007, available at <http://www.smh.com.au/articles/2007/03/01/1172338791480.html>.

- (a) the right to freedom from arbitrary detention (discussed under Article 9: Immigration Law, Policy and Practice);
- (b) the right to freedom of movement (discussed under Article 12: Immigration Detention);
- (c) the right to procedural rights against expulsion (discussed under Article 13: Asylum Seekers);
- (d) the right to a fair trial (discussed under Article 14: Asylum Seekers);
- (e) the right to recognition before the law (discussed under Article 16: Asylum Seekers);
- (f) the right to protection of families (discussed under Article 23: Immigration Law, Policy and Practice); and
- (g) the right to protection of children (discussed under Article 24: Children in Immigration Detention).

323. This section deals in particular with issues raising concern under Articles 7 and 10 of the *ICCPR*.

**(a) Mandatory Detention of Asylum Seekers**

324. Since 1992, Australia has had a policy of indefinite mandatory detention of asylum seekers. The operation of the *Migration Act 1958* (Cth) (***Migration Act***) is discussed under Article 9: Immigration Law, Policy and Practice. In July 2008, the current Australian Government announced proposed reforms to Australia's immigration policy to 'ensure the inherent dignity of the human person', which are also discussed under Article 9.

325. Particularly in light of the conditions in immigration detention and the lack of access to adequate health care (discussed in further detail below), the long term and indefinite nature of Australia's immigration detention policy raises serious concerns in relation to Articles 7 and 10 of the *ICCPR*. In its recent Concluding Observations, the Committee against Torture expressed its concern at Australia's mandatory detention policy. In particular, the Committee recommended that immigration detention should be used as a measure of last resort only and a reasonable time limit for detention should be set.<sup>269</sup>

326. Detainees have limited avenues through which to challenge the legality of their detention. This is discussed in further detail below under Article 9: Lack of Available Remedies. Indeed, alarmingly, as discussed further under Article 9: Stateless People, a recent decision of the High Court of Australia has determined that it is both constitutional and lawful under the *Migration Act* to keep a person in immigration detention *indefinitely*.<sup>270</sup>

**(b) Conditions in Immigration Detention**

327. The conditions of Australia's immigration detention facilities have been the subject of both domestic and international criticism. Domestically, the Human Rights and Equal Opportunity Commission (**HREOC**) has most recently expressed significant concerns about:

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<sup>269</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [11], UN Doc CAT/C/AUS/CO/3.

<sup>270</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

- (a) the incidence and impact of ‘prolonged and indeterminate detention’, particularly given the absence of independent review of the need to detain;
- (b) detainees’ lack of access to legal advice and information;
- (c) lack of educational and recreational opportunities in detention;
- (d) overcrowding; and
- (e) children in detention, and the separation of families.<sup>271</sup>

328. In 2002, the UN Working Group on Arbitrary Detention reported that ‘the conditions of [immigration] detention are in many respects similar to prison conditions’.<sup>272</sup> The Working Group was also critical of a number of practices that create stressful conditions for detainees, including constant video surveillance, routinely handcuffing detainees outside the centres and isolation practices.

#### **Case Study**

One boy was so affected and distressed by detention at Woomera Immigration Detention Centre that, in the space of four months, he tried to hang himself four times, climbed into the razor wire four times, slashed his arms twice, and went on hunger strike twice. He was 14 years old.<sup>273</sup>

#### **(c) Access to Health Care**

329. The health care, particularly mental health care, provided to people in immigration detention is severely inadequate and raises concerns with Articles 7 and 10 of the *ICCPR*. In most cases it is not possible to properly treat the mental health problems suffered by detainees because the main way to treat a mental health concern is to remove the primary cause of the problem; namely, detention itself.
330. Indefinite detention, by its nature, has a seriously debilitating effect on the mental health of detainees. While many refugees are in good health, some specific health problems facing refugees include: psychological disorders such as post traumatic stress disorder, anxiety, depression and psychosomatic disorders; poor oral health; delayed growth of children; or under-recognised and under-managed hypertension, diabetes and chronic pain.<sup>274</sup> Indeed, the stresses of migration and settlement generally experienced by migrants may affect mental

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<sup>271</sup> Human Rights and Equal Opportunity Commission, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities 2007* (2007), available at [http://www.humanrights.gov.au/human\\_rights/immigration/ldc2007.html](http://www.humanrights.gov.au/human_rights/immigration/ldc2007.html).

<sup>272</sup> Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Visit to Australia*, [14], UN Doc E/CN.4/2003/8/Add.2 (2002).

<sup>273</sup> For other case studies, see Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

<sup>274</sup> The Royal Australian College of General Practitioners, *Refugee and Asylum Seeker Resources: Health Care for Refugees and Asylum Seekers* (2002), available at <http://www.racgp.org.au/refugeehealth>.

well-being.<sup>275</sup> For refugees and humanitarian visa holders, these mental health issues may actually be compounded by experiences of immigration detention and uncertainty over their future in Australia.

331. Various HREOC reports have identified a very high prevalence of ‘mental distress’ among detainees, especially long-term detainees, and that the mental health of detainees deteriorates significantly during immigration detention.<sup>276</sup> Numerous instances of self-harming behaviour have been documented, including among children.<sup>277</sup> Detainees must receive an adequate standard of psychiatric care given the compounded risks of distress and increased vulnerability to mental illness in detention.<sup>278</sup>
332. In 2008, HREOC renewed its call to repeal Australia’s mandatory detention laws in order to get people out of detention faster to reduce the risk of causing long-term mental health damage.<sup>279</sup> There is a range of alternatives to holding people in detention centres, including the issuing of bridging visas or residence determinations more readily so that people can live in the community.<sup>280</sup>
333. In addition to general concerns about mandatory immigration detention, HREOC has also labelled as a ‘disgrace’ the conditions of suicide and self-harm observation rooms in Villawood Immigration Detention Centre, where individuals requiring mental health treatment are effectively placed in solitary confinement.<sup>281</sup>
334. A report of the Commonwealth Ombudsman is also very critical of the health care treatment provided to detainees. Among other issues, the report identified that:
- (a) detention is often the first response when a person is identified as suffering from a mental illness;
  - (b) immigration officials often fail to recognise that mentally ill people may lack the capacity to consent to actions or sign documentation; and
  - (c) there is inadequate documentation of medical treatment provided to people in immigration detention, which often leads to issues with assessment, management and review of a person’s condition.<sup>282</sup>

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<sup>275</sup> Mental Health Council of Australia, *The National Action Plan for Promotion, Prevention and Early Intervention for Mental Health, 2000* (2003).

<sup>276</sup> See Human Rights and Equal Opportunity Commission, *A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner* (2001) [3.9]; Human Rights and Equal Opportunity Commission, *Summary of Observations*, above n 271.

<sup>277</sup> Human Rights and Equal Opportunity Commission, *A Last Resort?*, above n 273.

<sup>278</sup> *Ibid* 260.

<sup>279</sup> See generally Human Rights and Equal Opportunity Commission, *Summary of Observations*, above n 271.

<sup>280</sup> See generally *ibid*.

<sup>281</sup> Human Rights and Equal Opportunity Commission, ‘Immigration Detention Centres: Improvements, but Still More Work To Do’ (Press Release, 9 January 2008), available at [http://www.hreoc.gov.au/about/media/media\\_releases/2008/1\\_08.html](http://www.hreoc.gov.au/about/media/media_releases/2008/1_08.html).

<sup>282</sup> Commonwealth Ombudsman, *Report into Referred Immigration Cases: Mental Health and Incapacity*, Report No 7 (2006).

335. The effects of arbitrary, indefinite and prolonged immigration detention raise serious concerns in relation to Articles 7 and 10 of the *ICCPR*. In its recent Concluding Observations on Australia, the Committee against Torture recommended that, as a matter of priority, the Australian Government ensure that asylum seekers who have been detained are provided with adequate physical and mental health care, including routine assessments.<sup>283</sup>

**(d) Refoulement, Expulsion and Extradition**

336. In 2000, a Senate Legal and Constitutional References Committee tabled its report on Australia's refugee and humanitarian determination processes.<sup>284</sup> The Senate Committee recommended that Australia 'explicitly incorporate' the non-refoulement obligations of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and *ICCPR* into domestic law.<sup>285</sup>

337. In its recent Concluding Observations, the Committee against Torture recommended that Australia should explicitly incorporate into its domestic legislation the prohibition of non-refoulement, and implement it in practice.<sup>286</sup> The UN Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism has similarly noted 'with grave concern that the *Migration Act* does not prohibit the return of an alien to a place where they would be at risk of torture or ill-treatment'.<sup>287</sup>

338. Despite these concerns, the fundamental principle of non-return to face torture or death has not yet been enacted in Australian domestic law. This is of particular concern given that the Australian Government has repeatedly disclaimed any responsibility for the subsequent torture or cruel treatment of persons who are removed.<sup>288</sup> Indeed, the Committee against Torture in its recent Concluding Observations also highlighted that under no circumstances should the Australian Government resort to diplomatic assurances as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.<sup>289</sup>

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<sup>283</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [25], UN Doc CAT/C/AUS/CO/1 (2008).

<sup>284</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000), available at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/1999-02/refugees/report/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1999-02/refugees/report/index.htm).

<sup>285</sup> Ibid (Recommendation [2.2]).

<sup>286</sup> *Concluding Observations of the Committee against Torture: Australia*, [15], UN Doc CAT/C/AUS/CO/1 (2008).

<sup>287</sup> Martin Scheinin, Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN HRC, 4<sup>th</sup> sess, Item 2, [62], [72], UN Doc A/HRC/4/26/Add.3 (2006).

<sup>288</sup> A Chinese man deported from Australia earlier this year has claimed that he was interrogated and tortured immediately on his return to China: see ABC Radio, 'Chinese Deportee Claims Torture', *AM*, 29 June 2007, available at <http://www.abc.net.au/am/content/2007/s1965335.htm>.

<sup>289</sup> Martin Scheinin, Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN HRC, 4<sup>th</sup> sess, Item 2, [16], UN Doc A/HRC/4/26/Add.3 (2006).

339. The *Extradition Act 1988* (Cth) does contain a presumption against extradition to such a situation.<sup>290</sup> However, the Minister retains an overriding discretion to extradite a person notwithstanding that this may expose them to a real risk of torture.<sup>291</sup>
340. There is substantial evidence that asylum-seekers who have been returned by Australia to their country of origin have been tortured and even killed.<sup>292</sup> Australia regularly deports asylum seekers to countries that are not signatories to the *Convention relating to the Status of Refugees* (such as Malaysia and Thailand) and to so called 'safe third countries' (such as China) in which the use of torture and other cruel or degrading treatment remains widespread.

### Case Study

A Chinese man, known as Mr Zhang, was refused asylum in Australia after he spent 10 years in Australia arguing his case for asylum. Mr Zhang was of interest to the Chinese Government because he had supported students during the 1989 pro-democracy movement and feared for his life should he be returned to China.

Despite an interim measures request by the Human Rights Committee, Mr Zhang was ultimately deported from Australia in June 2007. Immediately prior to his deportation, Mr Zhang unsuccessfully attempted to end his life by embedding a razor blade in his oesophagus due to fear of returning to China.<sup>293</sup>

Once deported to China, Mr Zhang said that he was interrogated and roughed up by Chinese officials as soon as he returned.<sup>294</sup>

In June 2008, Mr Zhang committed suicide, reportedly to avoid further persecution and torture.<sup>295</sup>

<sup>290</sup> *Extradition Act 1988* (Cth) s 22(3)(b).

<sup>291</sup> *Extradition act 1988* (Cth) s 22(3)(f).

<sup>292</sup> See, eg, Australian Refugee Rights Alliance, 'Deportations to China: Australian RSD Processes that Return People to Persecution' (Draft Discussion Paper, 2007), available at [http://www.erc.org.au/index.php?module=documents&JAS\\_DocumentManager\\_op=downloadFile&JAS\\_File\\_id=156](http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=156); Edmund Rice Centre for Justice & Community Education, *Deported to Danger II: The Continuing Study of Australia's Treatment of Rejected Asylum Seekers* (2006), available at [http://www.erc.org.au/index.php?module=documents&JAS\\_DocumentManager\\_op=downloadFile&JAS\\_File\\_id=153](http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=153); Refugee Health Research Centre and Asylum Seeker Project, *Removing Seriously Ill Asylum Seekers from Australia* (2007), available at <http://www.latrobe.edu.au/rhrc/documents/removing.pdf>.

<sup>293</sup> Asylum Seeker Resource Centre, 'Chinese Man Still at Risk of Being Deported and Facing Torture' (12 September 2007), available at <http://www.asrc.org.au/humanrights/2007/09/12/chinese-man-still-at-risk-of-being-deported-and-facing-torture>.

<sup>294</sup> AAP, 'Deported Chinese Man "Interrogated"', *The Epoch Times*, 29 June 2007, available at <http://en.epochtimes.com/news/7-6-29/57048.html>.

<sup>295</sup> ABC, 'China Dissident Commits Suicide after Forcible Deportation', *ABC News*, 16 June 2008, available at <http://www.abc.net.au/news/stories/2008/06/16/2275279.htm>.

**Case Study**

A Palestinian asylum seeker, Mr Akram al Masri, arrived in Australia by boat in June 2001, suffering a bullet wound to the leg. He claimed asylum saying that Palestinian officials believed he was an Israeli spy. He was detained at the Woomera Immigration Detention Centre for eight months after his claim for asylum was rejected.

In 2002, Mr al Masri, was twice released from detention by order of the Federal Court of Australia. The Federal Court ordered his second release from custody after the former Australian Government detained him again because he did not have a visa.

Mr al Masri was removed to Gaza in September 2002. At the time, he said that he feared for his life if forced to return to Israel but that he would rather be returned home than go back to the detention centre.

On 31 July 2008, Mr al Masri was shot a number of times in the head at close range in Gaza.<sup>296</sup> A Department of Immigration spokesperson said that ‘we emphasise the fact that even if the person has spent some time in Australia, this does not mean that Australia is responsible for all events that may befall them in the future’.<sup>297</sup>

**(e) Education and Training of Immigration Officers**

341. In July 2005, the then Minister for Immigration commissioned an inquiry into the circumstances of the mistaken immigration detention of two Australian citizens (see Case Studies below).<sup>298</sup> The main findings of the inquiry, published in the ‘Palmer Report’,<sup>299</sup> included the following:

- (a) there were ‘serious problems with the handling of immigration detention cases [that] stem from deep-seated cultural and attitudinal problems’ within the Department’s immigration compliance and detention areas,<sup>300</sup>
- (b) immigration officials were exercising extraordinary powers ‘without adequate training, without proper management and oversight, with poor information systems, and with no genuine quality assurance and constraints on the exercise of these powers’;<sup>301</sup>

<sup>296</sup> AAP, ‘Asylum Seeker Shot Dead in Gaza’, *The Age* (Melbourne), 2 August 2008, available at <http://news.theage.com.au/national/asylum-seeker-shot-dead-in-gaza-20080801-3ood.html>.

<sup>297</sup> AAP, ‘Investigation into Deportee’s Death’, *The Sydney Morning Herald* (Sydney), 2 August 2008, available at <http://www.smh.com.au/news/national/investigation-into-deportees-death/2008/08/02/1217097596349.html>.

<sup>298</sup> Cornelia Rau was suspected of being an ‘unlawful non-citizen’ in Australia and was kept in detention unidentified for 10 months. Vivian Alvarez was deported from Australia in July 2001. It became public knowledge in 2005, however, that the Department of Immigration and Multicultural Affairs (as it then was) was aware of her wrongful deportation in 2003 and again in 2004.

<sup>299</sup> Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005), available at <http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf>.

<sup>300</sup> *Ibid* [17]. Ms Rau ‘was not a prisoner, had done nothing wrong, and was put there simply for administrative convenience’: at [12].

- (c) many immigration officials have received 'little or no relevant formal training and seem to have a poor understanding of the legislation they are responsible for enforcing, the powers they are authorised to exercise, and the implications of the exercise of those powers',<sup>302</sup> and
  - (d) officers responsible for detaining people suspected of being unlawful non-citizens 'often lack even basic investigative and management skills'.<sup>303</sup>
342. In addition to the Palmer Report, in 2006, the Commonwealth Ombudsman also released three reports in relation to the immigration detention of 20 people between 2000 and 2005.<sup>304</sup> As stated by the Ombudsman, Professor John McMillan:
- The reports highlight serious administrative deficiencies that existed in [the Department] during the period under investigation. The main areas of concern were poor understanding of law and policy relating to immigration and citizenship, inadequate staff training, deficient record keeping, wrongful exercise of the power to detain, failure of internal monitoring and review, and delay in resolving the immigration status of those in detention.<sup>305</sup>
343. In its recent Concluding Observations, the Committee against Torture recommended that Australia ensure that education and training of all immigration officials and personnel, including health service providers, employed at immigration detention centres is conducted on a regular basis and that regular evaluation of that training also take place.<sup>306</sup>

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<sup>301</sup> Ibid [9].

<sup>302</sup> Ibid [14].

<sup>303</sup> Ibid [15].

<sup>304</sup> Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, above n 299; Commonwealth Ombudsman, *Report into Referred Immigration Cases: Mr G*, Report No 6 (2006), available at [http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports\\_2006\\_06/\\$FILE/MrG\\_report\\_Dec2006.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2006_06/$FILE/MrG_report_Dec2006.pdf), Commonwealth Ombudsman, *Report into Referred Immigration Cases*, above n 282, Commonwealth Ombudsman, *Report into Referred Immigration Cases: Children in Detention*, Report No 8 (2006), available at [http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports\\_2006\\_08/\\$FILE/Children+in+Detention\\_DIMa\\_Dec2006.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2006_08/$FILE/Children+in+Detention_DIMa_Dec2006.pdf).

<sup>305</sup> Commonwealth Ombudsman, 'Ombudsman Releases Three Reports on Immigration Detention' (Press Release, 6 December 2006), available at [http://www.comb.gov.au/commonwealth/publish.nsf/Content/mediarelease\\_2006\\_15#mental\\_health](http://www.comb.gov.au/commonwealth/publish.nsf/Content/mediarelease_2006_15#mental_health).

<sup>306</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [22], UN Doc CAT/C/AUS/CO/1 (2008).

**Case Study: Cornelia Rau**

Cornelia Rau was unlawfully detained for a period of 10 months in 2004 and 2005 as part of the Australian Government's mandatory detention program. Ms Rau is a German citizen and Australian permanent resident who suffers schizophrenia, as a result of which she did not initially reveal her true identity to various authorities, including the then Department of Immigration and Multicultural and Indigenous Affairs (**DIMIA**). She was then classified by DIMIA as a suspected illegal immigrant and detained for six months with the general prison population at the Brisbane Women's Correctional Centre (as there were no immigration detention facilities in Queensland). Ms Rau was later moved to the Baxter Detention Centre. Ms Rau's plight came to the attention of her family following publication of a newspaper article about Ms Rau. Her family then notified the authorities of her identity and she was released.

A government inquiry into Ms Rau's detention was later expanded to investigate over 200 other cases of suspected unlawful detention by DIMIA.<sup>307</sup>

**Case Study: Vivian Alvarez Solon**

In 2001, DIMIA wrongly deported Vivian Alvarez Solon, an Australian citizen, to the Philippines, despite her claims that she had an Australian passport, and despite concerns being raised about her situation and her mental health by a number of professionals involved with her case. Ms Solon had lived in Australia for 18 years when she was deported, but could not remember details of her past due to mental illness.

Senior DIMIA officials learnt of their mistake in 2003, but did nothing. By this stage, Ms Solon had been living for almost two years in a ward for the destitute and the dying at the Mother Teresa Sisters Missionaries of Charity in the Philippines. Ms Solon's family was eventually notified of her deportation in May 2005. Ms Solon returned to Australia in November 2005.<sup>308</sup>

**G.3 Prisoners and Prison Conditions**

**(a) Conditions in Prison**

344. Unacceptable conditions in Australian prisons, including overcrowding and lack of access to adequate health care treatment, raise issues in relation to the prohibition against torture and may constitute cruel, inhuman or degrading treatment or punishment.

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<sup>307</sup> See Mick Palmer, above n 299.

<sup>308</sup> Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report No 3 (2005), available at [http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports\\_2005\\_03\\_dimia.pdf/\\$FILE/alvarez\\_report03.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2005_03_dimia.pdf/$FILE/alvarez_report03.pdf).

345. In Western Australia, an Ombudsman's report released in 2000 cited the existence of chronic over-crowding, a lack of basic medical supplies and sub-standard physical and psychological health care existing in the Western Australian prison system.<sup>309</sup> In South Australia, prisons are operating at more than 20 per cent above capacity, resulting in significant overcrowding and inappropriate placement of prisoners,<sup>310</sup> including the placement of adults in juvenile detention centres.<sup>311</sup> In New South Wales, prison overcrowding is resulting in juvenile prisoners sharing one-person cells.<sup>312</sup> Overcrowding in Australian prisons will not end until alternatives to detention, such as restorative justice and therapeutic jurisprudence, are more fully introduced.
346. In its recent Concluding Observations on Australia, the Committee against Torture expressed concern about overcrowding in prisons, particularly in Western Australia and recommended that the Australian Government undertake measures to reduce overcrowding, including consideration of non-custodial forms of detention.<sup>313</sup>
347. In Victoria, the Ombudsman has described some prisons as 'not fit for human habitation due to the age, condition, lack of basic facilities or a combination of all these factors'.<sup>314</sup> Much criticism has also been made of the lack of access to health care in prisons, such as the imprisonment in Victoria of an individual who had been found not guilty on the ground of mental impairment due to a lack of access to a bed in a mental health facility.<sup>315</sup>
348. A 'snapshot' of prisoners in Victoria indicates that approximately half of all prisoners in custody have two or more characteristics of serious disadvantage. Characteristics of severe disadvantage include being of Aboriginal or Torres Strait Islander descent, being unemployed, having an intellectual disability, having drug or alcohol issues, having previously been admitted to a psychiatric institution, or being homeless.<sup>316</sup>
349. Prisoners as a group are characterised by social and psychological disadvantage. They face major health issues, including high rates of injecting drug use and high rates of sexually transmitted diseases.<sup>317</sup>

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<sup>309</sup> Ombudsman Western Australia, *Report on Deaths in Prisons* (2000).

<sup>310</sup> ABC, 'Claims of Overcrowding in SA Prisons', *ABC News*, 10 March 2008, available at <http://www.abc.net.au/news/stories/2008/03/10/2185116.htm>.

<sup>311</sup> Greg Skelton, 'Overcrowding Pressures Prisons', *The Advertiser* (Adelaide), 17 February 2008, available at <http://www.news.com.au/adelaidenow/story/0,22606,23228823-2682,00.html>.

<sup>312</sup> 'Juvenile Prisoners Sharing One-Person Cells', *ABC News*, 7 April 2008, available at <http://www.abc.net.au/news/stories/2008/04/07/2209444.htm?section=justin>.

<sup>313</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [23], UN Doc CAT/C/AUS/CO/1 (2008).

<sup>314</sup> Ombudsman Victoria, *Twenty-Ninth Report of the Ombudsman* (2002) 32. See further Ombudsman Victoria, *Conditions for Persons in Custody: Report of Ombudsman Victoria and Office of Police Integrity* (2006), available at [http://www.ombudsman.vic.gov.au/resources/documents/Conditions\\_for\\_persons\\_in\\_custody.pdf](http://www.ombudsman.vic.gov.au/resources/documents/Conditions_for_persons_in_custody.pdf).

<sup>315</sup> *R v White* [2007] VSC 142 (Unreported, Supreme Court of Victoria, Bongiorno J, 7 May 2007).

<sup>316</sup> Department of Premier and Cabinet, State of Victoria, *Growing Victoria Together: Progress Report* (2005-06) (2006), Appendix B (Service Delivery 2005-06), 358-9.

<sup>317</sup> Australian Institute of Health and Welfare, Australian Government, *Australia's Health 2006* (2006) 249.

**(b) Inadequate Mental Health Care in Prisons**

350. Recent research indicates that, of a total Australian prison population of around 25,000 people, approximately 5,000 inmates suffer serious mental illness.<sup>318</sup> Rates of major mental illnesses are between three and five times higher in the prison population than in the general Australian community.<sup>319</sup> There is both a causal and consequential link between imprisonment and mental illness. People with mental illness are more likely to be incarcerated, particularly having regard to the lack of support provided by the poorly resourced community mental health sector, and people in prison are more likely to develop mental health problems, with prisons not being conducive to good mental health.
351. The European Court of Human Rights has consistently held that a failure to provide adequate facilities so as to ensure that prisoners are not subject to degrading conditions, including in particular the failure to provide adequate health care to mentally ill prisoners, may amount to a violation of the prohibition against torture.<sup>320</sup> According to the European Court, and other bodies (including the Human Rights Committee), it is incumbent on the State to ‘organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties’.<sup>321</sup>
352. There is significant evidence that mental health care in Australian prisons is manifestly inadequate and may amount to a level of neglect that constitutes degrading treatment or punishment.
353. According to evidence given by Forensicare (the Victorian Institute of Forensic Mental Health) to a recent Senate Select Committee on Mental Health:
- (a) adequate mental health services are very rare in prisons;
  - (b) the seriously mentally ill are often poorly managed in prisons and regularly wait in prison for admission under conditions which are not conducive to well being and recovery and may cause ‘enormous destruction to the psychological and human aspects’ of the individual concerned;<sup>322</sup> and

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<sup>318</sup> James P R Ogloff et al, ‘The Identification of Mental Disorders in the Criminal Justice System’, *Trends and Issues in Crime and Criminal Justice* (No 334, Australian Institute of Criminology, 2007) 2.

<sup>319</sup> Ibid 1.

<sup>320</sup> See especially, *Keenan v United Kingdom* (2001) 33 EHRR 913. See also *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Holomiov v Moldova* [2006] ECHR 30649/05; *Istratii v Moldova* [2007] ECHR 8721/05.

<sup>321</sup> *Mamedova v Russia* [2007] ECHR 7064/05, [63]. See also *Mukong v Cameroon*, Human Rights Committee, Communication No 458/1991, [9.3], UN Doc CCPR/C/51/D/458/1991 (1994), in which the Human Rights Committee rejected an attempt by the State Party to justify appalling prison conditions on the basis of economic and budgetary problems. The UK Court of Appeal made a similar finding in *R (on the Application of Noorkoiv) v Secretary of State for the Home Department* [2002] 4 All ER 515, 524 (Buxton LJ) where it was held that the Government could not be excused from what were otherwise breaches of the right to liberty and freedom from cruel treatment in the prison context ‘simply by pointing to a lack of resources that are provided by other arms of government’.

<sup>322</sup> Evidence to the Senate Select Committee on Mental Health, Parliament of Australia, Melbourne, 6 July 2005, 48 (Professor Paul Mullen, Clinical Director, Victorian Institute of Forensic Mental Health).

- (c) there is a pressing and increasing requirement for additional in-patient beds to meet the needs of the criminal justice system.<sup>323</sup>

354. Forensicare concluded that:

Currently in Australia the provision of care to mentally ill prisoners is rudimentary at best. Rarely are proper provisions made . . . .<sup>324</sup>

355. The inadequate provision of mental health care in prisons raises serious concerns in relation to Articles 7 and 10 of the *ICCPR*. Indeed, in its recent Concluding Observations on Australia, the Committee against Torture expressed concern about the insufficient provision of mental health care in prisons and reports indicating that mentally ill inmates are subjected to extensive use of solitary confinement and subsequent increased risks of suicide attempts.<sup>325</sup>

**(c) Solitary Confinement of Persons with Mental Illness**

356. The widespread use of solitary confinement (or ‘segregation’ as it is also known) as a management tool for people incarcerated in Australian prisons is an issue of significant concern, particularly in regard to those incarcerated who are also suffering from a mental illness. Research suggests that solitary confinement can cause and significantly exacerbate symptoms of mental illness, such as paranoia.<sup>326</sup> It is well established that prolonged solitary confinement may amount to torture or other cruel, inhuman or degrading treatment.<sup>327</sup>

357. At present, Australian law, in general terms, allows the governor of a correctional centre to direct that an inmate be held in segregated custody in circumstances where they consider that their association with other inmates may constitute a threat to the security of a correctional centre, or good order and discipline within the centre. The security of the facility is given greater priority than the mental health condition of the inmate.

358. According to Forensicare, the high incidence of mental illness in prison, in combination with the lack of adequate mental health care, means that it is very common for mentally ill prisoners displaying acute and disturbing psychiatric symptoms to be placed in a ‘management and observation cell’ (also known as a ‘Muirhead cell’). This placement is often not a mental health decision, but one made by correctional administrators where there is no other accommodation available to guarantee the safety of a prisoner displaying disturbing psychiatric symptoms.

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<sup>323</sup> See Submission to Senate Select Committee on Mental Health, Parliament of Australia, May 2005, 4-5, 19-20 (Forensicare) available at [http://www.apf.gov.au/senate/committee/mentalhealth\\_ctte/submissions/sub306.pdf](http://www.apf.gov.au/senate/committee/mentalhealth_ctte/submissions/sub306.pdf).

<sup>324</sup> Ibid 20 (Recommendation 7).

<sup>325</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [23], UN Doc CAT/C/AUS/CO/1 (2008).

<sup>326</sup> *Inquest into the Death of Scott Ashley Simpson* (Unreported, New South Wales Coroner’s Court, Pinch SM, 17 July 2006), available at [http://www.agd.nsw.gov.au/lawlink/Coroners\\_Court/ll\\_coroners.nsf/vwFiles/SimpsonInquest.doc/\\$file/SimpsonInquest.doc](http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc).

<sup>327</sup> See, eg, Human Rights Committee, *General Comment 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7)* (1992) [6]; *Bequiro v Uruguay*, [10.3], UN Doc. CCPR/C/OP/2 (1990).

Forensicare noted that solitary confinement and strict observation and control in these cells may prevent suicide, but may also cause ‘enormous destruction to the psychological and human aspects’ of the individual concerned.<sup>328</sup>

359. Australia does not collect or publish data on conditions in Australian prisons and, accordingly, it is difficult to definitively comment on the prevalence of the use of solitary confinement as a management tool, particularly for prisoners with mental illness. Anecdotal evidence suggests, however, that the use of solitary confinement is widespread, with inmates being locked up for 22 to 23 hours a day in their cells, provided with incorrect, or inappropriate medications, and with limited access to mental health professionals. If prisons are in lock down, inmates stay in their cells at all times. Greg Barns, barrister and legal adviser to a state based Prison Action Reform group, has observed that: ‘Solitary confinement is routinely used for prisoners who have mental illness. Hundreds of prisoners around Australia are in solitary confinement’.<sup>329</sup>

#### **Case Study**

In June 2006, the Deputy State Coroner of New South Wales investigated the suicide death in custody of an inmate, Scott Simpson. At the time of his death, Mr Simpson was awaiting admission into a prison hospital facility for treatment for his mental illness, but this admission had been repeatedly delayed. He had no traces of anti-psychotic medication in his system, despite the fact that a number of psychiatrists had diagnosed him as suffering from a serious case of paranoid schizophrenia, and despite the fact that he was urgently awaiting admission into hospital for treatment.

Simpson had been found not guilty of a criminal offence on the grounds of mental illness, but was still being kept in a segregation unit in the main high security prison. He had been placed in a cell with hanging points. For the final 26 months of his life (except for two short periods), he was kept in solitary confinement.

The Deputy State Coroner was critical of the circumstances of his incarceration. She recommended, in line with international human rights law, that inmates suffering from mental illness should be held in solitary confinement only as a last resort and only for a limited period.<sup>330</sup> This recommendation, however, has only been poorly and patchily implemented across Australia.

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<sup>328</sup> Evidence to the Senate Select Committee on Mental Health, Parliament of Australia, Melbourne, 6 July 2005, 48–9 (Professor Paul Mullen, Clinical Director, Victorian Institute of Forensic Mental Health). See also Forensicare, above n 323, 21; the comments of the Victorian Court of Appeal in respect of the use of solitary confinement, normally viewed as a form of punishment, to protect a mentally disturbed prisoner in *R v SH* [2006] VSCA 83 (Unreported, Victorian Court of Appeal, Warren CJ, Charles and Chernov JJA, 20 April 2006) [22]; Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health: From Crisis to Community (First Report)* (2006) [13.110]–[13.111].

<sup>329</sup> See Elizabeth Wynhausen, ‘Jailed in Body and Mind’, *The Australian* (Sydney), 28 August 2006.

<sup>330</sup> Inquest into the Death of Scott Ashley Simpson (Unreported, New South Wales Coroner’s Court, Pinch SM, 17 July 2006), available at [http://www.agd.nsw.gov.au/lawlink/Coroners\\_Court/ll\\_coroners.nsf/vwFiles/SimpsonInquest.doc/\\$file/SimpsonInquest.doc](http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc).

**(d) Women in Prison**

360. Women in prison present with significant health needs. Recent research conducted in New South Wales, Queensland and Western Australia indicates that more than half of the women inmates had been diagnosed with a mental health condition and that between 30 and 40 per cent had attempted suicide at some time.<sup>331</sup> Women labelled with an intellectual, psychiatric or learning disability are more likely to be classified as maximum-security prisoners.<sup>332</sup> Substance abuse and rates of infectious disease are also reported to be high.
361. Women in prison are not able to access adequate care and services, and prison staff are unable to ensure proper treatment for women with mental health issues.<sup>333</sup>
362. The systemic discrimination faced by women in prison may constitute torture or cruel, inhuman or degrading treatment or punishment. Fundamental breaches of the right may arise in relation to one or a combination of the following issues:
- (a) lack of access to health care;
  - (b) routine strip searches (discussed further below);
  - (c) the detention of low security prisoners in high security facilities;
  - (d) oppressive disciplinary regimes;
  - (e) restrictive visitation rules;
  - (f) limited access to educational and employment programs; and
  - (g) the significant overrepresentation of Indigenous women and women from cultural, ethnic and religious minorities.

**Case Study**

S 'had a little cry' on her first day of being in prison for the first time. For this reason, S was removed from the other prisoners, medicated with Valium and placed, naked, in a padded cell for four days on 15-minute observations.<sup>334</sup>

**(e) Strip Searches**

363. Prisoners and visitors to prison facilities in Australia are regularly subjected to strip searching when entering or moving around prison facilities. The process by which a person is subjected

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<sup>331</sup> Australian Bureau of Statistics, *Crime and Justice: Women in Prison*, ABS Catalogue No 4102.0 (2004).

<sup>332</sup> See Submission to the Anti-Discrimination Commissioner for the Inquiry into the Discrimination on the Basis of Sex, Race and Disability Experienced by Women Prisoners in Queensland (2004) (Sisters Inside Inc), available at <http://www.sistersinside.com.au/media/adcsqsubmission.pdf>; Victorian Council of Social Service, *Request for a Systematic Review of Discrimination against Women in Victorian Prisons* (2005), available at <http://www.sistersinside.com.au/media/VICComplaint.pdf>.

<sup>333</sup> Ibid.

<sup>334</sup> Case study provided by the Federation of Community Legal Centres, Victoria.

- to searching is arbitrary as the searches are often carried out on all prisoners and, in some cases, visitors.
364. Current policies regarding strip searching of prisoners and visitors do not require that the search be conducted in a manner that represents a permissible limitation on human rights. They do not require prison officers to seek alternatives, nor do they balance security concerns with the potential harm caused by the search. Furthermore, the practice of strip searching is an ineffective tool in discovering contraband, as indicated in the case study below.
365. Strip searching has also recently been the subject of adverse judicial comment in Victoria. In a recent ruling by the Supreme Court of Victoria, the Court held that in order for the relevant prisoners to have a fair trial they should no longer be strip searched in any situation where they had previously been under constant supervision or in secure areas.<sup>335</sup> In this case, prisoners on remand had been subjected to twice daily strip searching for over two years. A psychiatrist gave evidence that the search made the prisoners feel degraded and humiliated and that in combination with other factors, an ordinary person would experience significant psychological and emotional difficulties, including impairment on the ability to concentrate on the legal proceedings.<sup>336</sup>
366. Strip searching has a particular impact on female prisoners. Between 40 and 89 per cent of any female prison population are victims and survivors of sexual or physical violence and abuse.<sup>337</sup> The practice of strip searching can reinvok and replicate previous experiences of such abuse and the consequent trauma.<sup>338</sup> In many instances, women prisoners may forego visits from family or external medical treatment in order to reduce the number of searches.<sup>339</sup>
367. The arbitrary practice of strip searching raises concerns under Articles 7 and 10 of the *ICCPR*, as well as the right to privacy in Article 17.
368. At the time of writing this submission, the Australian Capital Territory was considering passing legislation that would permit the practice of strip searching only where the authorities judge it

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<sup>335</sup> No contraband was found on any of the prisoners over this period: *R v Benbrika (Ruling No 20)* [2008] VSC 80 (Unreported, Supreme Court of Victoria, Bongiorno J, 20 March 2008) [36], [100].

<sup>336</sup> *Ibid* [58].

<sup>337</sup> See, eg, B A Hockings et al, Department of Corrective Services, *Queensland Women Prisoners' Health Survey* (2002) 52-3; Barbara Denton, *Dealing: Women in the Drug Economy* (2001); Department of Justice, Western Australia, *Profile of Women in Prison* (2002); Debbie Kilroy, 'When Will You See the Real Us?' Women in Prison', (2001) *Women in Prison Journal* 39. 'Sexual assault' figures here do not include strip searches.

<sup>338</sup> Federation of Community Legal Centres and Victorian Council of Social Service, *Request for a Systemic Review of Discrimination against Women in Victorian Prisons* (2005), available at <http://www.vals.org.au/news/submissions/33%20ExecutiveSummaryFinal%20Discrimination%20against%20women%20in%20prison.pdf>.

<sup>339</sup> Anti-Discrimination Commission Queensland, *Women in Prison: A Report by the Anti-Discrimination Commission Queensland* (2006) 52-3; Amnesty International, 'Not Part of My Sentence': *Violations of Human Rights of Women in Custody* (1999) 24-5.

‘prudent’. Authorities would no longer be required to have ‘reasonable grounds’ for conducting the search.<sup>340</sup>

#### **Case Study**

At a maximum security women’s prison in Victoria, 18,889 strip searches were conducted on a prison population of 203 within a 12-month period between 2001 and 2002 (an average of 93 strip searches per prisoner). Only one item of ‘contraband’ was found during that time.<sup>341</sup>

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

#### **(f) ‘Supermaximum’ Prisons**

369. Conditions in Australia’s first ‘supermaximum’ prison, the High Risk Management Unit (HRMU) at Goulburn Correctional Centre, have been criticised by the New South Wales Ombudsman.<sup>342</sup> HREOC has also concluded that the housing in the HRMU of remand inmates and prisoners with mental illnesses violates Articles 7 and 10 of the *ICCPR*.<sup>343</sup> Many prisoners in the HRMU are held for extended periods of solitary confinement,<sup>344</sup> a practice that was criticised by the Committee against Torture in its recent Concluding Observations on Australia.<sup>345</sup>

#### **(g) Children Held in Adult Facilities**

370. Despite the prohibition in Article 10(3) of the *ICCPR*, many juvenile offenders are:

- (a) held in adult facilities in many jurisdictions across Australia; and
- (b) not accorded treatment appropriate to their age and legal status.

371. These issues are discussed in further detail under Article 24: Juvenile Justice System.

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<sup>340</sup> Bill Bush, ‘Jail with No Drugs or No Rights?’, *The Canberra Times* (Canberra), 27 August 2008, available at <http://www.canberratimes.com.au/news/opinion/editorial/general/jail-with-no-drugs-or-no-rights/1255346.aspx>.

<sup>341</sup> Study carried out by the Federation of Community Legal Centres as part of the Victorian Human Rights Charter Consultation in 2005.

<sup>342</sup> NSW Ombudsman, *Annual Report 2003-2004* (2004) 90.

<sup>343</sup> *Inquest into the Death of Scott Ashley Simpson* (Unreported, New South Wales Coroner’s Court, Pinch SM, 17 July 2006), available at [http://www.agd.nsw.gov.au/lawlink/Coroners\\_Court/ll\\_coroners.nsf/vwFiles/SimpsonInquest.doc/\\$file/SimpsonInquest.doc](http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc).

<sup>344</sup> General Purpose Standing Committee No 3, Legislative Council, Parliament of New South Wales, *Issues relating to the Operations and Management of the Department of Corrective Services: Final Report* (2006) [4.118]–[4.121].

<sup>345</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [24], UN Doc CAT/C/AUS/CO/1 (2008).

**(h) Prison Inspectorates**

372. Mechanisms for investigation and inspection of places of detention by independent bodies are essential to ensure the effective prohibition of and protection against torture and other forms of ill-treatment. A comprehensive system of inspection and investigation is required *in addition to* a complaints-based system in order to adequately protect the human rights of persons deprived of their liberty.
373. Australia already possesses a comprehensive complaints-based system. There are many avenues that exist for persons deprived of their liberty to make complaints, including HREOC, state and territory commissions, the Commonwealth Ombudsman, state and territory ombudsmen, anti-discrimination boards, health services commissioners and so on. While there are many existing avenues of complaint, the decisions of many of these bodies are non-binding and fail to provide adequate remedies for prisoners.
374. Indeed, the mechanisms for the inspection of detention facilities throughout Australia are not as well developed. Furthermore, where such procedures do exist, many of these mechanisms lack proper independence. They are often agencies that form part of, or are answerable to, state departments of justice and their independence may therefore arguably be compromised. For example, in Victoria, the Department of Justice is responsible for prison management in Victoria through Corrections Victoria. The Office of Correctional Services Review is the body responsible for reporting on the effectiveness of Corrections Victoria's management of the Victorian prison system. However, the Office of Correctional Services Review is a business unit of the Department of Justice and also reports to the Secretary to the Department of Justice.
375. An additional concern with some existing mechanisms is that their findings are often not published. This also has the potential to compromise their independence and undermine the transparency of these agencies.

**G.4 People with Mental Illness**

376. Mental health inpatient and crisis services are significantly under resourced in Australia. In 2006, the Senate Select Committee on Mental Health reported:
- Abuses within [mental health] services are said to include hostile environments, mental health staff ignoring or dismissing consumers' personal feelings, physical abuse and forced treatment.<sup>346</sup>
377. The Committee further reported that there are widespread problems with access to care, quality of care and adequate accommodation for people requiring mental health services.<sup>347</sup> These findings are supported by a series of state-based reports into the adequacy of mental health services.<sup>348</sup>

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<sup>346</sup> Senate Select Committee on Mental Health, *A National Approach to Mental Health*, above n 328, [3.18].

<sup>347</sup> *Ibid* 185.

<sup>348</sup> See, eg, Mental Health Council of Australia and the Brain and Mind Research Institute, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005) 46; Select Committee on Assessment and Treatment Services for People with Mental Health Disorders, Parliament of South Australia,

378. The failure to provide adequate services to meet the needs of mental health consumers may, in certain circumstances, amount to breaches of Articles 7 and 10 of the *ICCPR*. This issue is exacerbated by the issues discussed under Article 9: People with Mental Illness.

#### Case Study

A patient at the Nepean Hospital was placed on leave. Upon returning to the hospital, the patient found that his bed had been filled. He went home and killed himself and others in his family.<sup>349</sup>

### G.5 Indigenous Australians

379. Many Indigenous Australians confront serious human rights issues in the justice system. In particular, issues resulting from the disproportionate impact of certain criminal laws and the incidence and impacts of incarceration raise serious concerns in relation to Articles 7 and 10 of the *ICCPR*. The issues faced by Indigenous peoples in their interaction with the justice system are further compounded by limited access to legal and interpretative services, both of which are often necessary to ensure a fair hearing.
380. Indigenous peoples in Australia are among the most highly incarcerated peoples in the world. Despite Indigenous Australians representing approximately 2 per cent of the Australian population, around 24 per cent of the total prison population is Indigenous.<sup>350</sup> Based on 2005 figures, the rate of Indigenous imprisonment in Australia had risen by 23 per cent in the previous six years.<sup>351</sup> The incarceration rate for Indigenous Australians is more than 13 times higher than for non-Indigenous Australians and, as at March 2004, Indigenous women were incarcerated at a rate 20.8 times that of non-Indigenous women.<sup>352</sup>
381. The operation of mandatory sentencing provisions in Western Australia has a particular impact on Indigenous Australians. The arbitrary nature of mandatory sentencing is discussed under Article 9: Mandatory Sentencing Laws. The disproportionate affect of mandatory sentencing on Indigenous Australians is reflected in the statistic that Indigenous Australians are 21 times more likely to be in prison than non-Indigenous Australians in Western

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*Interim Report* (2006), available at <http://www.parliament.sa.gov.au/NR/rdonlyres/C1AFDCDF-731F-427C-B70A-2C4D4277DF43/6476/mhintprt.pdf>; Standing Committee on Environment and Public Affairs, Legislative Council, Parliament of Western Australia, *Petition on the Provision of Mental Health Services in Western Australia: Interim Report* (2004).

<sup>349</sup> Case study provided by Senate Select Committee on Mental Health, *A National Approach to Mental Health* above n 328, [8.9].

<sup>350</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2007*, ABS Catalogue No 4517.0 (2007), available at [http://www.abs.gov.au/Ausstats/ABS@.nsf/Latestproducts/4517.0Main\\_Features22007?opendocument&tabname=Summary&prodno=4517.0&issue=2007&num=&view](http://www.abs.gov.au/Ausstats/ABS@.nsf/Latestproducts/4517.0Main_Features22007?opendocument&tabname=Summary&prodno=4517.0&issue=2007&num=&view).

<sup>351</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2005*, ABS Catalogue No 4517.0 (2005) 5.

<sup>352</sup> Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2006), available at [http://www.hreoc.gov.au/social\\_justice/statistics/index.html](http://www.hreoc.gov.au/social_justice/statistics/index.html).

Australia.<sup>353</sup> Young Indigenous people, who are a small fraction of the total youth population of Western Australia, constitute three quarters of those sentenced in mandatory sentencing cases.<sup>354</sup>

382. In the case of Indigenous offenders, arbitrariness is particularly manifest because mandatory sentencing laws prevent courts from taking account of the cultural background and responsibilities of offenders, and the economic and social difficulties often faced by Indigenous Australians. Mandatory sentencing laws also continue to disproportionately affect children and young people, as discussed in further detail under [Article 24: Juvenile Justice System](#).
383. Particularly in light of the continued high incidence of Indigenous deaths in custody, as discussed under [Article 6: Indigenous Deaths in Custody](#), the unfair treatment of Indigenous Australians in the justice system raises concerns in relation to Articles 7 and 10 of the *ICCPR*. Indeed, in its recent Concluding Observations on Australia, the Committee against Torture expressed concern about the disproportionately high numbers of Indigenous Australians incarcerated and the continued reports of Indigenous deaths in custody.<sup>355</sup>

#### Case Study

In 2003, the Human Rights Committee found that the treatment of Corey Brough, an Aboriginal juvenile with an intellectual disability who had been stripped and kept under constant lighting in solitary confinement in an adult correctional centre, was in violation of Articles 10(1), 10(3) and 24(1) of the *ICCPR*.<sup>356</sup> However, despite the Human Rights Committee's View, the former Australian Government rejected these findings.<sup>357</sup>

#### G.6 Police Use of Taser Guns

384. Electronic devices known as 'Tasers' have been deployed for use by officers of the AFP and the Western Australian police force.<sup>358</sup> There are also plans for the devices to be rolled out

<sup>353</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2007*, above n 350.

<sup>354</sup> The UN Committee on the Rights of the Child expressed its concern about the over-representation of Indigenous children in the juvenile justice system: see UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, [73]-[74], UN Doc CRC/C/15/Add.268 (2005).

<sup>355</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [23], UN Doc CAT/C/AUS/CO/1 (2008).

<sup>356</sup> *Brough v Australia*, Communication No 1184/2003, UN Doc CCPR/C/86/D/1184/2003 (17 March 2006).

<sup>357</sup> Core Common Document, above n 4, 14-15.

<sup>358</sup> Australian Federal Police, 'Police SRS Team Adopts Tasers' (Press Release, 18 August 2006); Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 March 2008, [3063] (Question on notice from Dr E Constable).

for widespread use in New South Wales and Queensland,<sup>359</sup> and the South Australian Government has recently announced plans to trial the device by 'frontline' police officers.<sup>360</sup>

385. There are two applications of the Taser:

- (a) in 'probe' mode, when fired, the Taser propels barbs that attach to the subject's skin or clothing, through which the device emits a sequence of very short duration, high voltage current intended to inhibit the subject's muscular control; and
- (b) in 'stun' mode, the device directly contacts with the subject and emits electrical pulses directly into the subject's body through fixed electrodes.

The devices are intended to be a type of 'non-lethal force' weapon.

386. The use of Tasers is generally subject to the same limitations as other 'non-lethal force' weapons. Generally, police officers are entitled to use the devices in the course of their duties, in self-defence or to prevent escape, provided they do not use excessive force.

387. The Committee against Torture has expressed strong concerns about Tasers, noting that 'the use of these weapons causes severe pain constituting a form of torture, and that in some cases it may even cause death, as recent developments have shown'.<sup>361</sup> The Committee recommended that Portugal relinquish the use of 'TaserX26' weapons (a type of Taser used in 'probe' mode), concluding that their use appeared to violate Articles 1 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Punishment*.

388. In light of the Committee against Torture's conclusions, the use of Tasers may also fall foul of right to freedom from torture guaranteed under Article 7 of the *ICCPR*.

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<sup>359</sup> 'NSW Police Wants Tasers Gun for All Cops', *news.com.au*, 7 July 2008; Queensland Police Service, 'Duty Officers To Trial Tasers' (Press Release, 30 June 2007).

<sup>360</sup> Government of South Australia, 'South Australian Police to Trial Taser Stun Guns' (Press Release, 1 June 2008).

<sup>361</sup> Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Portugal*, [14], UN Doc CAT/C/PRT/CO/4 (2008).

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLES 7 AND 10)**

- Please advise as to the steps and measures taken to implement the recent recommendations of the Committee against Torture.
- Please detail the steps being taken to ensure that all counter-terrorism laws and practices are compatible with human rights, including particularly the absolute prohibition against torture and other forms of cruel treatment.
- Please provide information regarding the investigation of serious allegations as to the torture and rendition of Australian citizens, including Mamdouh Habib and David Hicks.
- Please provide details as to the legislative amendments proposed to end the policy of mandatory immigration detention.
- Please provide information as to whether and how asylum seekers who have been detained are provided with adequate physical and mental health care, including routine assessments.
- Please provide information regarding drug harm prevention and minimisation programs in prisons, including condom and needle and syringe exchange programs.
- Please update the Human Rights Committee as to the steps and measures, including legislative, budgetary and programmatic measures, that Australia is taking to review and implement the recommendations of the Senate Select Committee on Mental Health in *A National Approach to Mental Health – from Crisis to Community*.
- Please provide details as to the use of 'Tasers', and other weapons that cause severe pain, by police and correctional authorities.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLES 7 AND 10)**

THAT Australia comprehensively review all counter-terrorism laws and practices and take all necessary steps and measures, including legislative measures, to ensure that such laws and practices are compatible with human rights, including particularly the absolute prohibition against torture and other forms of cruel treatment.

THAT Australia comprehensively legislate to absolutely prohibit the use of evidence that has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment other than for the purpose of establishing such treatment or punishment.

THAT Australia take all necessary steps and measures, including legislative measures, to ensure that allegations of torture and other forms of cruel, inhuman or degrading treatment or punishment, including by Australian agents abroad or in respect of Australian citizens abroad, be fully investigated and that appropriate reparations be made where such conduct is found to have occurred.

THAT Australia immediately repeal section 189 of the *Migration Act* and legislatively abolish its policy of mandatory immigration detention.

THAT, as a matter of priority, Australia ensure that all asylum-seekers who have been detained are provided with adequate physical and mental health care, including routine assessments.

THAT Australia amend both the *Migration Act* and the *Extradition Act 1988* (Cth) to comprehensively prohibit the refoulement, extradition or expulsion of a person from Australia in circumstances where they may be exposed to a risk of torture or other cruel, inhuman or degrading treatment or punishment.

THAT Australian law be amended to provide that, under no circumstances, will the Australian Government resort to diplomatic assurances as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.

THAT all persons involved in the management and administration of the immigration system receive human rights training and that all immigration laws, policies and practices be comprehensively reviewed to ensure that they are compatible with human rights.

THAT Australia enshrine in legislation and practice the principle that prisoners are not to be subject to any deprivations of rights or freedoms that are not a necessary consequence of the deprivation of liberty itself.

THAT Australia take further steps and measures to address overcrowding in prisons.

THAT Australia ensure that all prisoners have adequate access to health care, including mental health care, consistent with the human right to the highest attainable standard of physical and mental health.

THAT Australia develop and implement drug harm prevention and minimization programs in prison, including condom and needle and syringe exchange programs.

THAT Australia ensure that persons with mental illness are not subject to solitary confinement and are provided with access to appropriate treatment in a therapeutic environment.

THAT Australia take immediate steps to ensure that women in prison are not subject to any direct or systemic discrimination, or substantive inequality relative to male prisoners.

THAT all Australian jurisdictions establish independent, effective, publicly accountable and adequately resourced prison inspectorates.

THAT Australia continue its efforts to address the socio-economic disadvantage that, inter alia, leads to a disproportionate number of Indigenous Australians coming into contact with the criminal justice system.

THAT Australia review all mandatory sentencing legislation and take all necessary steps and measures to ensure that such legislation does not adversely impact on disadvantaged groups, particularly Indigenous people, in a manner that is disproportionate or discriminatory.

THAT Australia takes steps, including legislative, budgetary and programmatic measures, to review and implement the recommendations of the Senate Select Committee on Mental Health in *A National Approach to Mental Health – from Crisis to Community*.

THAT Australia relinquish the use of ‘Tasers’ and other weapons that cause severe pain, sometimes constituting a form of torture, and in some cases even death.

## Article 8 — Freedom from Slavery, Servitude and Forced Labour

**Article 8:**

1. *No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.*
2. *No one shall be held in servitude.*
3. (a) *No one shall be required to perform forced or compulsory labour;*  
 (b) *Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;*  
 (c) *For the purpose of this paragraph the term ‘forced or compulsory labour’ shall not include:*
  - (i) *Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;*
  - (ii) *Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;*
  - (iii) *Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;*
  - (iv) *Any work or service which forms part of normal civil obligations.*

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### H. FREEDOM FROM SLAVERY, SERVITUDE AND FORCED LABOUR

389. Article 8 guarantees the fundamental human rights of freedom from slavery, servitude and forced labour. ‘Slavery’ refers to a situation where a person is subject to complete exploitation by effectively being ‘owned’ by another while ‘servitude’ is broader and encompasses other forms of economic exploitation. Compulsory or forced labour generally refers to work that is extracted under the menace of a penalty.

### H.1 Trafficking in Human Beings: Sexual Servitude

390. Practices involved in the trafficking of people, including the trafficking of women into sexual servitude (also known as ‘debt bondage’), may involve a range of exploitative practices that include sexual, physical, psychological, criminal and labour exploitation. In 2006, the Committee on the Elimination of Discrimination against Women recommended that Australia formulate a comprehensive strategy to combat the trafficking of women and exploitation resulting from prostitution.<sup>362</sup>
391. In October 2003, the former Australian Government introduced the ‘Commonwealth Action Plan to Eradicate Trafficking in Persons’ to focus on the ‘full cycle of trafficking, giving equal weight to the three critical areas of prevention, prosecution and victim support’.<sup>363</sup> In 2007, it was announced that this strategy would be renewed for a further four years with additional funding.<sup>364</sup> The major focus of this funding has been dedicated to enhancing the criminal justice response to the trafficking of women into sexual servitude to enable the successful prosecution of offenders.<sup>365</sup>
392. The criminal justice approach to trafficking provides no recognition of the rights of trafficked persons or those in positions of debt bondage, nor is there any clear commitment to safeguarding their rights as workers. Victims of trafficking/sexual servitude are not identified as victims of exploitation within the workplace. Rather, their right to work and to be protected as an *employee* is replaced by a focus on victimisation within a criminal justice framework where the emphasis is on pursuing prosecutions.
393. Those who work under conditions of sexual servitude are most often non-citizens and, in many cases, illegal non-citizens.<sup>366</sup> The rights of victims of trafficking and sexual servitude are therefore limited by their concurrent status as non-citizens. Sex workers are ineligible to apply for temporary work visas, and generally enter Australia on short-term travel visas, such as a tourist visa, rather than on a work permit visa. The majority of persons identified as potential victims of trafficking in Australia are repatriated back to their country of origin at the completion of the criminal justice process. A visa system was introduced in 2004 to enable

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<sup>362</sup> Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, [21], UN Doc CEDAW/C/AUL/CO/5 (2006).

<sup>363</sup> Minister for Justice and Customs, ‘Australian Government Announces Major Package to Combat People Trafficking’ (Press Release, 13 October 2003).

<sup>364</sup> Attorney-General’s Department, ‘More Resources to Combat People Trafficking’ (Press Release, 8 May 2007) available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP7561D03F6952FB64CA2572D4000BB873>.

<sup>365</sup> This criminal justice framework reflects the emphasis of the international framework encapsulated within the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (UN Doc A/RES/55/25) — one of three supplementary protocols to the *UN Convention Against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Annex I, UN Doc A/RES/55/25 (2000).

<sup>366</sup> 52 per cent of potential trafficking victims referred by the Department of Immigration and Multicultural and Indigenous Affairs to the Australian Federal Police up to 2005 were reported to be illegal non-citizens at the time. See Department of Immigration and Multicultural and Indigenous Affairs, *Evidence to Supplementary Inquiry into the Trafficking of Women for Sexual Servitude* (2005).

the Minister of Immigration to grant a temporary or permanent Witness Protection (Trafficking) Visa to trafficking victims who he/she is satisfied have played a 'significant' role in the criminal justice process and/or who are 'in danger' if they return to their country of origin.<sup>367</sup> However, these visas are made accessible by the Minister on a case-by-case basis and the decision is not subject to review or appeal. This visa system does not recognise Australia's obligation to acknowledge their exploitation as an abuse within the workplace.

### Case Study

X travels to Australia after agreeing to work in the sex industry to repay a set fee for a broker to arrange a tourist visa, travel and accommodation. Upon her arrival in Australia she is taken to her workplace where her passport is taken from her for 'security', the agreed fee is tripled and the work conditions are changed substantially (increased work hours and limited, if any, days off).

Working illegally with a tourist visa that has expired, X is picked up by Department of Immigration and Citizenship (**DIAC**) compliance officers six months after her arrival. During this time she has managed to pay off three-quarters of her debt but has not been able to save any money, as the majority of her earnings have gone directly to her employer. As she works in a brothel and does not have easy access to her passport, she is put onto a bridging visa<sup>368</sup> and passed on by DIAC officers to the Australian Federal Police and the victim support agency as a potential victim of trafficking.

Unable to share any information about the broker who assisted her to Australia or to provide any useful information about those operating the business she was working in, X's case is dropped and she is no longer eligible to remain in Australia on the bridging visa. As she is ineligible for any other visa, X is returned to her country of origin with no money and without any financial support to assist her upon her return.<sup>369</sup>

## H.1A 457 Visas

394. The Temporary Business (Long Stay) — Standard Business Sponsorship 457 Visa (**457 visa**) regime in Australia allows employers to sponsor overseas workers to work in Australia for a period of between three months and four years.

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<sup>367</sup> Department of Immigration and Citizenship, 'New Visas for Witnesses in Trafficking Cases' (Press Release, 1 January 2004) available at <http://www.immi.gov.au/legislation/amendments/2004/040101/lc01012004-05.htm>.

<sup>368</sup> In Australia, there are five classes of 'bridging visas', which are used to make 'non-citizens' lawful who otherwise would be unlawful in the following situations: (a) during the processing of an application, made in Australia, for a substantive visa; (b) while arrangements are made to leave Australia; and (c) at other times when the 'non-citizen' does not have a visa (for example, when seeking judicial review) and it is not necessary for the person to be kept in immigration detention.

<sup>369</sup> Case study based on experiences of victims of trafficking involved in the research of Dr Marie Segrave, University of Western Sydney.

395. The Australian Council of Trade Unions and many community groups have repeatedly raised concerns over the failure of the former Australian Government to adequately protect workers on 457 visas from exploitation, including through forced or indentured labour.<sup>370</sup> The United States Department of State has also found that Australia should devote more resources to the issue of labour trafficking, particularly in relation to the 457 visa regime.<sup>371</sup>
396. The exploitation of migrant workers through forced labour under the 457 visa regime raises concerns under Article 8 of the *ICCPR*. Further, the fact that 457 visa holders are sponsored to work in Australia for a specific employer only raises concerns in relation to freedom of movement under Article 12 of the *ICCPR*.
397. The current Australian Government has announced a broad reform agenda for the 457 Visa program in 2008.<sup>372</sup> While the suggested reforms, if adopted, will enhance monitoring and investigative powers, it remains to be seen whether these reforms will be effective in improving the working conditions of 457 visa holders.

#### **Case Study**

A worker was brought to Australia on a 457 visa by an employer who owned four restaurants. The worker arrived in Australia with none of his own money, virtually no English language skills and no appreciation of his legal entitlements. During his stay in Australia, the worker was dependent upon his employer for food, money, accommodation and transportation. He was never shown a work roster and would simply be picked up from home and driven to successive restaurants to work. He worked at least 14 hours a day, seven days a week for 40 days straight. He received no wages for the seven weeks he worked and was told by his employer that he would not receive wages for a year, as his employer had paid for his airplane ticket to Australia.<sup>373</sup>

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<sup>370</sup> See Submissions to Joint Standing Committee on Migration, Inquiry into Temporary Business Visas, Parliament of Australia, 9 February 2007 and 2 February 2007 respectively (Australian Council of Trade Union, and Uniting Church of Australia). Both submissions are available at <http://www.aph.gov.au/house/committee/mig/457visas/subs.htm>.

<sup>371</sup> United States Department of State, *Trafficking in Persons Report 2007*, p 57.

<sup>372</sup> Senator Chris Evans, 'New laws to protect overseas workers' (Press Release, 24 September 2008).

<sup>373</sup> *Fryer v Yoga Tandoori House Pty Limited* [2008] FMCA 288 (Unreported, Federal Magistrates Court of Australia, Cameron FM, 13 March 2008).

## H.2 Indigenous Stolen Wages

398. In December 2006, the Senate Legal and Constitutional Affairs Committee published a report entitled *Unfinished Business: Indigenous Stolen Wages*.<sup>374</sup> ‘Stolen wages’ is a term used to refer to the wages of ‘Indigenous workers whose paid labour was controlled by Government’ under the ‘protection acts’ of the 19th and 20th centuries. That legislation enabled states and territories to control the conditions of Indigenous people at work, including for whom they worked, for how long and under what conditions, and absolutely controlled the wages earned in that employment. In many cases, Indigenous people did not receive any wages. In this regard, practices under this legislation arguably constituted slavery and certainly raise serious concerns in relation to Article 8 of the *ICCPR*.
399. This control resulted in government practices including:
- (a) failing to pay wages and entitlements to Indigenous workers;
  - (b) deliberately paying lower wages to Indigenous workers than non-Indigenous workers;
  - (c) withholding the wages and entitlements of Indigenous workers in government trust and savings accounts; and
  - (d) failing to provide safe and healthy working conditions.
400. The Senate Legal and Constitutional Affairs Committee found that Indigenous stolen wages affected every Australian jurisdiction.<sup>375</sup>
401. In 1999, the Queensland Government established the Underpayment of Award Wages Process, which compensated Indigenous individuals for the Queensland Government’s underpayment to them of wages.<sup>376</sup> The compensation consisted of a one-off payment of \$7,000. In 2003, the Queensland Government established the Indigenous Wages and Savings (1890s to 1980s) Reparation Process.<sup>377</sup> This process makes *ex gratia* payments to claimants whose wages were compulsorily held in government accounts and not paid out to them. The Queensland Government denies that this process is compensatory. However, it requires successful applicants to waive any legal claims it may have against the State in order to qualify for the \$2,000 and \$4,000 ‘without prejudice’ offers. Indigenous Queenslanders have criticised these two processes as arbitrary and inadequate.<sup>378</sup>

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<sup>374</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006) available at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/stolen\\_wages/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/index.htm).

<sup>375</sup> *Ibid* xiii–xiv.

<sup>376</sup> This process was established in response to the successful race discrimination complaint in *Bligh & Others v State of Queensland* [1996] HREOCA 28 (Unreported, Human Rights and Equal Opportunity Commission, Carter QC, 24 September 1996). A later race discrimination complaint, *Baird v State of Queensland* (2006) 156 FCR 451, succeeded in extending the government’s liability. However, the Queensland government has not extended the Underpayment of Awards Process to cover the findings of the *Baird* case.

<sup>377</sup> The Queensland Scheme’s website is [http://www.atsip.qld.gov.au/datsip/work\\_savings.cfm](http://www.atsip.qld.gov.au/datsip/work_savings.cfm).

<sup>378</sup> Senate Legal and Constitutional Affairs Committee, *Unfinished Business: Indigenous Stolen Wages*, above n 374, 95-97.

402. In 2005, the New South Wales Government established the Aboriginal Trust Fund Repayment Scheme to pay back monies held in trust for Indigenous people under the 'protection acts'.<sup>379</sup> The New South Wales Scheme is limited to repayment of monies held on trust for individuals by the New South Wales Government. Documentary evidence of the existence of a trust account must be provided. However, government and institutional record-keeping was poor, sometimes incorrect or false, and has been inadequately preserved. Where no records were created, or have been lost or destroyed, a claim under the New South Wales Scheme will fail, regardless of any oral evidence that is available. Similarly, if money did not pass through a trust account, either because no account was established, or no money was paid, claims for that money will fail.
403. No scheme or process currently in operation in Australia calls on state and territory governments to account for the monies held by them on behalf of Indigenous people. This has effectively allowed both the New South Wales<sup>380</sup> and Queensland<sup>381</sup> governments to reduce their overall liability to Indigenous people. Further, such schemes also fail to address all the consequences flowing from the control of Indigenous wages by governments.
404. In its *Unfinished Business: Indigenous Stolen Wages* report, the Senate Committee made extensive recommendations for redress.<sup>382</sup> However, no coordinated response to Indigenous stolen wages has been initiated by the Australian Government, despite the Senate Committee's finding that '[I]t would be an abrogation of moral responsibility to delay any further, particularly with the knowledge that the age and infirmity of the Indigenous people affected by these practices limit their capacity to pursue claims [in the courts]'.<sup>383</sup>

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<sup>379</sup> The New South Wales Scheme's website is <http://www.atfrs.nsw.gov.au/>.

<sup>380</sup> An early estimate of the New South Wales Government's liability for stolen wages, based on the number of potential claimants and monies paid into trust, was AU\$69 million. A later estimate, based on the cost of implementing the (then) proposed NSW Scheme, was AU\$15 million: Brian Gilligan, Terri Janke and Sam Jeffries, *Report of the Aboriginal Trust Fund Repayment Scheme*, (2004) Aboriginal Trust Fund Repayment Scheme Panel [2.6], available at [http://www.atfrs.nsw.gov.au/\\_data/assets/pdf\\_file/0020/15545/Report\\_of\\_the\\_Aboriginal\\_Trust\\_Fund\\_Repayment\\_Scheme\\_Panel\\_Oct\\_2004.pdf](http://www.atfrs.nsw.gov.au/_data/assets/pdf_file/0020/15545/Report_of_the_Aboriginal_Trust_Fund_Repayment_Scheme_Panel_Oct_2004.pdf). The Public Interest Advocacy Centre advises that less than \$1 million dollars has been paid back to Aboriginal people under the New South Wales Scheme.

<sup>381</sup> The Queensland Government has allocated \$55.4 million to the Wages and Savings process. Compare this amount to the \$180 million estimated to have been actually withheld from Indigenous people by the Government: Dr William Jonas, "'Stolen Wages' case should be delayed, says Social Justice Commissioner" (Press Release, 8 November 2002);.

<sup>382</sup> See Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006) above n 374, xiii–xiv.

<sup>383</sup> *Ibid* [1.15].

### Case Study

Bruce arrived at Caring Home for Aboriginal Boys when he was seven years old and lived there until he was 14. From the day he arrived, Bruce worked from 4:30am to 8:30am chopping wood, milking cows and cleaning. Between 9am and 3pm he went to school. From 4pm to 7pm he worked at a neighbouring farm.

While working at Caring Home, Bruce's leg was broken and he chopped off three toes on his right foot while cutting wood. While working at the neighbouring farm, Bruce broke his hand. He did not receive compensation for any of the injuries he suffered while working.

The manager of Caring Home sometimes imposed additional work on Bruce as punishment for trivial matters, made him 'run the gauntlet', and sexually abused him. The 'gauntlet' comprised two rows of boys who were forced to beat another boy forced to run between the rows. If a boy did not try hard enough (in the view of the manager) to hurt another boy, he was required to run the gauntlet himself.

Bruce was not paid for any of the work he did between the ages of seven and 14. From the age of 14 to 21, the New South Wales Government sent Bruce to work at a factory in a nearby town, where he privately boarded.

The government required the employer to pay most of Bruce's wage into a government account, his board to be paid direct to the boarding house and a small amount to be paid to him as pocket money. Bruce did not receive any pocket money while employed by the factory and when he turned 21 he was refused access to the New South Wales Government account containing his wages.<sup>384</sup>

### H.3 Prison Labour

405. The Committee on Economic, Social and Cultural Rights has previously recommended that Australia ensure that labour in private prisons is voluntarily undertaken and properly remunerated.<sup>385</sup> While the Common Core Document addresses this issue,<sup>386</sup> it fails to identify the following issues:

- (a) that the 'unemployment rate' for prisoners who are unable to work is entirely inadequate;
- (b) that convicted prisoners who refuse to work or who are dismissed from a position are not entitled to the miniscule unemployment rate;
- (c) that convicted prisoners who refuse to work may suffer penalties such as limitation of freedom of movement within the prison, transfer to other prisons, or damage to early release opportunities;

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<sup>384</sup> This case study is drawn from real life experiences of clients at the Public Interest Advocacy Centre, Sydney.

<sup>385</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [30], UN Doc E/C.12/1/Add.50 (2000).

<sup>386</sup> Common Core Document, above n 4, [431]–[436].

- (d) that the type of work required, such as cleaning, kitchen, and laundry duties, provides no opportunity to acquire useful skills, does not involve vocational training in useful trades, and so provides little or nothing by way of rehabilitative value;
- (e) that prisoners do not have the same rights as other workers in relation to workplace injuries; and
- (f) that the remuneration rates for prisoners are well below the minimum wage and lower than the rate for workers undergoing training.

406. These concerns illustrate the issues faced by many prisoners in relation to the realisation of their right to freedom from forced work contained in Article 8 of the *ICCPR*.

#### **H.4 Child Labour**

407. The issue of child labour raises concerns under Article 8 of the *ICCPR*. This issue is discussed further under [Article 24: Child Labour](#).

#### **PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 8)**

- Please update the Human Rights Committee as to implementation of the 2006 recommendation of the Committee on the Elimination of Discrimination against Women that Australia formulate a comprehensive strategy to combat the trafficking of women and exploitation resulting from prostitution.
- What steps is Australia taking to ensure that adequate compensation is paid to Indigenous Australians for ‘Stolen Wages’?

#### **PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 8)**

THAT Australia formulate a comprehensive strategy to combat the trafficking of women and exploitation resulting from prostitution.

THAT Australia implement the recommendations contained in the *Unfinished Business: Indigenous Stolen Wages* report, including the establishment of a national compensation plan.

THAT Australia implement laws to ensure that prisoners are:

- (a) fairly remunerated for their work;
- (b) not penalised through loss of other opportunities or privileges for refusing to undertake paid work;
- (c) provided with opportunities to acquire vocational skills to assist them to find post-release employment; and
- (d) equally protected in relation to workplace injury as other workers.

## Article 9 — Freedom from Arbitrary Detention

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**Article 9:**

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*
4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

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### I. FREEDOM FROM ARBITRARY DETENTION

408. Article 9(1) enshrines the right to liberty and security of person. It also prohibits the subjection of any person to arbitrary arrest or detention, and limits the deprivation of a person's liberty to such grounds and in accordance with such procedures as are established by law.

## I.1 Immigration Law, Policy and Practice

### (a) *Mandatory Immigration Detention*

409. Since 1992, Australia has maintained a policy of indefinite mandatory detention of asylum seekers. The *Migration Act 1958* (Cth) (***Migration Act***) establishes a scheme whereby an ‘unlawful non-citizen’ — that is a non-citizen who does not hold a valid visa<sup>387</sup> — must be detained<sup>388</sup> until such time as they are removed from Australia, deported, or granted a visa.<sup>389</sup> If none of the triggers for release eventuates, detention can be indefinite.<sup>390</sup> In July 2008, the current Australian Government announced proposed reforms to Australia's immigration policy, which are discussed further below under [Recent Changes in Policy](#).
410. Individuals who invoke Australia's international protection obligations are permitted to make protection visa applications. The basic criterion for the grant of a protection visa is that the applicant is ‘a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugee Convention as amended by the Refugee Protocol’.<sup>391</sup> If they are found not to meet these criteria, the asylum seeker may be able to access merits and judicial review of the decision. The Minister for Immigration is also able to substitute a ‘more favourable’ decision ‘if the Minister thinks that it is in the public interest to do so’.<sup>392</sup> This process can take a long time, with some applications sitting with the courts or the Minister for many months, even years.
411. There are Ministerial Guidelines which outline cases where the Minister is more likely to find that it is the ‘public interest’ to intervene and substitute a more favourable decision.<sup>393</sup> The Guidelines indicate that the Minister might take into account Australia's obligations under obligations under the *ICCPR*, the *Convention on the Rights of the Child*, and the *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*. However, the Minister's discretion is non-compellable. Further, Australia's obligations under the Statelessness Convention are not specifically mentioned.

### (1) *Criticisms of Mandatory Detention*

412. Australia's policy of mandatory immigration detention has received extensive criticism both domestically and internationally. The Human Rights and Equal Opportunity Commission (**HREOC**) has repeatedly called for mandatory detention to be repealed,<sup>394</sup> and the same recommendation has been made by a number of international human rights bodies including

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<sup>387</sup> *Migration Act* ss 13 and 14.

<sup>388</sup> *Migration Act* s 189.

<sup>389</sup> *Migration Act* s 196.

<sup>390</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>391</sup> *Migration Act* s 36.

<sup>392</sup> *Migration Act* s 417.

<sup>393</sup> Department of Immigration and Multicultural and Indigenous Affairs, *Migration Series Instruction No 386: Guidelines on Ministerial Powers under Sections 345, 351, 391, 417, 454 and 501 of the Migration Act 1958*, available at [http://www.aph.gov.au/senate\\_minmig/submissions/sub24att9.pdf](http://www.aph.gov.au/senate_minmig/submissions/sub24att9.pdf).

<sup>394</sup> See, eg, HREOC, *Summary of Observations*, above n 271.

the Human Rights Committee,<sup>395</sup> the Committee against Torture,<sup>396</sup> and the Committee on the Rights of the Child.<sup>397</sup>

413. The Human Rights Committee has concluded on seven occasions since 1997 that Australia's system of immigration detention breached Article 9(1) of the *ICCPR*.<sup>398</sup> Principally, the Committee has found that Australia's detention regime is arbitrary as:

- (a) there is no consideration of the particular circumstances of each detainee's case;<sup>399</sup>
- (b) the Australian Government could not demonstrate, in the particular circumstances of each case, that there were no less invasive means of achieving the Government's immigration policy objectives;<sup>400</sup>
- (c) the length of the detention, and its potentially indefinite nature, could not be justified by the circumstances of each case;<sup>401</sup> and
- (d) the opportunities for substantive judicial review of the lawfulness of detention were non-existent or inadequate.<sup>402</sup>

414. The report of the United Nations Working Group on Arbitrary Detention<sup>403</sup> supported the Human Rights Committee's findings, identifying the following three aspects of Australia's detention regime as demonstrating arbitrariness:

- (a) the mandatory, automatic and indiscriminate character of detention;

<sup>395</sup> See, eg, *Shams et al v Australia*, UN Doc CCPR/C/90/D/1255 (11 September 2007).

<sup>396</sup> Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008).

<sup>397</sup> Committee on the Rights of the Child, *Concluding observations: Australia*, [64], UN Doc CRC/C/15/add.268 (2005).

<sup>398</sup> *D & E v Australia*, UN Doc CCPR/C/87/2D/1050/2002 (2006); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (2003); *Bakhtiyari v Australia*, UN Doc CCPR/C/79/D/1069/2002 (2003); *C v Australia*, UN Doc CCPR/C/76/D/900/1999 (2002); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (1997); *Shams et al v Australia*, UN Doc CCPR/C/90/D/1255 (2007); *Shafiq v Australia*, UN Doc CCPR/C/88/D/1324/2004 (2006).

<sup>399</sup> *Shams et al v Australia*, [7.2], UN Doc CCPR/C/90/D/1255 (2007); *C v Australia*, [8.2], UN Doc CCPR/C/76/D/900/1999 (2002).

<sup>400</sup> *Shams et al v Australia*, [7.2], UN Doc CCPR/C/90/D/1255 (2007); *C v Australia*, [8.2], UN Doc CCPR/C/76/D/900/1999 (2002); *Bakhtiyari v Australia*, [9.2], UN Doc CCPR/C/79/D/1069/2002 (2003).

<sup>401</sup> *C v Australia*, [8.2], UN Doc CCPR/C/76/D/900/1999 (2002); *Bakhtiyari v Australia*, [9.2], UN Doc CCPR/C/79/D/1069/2002 (2003); *D & E v Australia*, [7.2], UN Doc CCPR/C/87/2D/1050/2002 (2006).

<sup>402</sup> *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001 (2003); *Shams et al v Australia*, [7.2], UN Doc CCPR/C/90/D/1255 (2007); *C v Australia*, [8.2], UN Doc CCPR/C/76/D/900/1999 (2002).

<sup>403</sup> Commission on Human Rights, Economic and Social Council, United Nations, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Visit to Australia*, UN Doc E/CN.4/2003/8.Add 2 (2002) (**Working Group Report**). See also Report of Justice P N Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, *Mission to Australia 24 May to 2 June 2002: Human Rights and Immigration Detention in Australia* (**Bhagwati Report**).

- (b) the potentially indefinite duration of detention; and
- (c) the lack of sufficient juridical control of the legality of detention.

415. Although the Working Group did not expressly state that these aspects of the regime breached the international prohibition on arbitrary detention, the Working Group did conclude by expressing hope that the Australian Government would 'take the initiative to review its laws in order to bring them into compliance with commonly accepted international standards, in particular the *ICCPR*'.<sup>404</sup>

416. In the absence of repealing mandatory immigration detention, HREOC has recommended that there should be greater efforts to promptly release detainees and resolve visa decisions.<sup>405</sup> However, as identified in the Introduction to this submission, HREOC's authority is limited to recommendations only, with no power to bind the Australian Government.

## **(2) Recent Changes in Policy**

417. Despite these concerns, the Australian Government maintains its policy of mandatorily detaining all unauthorised arrivals, although there has been some softening of the practice since 2005. There have been some changes including:

- (a) an amendment to the *Migration Act* which means that a child will only be detained within an immigration detention facility 'as a measure of last resort'.<sup>406</sup> This issue is discussed in further detail under Article 24: Children in Immigration Detention; and
- (b) the introduction of residential housing facilities and residence determinations.

418. In July 2008, the current Australian Government announced proposed reforms to Australia's immigration policy. The proposed reforms involved a statement by the Minister for Immigration and Citizenship of 'seven key immigration values':<sup>407</sup>

- (a) Mandatory detention is an essential component of strong border control.

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<sup>404</sup> *Working Group Report*, above n 403, 2.

<sup>405</sup> HREOC, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (2006), available at [http://www.hreoc.gov.au/immigration/inspection\\_of\\_mainland\\_rdf.html](http://www.hreoc.gov.au/immigration/inspection_of_mainland_rdf.html).

<sup>406</sup> Article 37 of the *Convention on the Rights of the Child* provides that detention of a child 'shall only be used as a measure of last resort and for the shortest appropriate period of time' and that a child deprived of liberty 'shall be treated with humanity and respect for the inherent dignity of the human person'. This principle is now recognised in the *Migration Act*, following the passage in 2005 of the *Migration Amendment (Detention Arrangements) Act 2005* (Cth). Section 4AA(1) of the *Migration Act* provides: 'the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort'. This section goes on to say that the measure of last resort principle does not apply to residence determination detention arrangements. As at 21 September 2007, there were 32 children living in community detention, four children living in immigration residential housing and sixteen children living in alternative temporary detention in the community. There were no children in Australian mainland immigration detention centres: Department of Immigration and Citizenship, Detention and Offshore Services Division, Detention Statistics Summary, available at <http://www.immi.gov.au>.

<sup>407</sup> Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (Speech delivered at the Australia National University, Canberra, 29 July 2008).

- (b) To support the integrity of Australia's immigration program, three groups will be subject to mandatory detention:
    - (i) all unauthorised arrivals, for management of health, identity and security risks to the community;
    - (ii) unlawful non-citizens who present unacceptable risks to the community; and
    - (iii) unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
  - (c) Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.
  - (d) Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
  - (e) Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
  - (f) People in detention will be treated fairly and reasonably within the law.
  - (g) Conditions of detention will ensure the inherent dignity of the human person.
419. Although representing considerable, and welcome, improvements, the proposed reforms to Australia's immigration detention regime have not been legislatively incorporated into the *Migration Act* or its regulations.
420. Further, while the recent policy shift of the current Australian Government represents a substantial improvement of Australia's immigration detention policy, there remain a number of issues with the proposed changes in the context of the right to freedom from arbitrary detention. Most significantly, the current Australian Government has signalled its intention to maintain a policy of mandatory detention of all unauthorised arrivals for 'for management of health, identity and security risks to the community'.
421. In May 2008, the Joint Standing Committee on Migration decided to inquire into immigration detention in Australia.<sup>408</sup> Terms of reference for the inquiry include:
- (a) the criteria that should be applied in determining how long a person should be held in immigration detention and when a person should be released from immigration detention following health and security checks;
  - (b) options for the provision of detention services and detention health services across the range of current detention facilities; and
  - (c) options for additional community-based alternatives to immigration detention.
422. The Committee is due to report on its findings by 30 September 2008.
423. Notwithstanding the proposed reforms representing a significant and positive departure from the policies of previous Australian governments, Australia's immigration law, policy and

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<sup>408</sup> For the terms of reference, see Joint Standing Committee on Migration website at <http://www.aph.gov.au/house/committee/mig/detention/index.htm>.

practice continue to raise serious concerns in relation to Article 9 of the *ICCPR*. Even supposing the changes are implemented, ‘unauthorised arrivals’ are still detained:

- (a) for health checks, to which authorised arrivals are not subject, which is discriminatory and arguably a disproportionate limitation;
- (b) if they are an ‘unacceptable risk to the community’, an undefined and potentially over-broad criterion; and
- (c) for an indeterminate period, with limited access to effective judicial review.

424. Abolition of Australia’s policy of mandatory detention of asylum seekers would ensure compliance with Australia’s obligations under Article 9 of the *ICCPR*, as well as Articles 7 and 10.

**(b) Stateless People**

425. Provisions of the *Migration Act* have resulted in the alarming situation where an individual who has committed no crime, who has requested removal from Australia and who is cooperating with the authorities, may be kept in immigration detention for the rest of their life because they are effectively stateless and cannot be removed from Australia.<sup>409</sup> Not only did the High Court of Australia determine that it is both constitutional and lawful under the *Migration Act* to keep a person in immigration detention indefinitely, but the former Australian Government strongly defended this position. In its recent Concluding Observations, the Committee against Torture was especially concerned at the situation of stateless people in immigration detention who cannot be removed to any country and risk to be potentially detained ‘*ad infinitum*’.<sup>410</sup>

426. The inability of stateless persons who have left their countries of habitual residence to return to them has been a reason for unduly prolonged or arbitrary detention of these persons in Australia. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality (which in the circumstances is difficult to acquire) have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

427. However, the Government has announced that under the new regime ‘[d]etention that is indefinite or otherwise arbitrary is not acceptable’ and that ‘[d]etention in immigration detention centres is only to be used as a last resort and for the shortest practicable time’.<sup>411</sup>

428. The effective implementation of these encouraging commitments would require a legislatively enshrined time limit on immigration detention. To date, the Government has not indicated that it intends to make such an amendment to the *Migration Act*.

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<sup>409</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>410</sup> Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, [11], UN Doc CAT/C/AUS/CO/3 (2008).

<sup>411</sup> Chris Evans, ‘New Directions in Detention – Restoring Integrity to Australia’s Immigration System’ (Speech delivered at the Australia National University, Canberra, 29 July, 2008).

**Case Study: Al-Kateb**

Ahmed Al-Kateb is a Palestinian man born in Kuwait who moved to Australia in 2000 and applied for a temporary protection visa. The Minister for Immigration refused his application. This decision was upheld by the Refugee Review Tribunal and the Federal Court of Australia. In 2002, Mr Al-Kateb applied to return to either Kuwait or Gaza. However, as neither country had ever granted him citizenship, Kuwait and Palestine refused to accept Mr Al-Kateb, rendering him stateless. He was then to be held in Australian detention indefinitely under the policy of mandatory detention.

Mr Al-Kateb's appeal to the High Court was rejected. A majority of the High Court held that the *Migration Act* permitted indefinite detention, and that indefinite detention is permissible under the Constitution of Australia.<sup>412</sup>

**Case Study: Qamar Naseeb Khan**

Qamar Naseeb Khan an Indian national from the disputed area of Kashmir arrived in Australia in 1998 via Papua New Guinea on a boat. He was immediately detained. He was unsuccessful in an application for a protection visa and in his appeals to the Minister for Immigration. The Indian government refused to acknowledge his identity and would not accept him back. He spent five years in detention until he was released by the Federal Court of Australia in August 2003. While on release he was not allowed to work or have access to social security. He married an Australian citizen.

In October 2007 the Minister for Immigration granted him a Removal Pending Bridging Visa which allows him to work but means he can be removed from Australia at any time.

**(c) Lack of Available Remedies**

429. The former Australian Government implemented a consistent and sustained policy over a number of years to drastically scale back the remedies available to detained persons and to minimise the scope of judicial and other review available in relation to administrative decisions made under the *Migration Act*. In the second reading speech before the Senate in relation to the *Migration Legislation Amendment (Judicial Review) Bill 1998* (Cth), the Parliamentary Secretary for the former Minister for Immigration noted that the purpose of the bill was 'to give legislative effect to the [then] government's election commitment to reintroduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances'.<sup>413</sup>
430. Section 189(1) of the *Migration Act* requires a Department of Immigration and Citizenship officer or a police officer to detain any person they know or reasonably suspect to be an unlawful non-citizen. Section 196(1) provides that an unlawful non-citizen detained under section 189(1) must be kept in immigration detention until removed from Australia, deported

<sup>412</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>413</sup> Commonwealth, *Parliamentary Debates*, Senate, 2 December 1998, 1025 (Senator Kay Paterson).

or granted a visa. The detention of unlawful non-citizens is therefore prescribed by the operation of law and not by an order of a court or administrative authority.

431. The absence of judicial oversight increases the risk that a person may be detained on the basis of an insufficient or an erroneous reasonable suspicion that a person is an unlawful non-citizen. This concern about the possibility of individuals being wrongfully detained or even deported is highlighted by the Case Studies under Articles 7 and 10: Education and Training of Immigration Officers.
432. The ability to challenge the lawfulness of detention is an important safeguard against arbitrary detention. The *ICCPR* requires that detainees be able to challenge the lawfulness of their detention before a court.<sup>414</sup> Similarly, Principle 11(1) of the UN Body of Principles requires that ‘a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority’.
433. In *A v Australia*, the Human Rights Committee noted that ‘every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed’.<sup>415</sup> Furthermore, judicial review of the lawfulness of detention must be, in its effects, real and not merely formal.<sup>416</sup>
434. The Human Rights Committee and the United Nations Working Group on Arbitrary Detention have both expressed concern about the lack of adequate judicial review of immigration detention in Australia.<sup>417</sup> The Working Group noted that, although avenues for judicial review exist, ‘it is unlikely that these remedies are effective in ordinary immigration detention cases’, due to the difficulty of detainees obtaining, and being able to pay for, legal representation.<sup>418</sup> In *Baban v Australia*,<sup>419</sup> the Human Rights Committee was highly critical of the fact that, in that case:
- judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and ... the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant.<sup>420</sup>
435. In order to comply with international human rights law, any form of immigration detention must be subject to judicial review.

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<sup>414</sup> *ICCPR* art 9(4).

<sup>415</sup> [9.4], UN Doc CCPR/C/59/D/560/1993 (3 April 1997).

<sup>416</sup> *Ibid* [9.5].

<sup>417</sup> *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Visit to Australia*, UN Doc E/CN.4/2003/8.Add 2 (24 October 2002). See also Bhagwati Report, above n 403.

<sup>418</sup> *Working Group Report* 8.

<sup>419</sup> UN Doc CCPR/C/78/D/1014/2001 (6 August 2003).

<sup>420</sup> *Ibid* [7.2].

## I.2 Counter-Terrorism Measures

436. Many aspects of Australia's counter-terrorism measures raise serious concerns in relation to Article 9 of the *ICCPR*, in particular the regimes relating to preventative detention and control orders. Practices involving detention by the Australian Security and Intelligence Organisation, and the length and conditions of detention of remand prisoners also raise issues with arbitrary detention and are discussed in further detail under Articles 7 and 10: Counter-Terrorism Measures.

### (a) Preventative Detention Orders

437. Where the Australian Federal Police (**AFP**) considers that a terrorist act is imminent, they may preventatively detain a person for up to 48 hours. Division 105 of the *Criminal Code 1995* (Cth) (**Criminal Code**) sets out the federal regime for preventative detention.

438. An initial preventative detention warrant for up to 48 hours may be made by a senior member of the AFP, with no requirement for judicial authorisation.<sup>421</sup> An AFP member may then apply to an 'issuing authority' for a continued preventative detention order for up to 48 hours.<sup>422</sup> This period may be extended to 14 days under complementary state and territory regimes. For the extension of an initial detention order or the continuation of a preventative detention order, a police member is merely required to adduce 'such facts and grounds' which would make the continuation of a detention order 'reasonably necessary' in the circumstances.<sup>423</sup>

439. Under a preventative detention order:

- (a) the detainee is held in circumstances of extreme secrecy and may effectively be held incommunicado, except for limited contact with family. Contact with a lawyer of choice, or any lawyer at all, may be prohibited through a 'prohibited contact order';<sup>424</sup>
- (b) even where contact with a lawyer is permitted, the detainee's ability to effectively communicate is hampered as all communications may be monitored by police;<sup>425</sup> and
- (c) a reporter, advocate or accused who discloses circumstances of their detention may be liable to five years imprisonment under the 'non-disclosure' offences.<sup>426</sup>

440. Under the preventative detention regime, an individual can therefore be held for up to 48 hours on virtually untested bases and information, with limited contact with the outside world and no ability to appeal or challenge their detention.

441. In addition to raising concerns regarding freedom from arbitrary detention, the presumption of innocence and the right to a fair hearing, the regime raises significant concerns due to the inadequacy of safeguards to comprehensively prevent ill-treatment.

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<sup>421</sup> *Criminal Code* ss 105.7 and 105.8.

<sup>422</sup> "Issuing authorities" include judges, federal magistrates, Administrative Appeals Tribunal members and retired judges: *Criminal Code* ss 100.1 and 105.2.

<sup>423</sup> *Criminal Code* ss 105.10(2) and 105.11(2).

<sup>424</sup> *Criminal Code* ss 105.16. See also *Criminal Code* ss 105.14A and 105.15.

<sup>425</sup> *Criminal Code* s 105.38.

<sup>426</sup> *Criminal Code* s 105.41.

**(b) Control Orders**

442. Control orders are protective measures that allow controls to be placed on the movements and activities of people who are alleged to pose a terrorist risk to the community. Division 104 of the *Criminal Code* sets out the control order regime.
443. Before obtaining a control order, the AFP must first obtain the consent of the Attorney-General, after which the AFP may request that the Federal Court of Australia make an interim control order. The Court must be satisfied, on the balance of probabilities, that:
- (a) the order would substantially assist in preventing a terrorist act; or
  - (b) the person has given training to or received training from one of the listed terrorist organisations.

The listing of ‘terrorist organisations’ is discussed in further detail under [Article 18: Counter Terrorism Measures](#).

444. A control order may include:<sup>427</sup>
- (a) a prohibition or restriction on the person being at specified areas or places;
  - (b) a prohibition or restriction on the person leaving Australia;
  - (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
  - (d) a requirement that the person wear a tracking device;
  - (e) a prohibition or restriction on the person communicating or associating with specified individuals;
  - (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
  - (g) a prohibition or restriction on the person possessing or using specified articles or substances;
  - (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
  - (i) a requirement that the person report to specified persons at specified times and places;
  - (j) a requirement that the person allow himself or herself to be photographed;
  - (k) a requirement that the person allow impressions of his or her fingerprints to be taken; and
  - (l) a requirement that the person participate in specified counselling or education.
445. The Court must be satisfied that each of the conditions of the proposed control order is ‘reasonably necessary’. Control orders can last for a maximum of 12 months. Individuals the subject of a control order may apply to the Federal Court of Australia for a revocation or

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<sup>427</sup> *Criminal Code* s 104.5(3).

variation of the order. The offence for contravention of a control order is a maximum of five years' imprisonment.

446. Control orders place significant restrictions on an individual's behaviour, movements and liberties, raising concerns with Article 9 of the *ICCPR*.

**Case Study: Jack Thomas**

After being acquitted of terrorism-related charges (see Case Study above on page 90), an interim control order was placed on Jack Thomas in August 2006. The grounds for the order were that Mr Thomas had trained with Al Qa'ida in 2001 and that, as a result, he could be a resource in a terrorist act for Al Qa'ida or some other 'extremists'. This interim control order remained in place for approximately one year and included the following conditions relating to Mr Thomas's movements:

- a curfew from midnight to 5:00am everyday;
- a requirement to report to police three times a week; and
- a prohibition on leaving Australia.

Ultimately, after remaining in place for 12 months, the interim control order was not finalised.<sup>428</sup>

**Case Study: David Hicks**

After pleading guilty before a US Military Commission to a charge of providing material support for terrorism (see Case Study on page 92), David Hicks was released into the custody of Australia and served the remainder of his sentence in a South Australian prison. Immediately upon his release in December 2007, Mr Hicks was made subject to an interim control order.

The conditions of the control order required that Mr Hicks:

- report at least three times per week to a police station;
- be fingerprinted; and
- be subject to a curfew between midnight and 6am.

The order also imposed significant restrictions as to where Mr Hicks could live, with whom he could associate and where he could travel. It also substantially restricted his ability to communicate via email, telephone (fixed or mobile) and the internet.

The grounds for the imposition of the control order have never been tested by an Australian court. In February 2008, the Federal Court of Australia eased some of the conditions and restrictions imposed on Mr Hicks, while affirming the application of the control order.

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<sup>428</sup> This is the understanding of the authors at the time of preparing this submission, based on publically available information.

### **I.3 Mandatory Sentencing Laws**

447. Mandatory sentencing laws for many offences remain under the *Western Australian Criminal Code*. Mandatory sentencing laws raise concerns with Article 9 of the *ICCPR* because they do not allow:
- (a) for any differentiation between serious and minor offending;
  - (b) for any differentiation between those for whom offending is out of character and those who display elements of recidivism;
  - (c) courts to sentence individuals according to the circumstances of the particular case; and
  - (d) courts to sentence individuals according to the circumstances of the particular offender.
448. The arbitrary nature of mandatory sentencing laws is also compounded by some aspects of police practices, as discussed in further detailed below under Policing Practices. The exercise of police and prosecutorial discretion effectively determines whether or not an offender is subject to a period of imprisonment.
449. The disproportionate and unjust nature of mandatory sentencing law raises concerns in relation to Article 9 of the *ICCPR*. The particular impact of mandatory sentencing laws on Indigenous Australians is discussed under Articles 7 and 10: Indigenous Australians.

### **I.4 People with Mental Illness**

#### **(a) Involuntary Detention**

450. Mental health laws in all Australian jurisdictions make provision for the involuntary detention of people with a mental illness when certain criteria are met. The relevant criteria vary between jurisdictions, but generally, a person may be detained as an involuntary patient if they appear to suffer from a mental illness, if their health or safety is at risk, or if they pose a threat to the public.<sup>429</sup>
451. The relative ease with which involuntary detention is currently imposed on individuals raises concerns with Article 9 and 10 of the *ICCPR*. The compatibility of involuntary detention and human rights may be improved through the availability of legally recognised Advance Directives. Advance Directives are prepared by people when they are well and allow that person to articulate their treatment preferences or nominate another person to make particular decisions.<sup>430</sup>
452. In 2006, a Senate Committee inquiry into the mental health sector in Australia reported that, as a matter of priority, state and territory governments consider making advance directives available to people who suffer from mental illness. To date, advance directives have not been granted legal recognition in any Australian jurisdictions.

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<sup>429</sup> Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health*, above n 328, 37.

<sup>430</sup> Vivienne Topp and Martin Thomas, 'Advance Directive for Mental Health', (2008) *New Paradigm*.

**(b) External Review of Involuntary Treatment**

453. The failure of many mental health review bodies to conduct timely external reviews of the involuntary detention of persons raises serious concerns with Article 9 of the *ICCPR*. Indeed, the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (UN Principles)* provide that initial involuntary admission shall be for a 'short period' pending external review<sup>431</sup> and that the review shall take place 'as soon as possible'.<sup>432</sup>
454. However, most Australian jurisdictions fail to comply with these principles.<sup>433</sup> For example, in Victoria and Western Australia, the period within which initial automatic review must take place is 8 weeks,<sup>434</sup> in Queensland it is 6 weeks,<sup>435</sup> South Australia 45 days<sup>436</sup> and Tasmania 28 days.<sup>437</sup> In 2001, a review by Victoria's Auditor-General identified that almost 70 per cent of involuntary patients did not have their status reviewed by the Mental Health Review Board at all because they had been discharged before the hearing.<sup>438</sup>
455. In addition to the period of time for an initial review, the interval between automatic periodic reviews in many jurisdictions also raises concerns with the prohibition on arbitrary detention. For example, in Victoria community treatment orders can be for up to 12 months and involuntary patients are only reviewed every 12 months.<sup>439</sup> While in Victoria people can appeal to the board for a review of their order at any time, it is insufficient to leave the initiation of reviews to those subject to the order.<sup>440</sup> This issue is compounded by an inability to access legal representation to assist individuals to challenge their treatment order, which is discussed further under Article 14: Adequacy of Funding of Legal Aid and Community Legal Centres.
456. The inability of people subjected to involuntary detention to challenge their detention in a timely manner raises serious concerns with Article 9 of the *ICCPR*.

**I.5 Policing Practices**

457. Many policing practices raise concerns in relation to the right to non-discrimination and equality before the law, the right to a fair trial and, in many instances, freedom from arbitrary detention.

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<sup>431</sup> UN Principles, Principle 16.2.

<sup>432</sup> Principle 17.2.

<sup>433</sup> See generally, Sophie Delaney, *An Optimally Rights Recognising Mental Health Tribunal – What Can Be Learned from Australian Jurisdictions*, (2003) 10 *Psychiatry, Psychology and Law* 71.

<sup>434</sup> *Mental Health Act 1986* (Vic) s 30; *Mental Health Act 1986* (WA) s 138.

<sup>435</sup> *Mental Health Act 2000* (Qld) s 187.

<sup>436</sup> *Mental Health Act 1993* (SA) s 12.

<sup>437</sup> *Mental Health Act 1996* (Tas) s 52.

<sup>438</sup> Auditor-General for Victoria, *Mental Health Services for People in Crisis* (2002), 8.

<sup>439</sup> *Mental Health Act 1986* (Vic) s 30.

<sup>440</sup> Delaney, above n 433, 76.

**(a) Police Discretion to Arrest**

458. Police in the field regularly exercise their discretion to arrest persons accused of minor offences when other more appropriate alternatives that do not compromise a person's liberty are available. Alternatives include cautioning or issuing a Field Court Attendance Notice or summons.
459. While legislation permits police to arrest a person reasonably suspected of having committed an offence (or about to commit an offence), police codes of practice recommend arrest as a last resort.<sup>441</sup> Some appellate court judgments have been critical of police arresting a person who has committed a minor offence and poses no real risk of absconding.<sup>442</sup>
460. A common scenario where police inappropriately and prematurely choose to exercise their discretion to arrest is when they detect people engaging in offensive conduct or offensive language in public places (both minor offences in all Australian jurisdictions). These scenarios commonly involve Indigenous people and intoxicated people in remote or rural settings. They also commonly result in additional charges of resisting arrest and assaulting and intimidating police being laid against the person, when they quite naturally react adversely to the unnecessary and heavy-handed approach taken by the police.
461. The discretion to arrest an accused person should only be exercised:
- (a) as a last resort;
  - (b) where the offence is serious enough to warrant it;
  - (c) after considering the medical status of the accused person (particularly if they are intoxicated);
  - (d) if there is a likelihood the accused person will abscond and not appear at court;
  - (e) if there is a likelihood the accused person will offend again; and
  - (f) if there is a likelihood the accused person will interfere with the police investigation, intimidate witnesses, interfere with evidence or be a risk to the safety of any victim.

**Case Study**

A magistrate found that Mr Lance Carr, an Indigenous man, was arrested for swearing at a policeman.<sup>443</sup> He was subsequently charged with a further three charges of resisting arrest, assaulting police and intimidating police.

The maximum penalty for offensive language at the time of the alleged offence was a fine of \$660. It is at the lowest end of the criminal scale.

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<sup>441</sup> For example, see NSW Police Code of Practice for Custody, Rights, Investigation, Management and Evidence (2008) 9 available at [http://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0007/108808/Code\\_CRIME\\_-\\_February\\_2008.pdf](http://www.police.nsw.gov.au/_data/assets/pdf_file/0007/108808/Code_CRIME_-_February_2008.pdf).

<sup>442</sup> See, eg, *Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151 and *Lake v Dobson* (1981) 5 PS Rev 2221.

<sup>443</sup> *Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151.

**(b) Targeting of Particular Groups**

462. Many disadvantaged and vulnerable groups experience being targeted by law enforcement officials. For example, in the Northern Territory, a significant proportion of policing targets Indigenous Australians for minor offences. During 2005-2006, there were a total of 476 prison sentences handed down for driving offences, with 467 of those sentenced (98 per cent) being Indigenous people.<sup>444</sup> In the same period, 22 per cent of all prison sentences handed out were to Indigenous people for driving offences. Alarming, the statistics also show that of the 2,356 prison sentences handed down by Northern Territory courts, 2,093 of those sentenced (89 per cent) were Indigenous Australians.<sup>445</sup>
463. Other statistics highlighting the disproportionate police targeting of Indigenous people and resulting in their alarming over-representation in custody in the Northern Territory include:<sup>446</sup>
- (a) one in every 23 adult Indigenous males in the Northern Territory is in prison;
  - (b) the imprisonment rate for all people in the Northern Territory is four times the national average; and
  - (c) in March 2007, the average daily number of prisoners in Northern Territory prisons was 861, 688 of whom (80 per cent) were Indigenous Australians.
464. Other marginalised groups are also disproportionately targeted by police, including:
- (a) homeless people, against whom police often inappropriately use move-on powers;<sup>447</sup>
  - (b) young African refugees, including reports about police brutality, harassment and racism,<sup>448</sup> and
  - (c) young people, particularly young homeless people.<sup>449</sup>
465. Many of these practises raise concerns in relation to Article 9 of the *ICCPR*, as well as Article 2.

**(c) Complaints Against Police**

466. The integrity and independence of police complaints procedures in Australia has regularly been questioned. Most states in Australia have civilian oversight bodies that rely on internal

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<sup>444</sup> *Correctional Services Annual Statistics – 2005-2006* (2006) Northern Territory Department of Justice, available at [http://www.nt.gov.au/justice/policycoord/documents/statistics/20061127\\_ntcs\\_stat\\_summary.pdf](http://www.nt.gov.au/justice/policycoord/documents/statistics/20061127_ntcs_stat_summary.pdf).

<sup>445</sup> Ibid.

<sup>446</sup> Ibid.

<sup>447</sup> Monica Taylor and Tamara Walsh (ed), *Nowhere to Go: The Impact of Police Move-on Powers on Homeless People in Queensland* (2006) 72 available at [http://www.qpilch.org.au/\\_dbase\\_upl/Nowhere%20To%20Go.pdf](http://www.qpilch.org.au/_dbase_upl/Nowhere%20To%20Go.pdf).

<sup>448</sup> Liz Porter, 'Police Accused of Race Attacks on Africans', *The Age* (Melbourne), 30 September 2007, available at <http://www.theage.com.au/news/national/police-accused-of-race-attacks-on-africans/2007/09/29/1190486635545.html>.

<sup>449</sup> *Australia's Homeless Youth* (2008) National Youth Commission chapter 18, available at [http://www.nyc.net.au/files/Australias\\_Homeless\\_Youth.pdf](http://www.nyc.net.au/files/Australias_Homeless_Youth.pdf).

police accountability bodies to conduct investigations of police misconduct. This undermines the independence of such investigations and, although there are own motion investigative powers in many jurisdictions, these are sparingly exercised and generally not when the complaints involve only police brutality.

467. Further impediments to police accountability include limited avenues by which to pursue civil litigation. For example, in Victoria, section 123 of the *Police Regulation Act 1958 (Vic)* limits the Victorian Government's liability for civil actions from actions of police officers not performed 'in good faith'. The narrow construction of this provision means that only where police officers are acting under orders or according to operating procedures will the Victorian Government be liable for its actions.

**Case Study: Corinna Horvath**

On 9 March 1996, eight police officers raided the home of Corinna Horvath and Craig Love where four adults and some children were present. Police assaulted all four adults causing injuries to Ms Horvath and Mr Love. Ms Horvath's injuries, including a broken nose, resulted in her being hospitalised for five days.

In April 2001, the Victorian County Court found that the police raid was conducted with 'unnecessary and grossly excessive violence'. The Court found that one of the officers 'brutally and unnecessarily' punched Ms Horvath in the face, fracturing her nose, 'wrought out of unmeritorious motives of ill will and desire to get even'.<sup>450</sup>

The Court ordered that the Victorian Government pay damages of \$315,000 for assault, unlawful arrest, false imprisonment and malicious prosecution. It was also found that the police in question had fabricated part of their version of events and lied with regards to matters of 'major significance'.

On appeal, the Victorian Government successfully argued that under section 123 of the *Police Regulation Act 1958 (Vic)* Victoria Police bore no vicarious responsibility for the actions of the police officers in question.<sup>451</sup> This finding represents a major disincentive for people to take civil action against police in Victoria.

Despite the findings of the trial judge, the police officers have neither been prosecuted nor disciplined.<sup>452</sup>

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<sup>450</sup> *Horvath v State of Victoria* (Unreported, County Court of Victoria, 23 February 2001).

<sup>451</sup> *State of Victoria v Horvath* (2002) 6 VR 326.

<sup>452</sup> Case Study provided by Fitzroy Legal Service, Victoria. This matter is currently the subject of an Individual Communication to the Human Rights Committee.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 9)**

- Please provide information as to the legislative steps being taken to abolish mandatory immigration detention and to enable substantive judicial review of the lawfulness of detention.
- Please advise the Human Rights Committee as to the steps, including legislative steps, being taken by Australia to address the decision of the High Court in *Al-Kateb* which permits the indefinite detention of a stateless person, potentially for life.
- Please update the Human Rights Committee as to the steps and measures, including legislative steps, that Australia is taking to review and implement the recommendations of the Senate Select Committee on Mental Health in *A National Approach to Mental Health – from Crisis to Community* with respect to Advance Directives.
- Please explain whether and how Australia considers that the processes and legislative timelines for external review of involuntary mental health treatment are consistent with the requirements of the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* which provide that initial involuntary admission shall be for a 'short period' pending external review and that the review shall take place 'as soon as possible'.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 9)**

THAT Australia immediately repeal section 189 of the *Migration Act* and legislatively abolish its policy of mandatory immigration detention.

THAT Australia legislate to require that every decision to keep a person in detention be periodically reviewed so that the grounds justifying the detention can be assessed and THAT full rights of judicial review be reinstated in the migration jurisdiction.

THAT Australia legislate to address the decision of the High Court in *Al-Kateb*, which permits the indefinite detention of a stateless person, potentially for life.

THAT Australia comprehensively review all counter-terrorism laws and practices and take all necessary steps and measures, including legislative measures, to ensure that such laws and practices are compatible with human rights, including particularly the right to freedom from arbitrary detention.

THAT Australia review all mandatory sentencing legislation and take all necessary steps and measures to ensure that such legislation does not adversely impact on disadvantaged groups, particularly Indigenous people, in a manner that is disproportionate or discriminatory.

THAT Australia takes steps, including legislative measures, to review and implement the recommendations of the Senate Select Committee on Mental Health in *A National Approach to Mental Health – from Crisis to Community* with respect to Advance Directives.

THAT all Australian jurisdictions ensure that, consistently with the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, initial involuntary admission shall be for a 'short period' pending external review and that the review shall take place 'as soon as possible' and certainly within six weeks.

THAT all Australian jurisdictions review the current police complaints mechanisms to ensure that:

- (a) there are robust complaints mechanisms that require an independent body to properly investigate complaints involving police brutality and criminality; and
- (b) there is effective disciplining of police and enforcement of the findings of the independent bodies.

## Article 12 — Freedom of Movement

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**Article 12:**

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
4. *No one shall be arbitrarily deprived of the right to enter his own country.*

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### **J. FREEDOM OF MOVEMENT**

468. Article 12 of the *ICCPR* provides that everyone has the right to freedom of movement and to leave and enter his or her own country. Any restrictions must be provided for by law, be consistent with the other rights recognised in the Covenant, and be necessary to protect national security, public order, public health or morals or the rights and freedoms of others.

#### **J.1 Counter-Terrorism Measures**

469. Many aspects Australia’s counter-terrorism measures, including control orders and forms of preventative detention, raise concerns in relation to the right to freedom of movement. The nature of control orders and preventative detention orders is discussed in further detail under Article 9: Counter-Terrorism Measures.

470. In addition to concerns in relation to Articles 7, 9 and 10 of the *ICCPR*, control orders and preventative detention orders may subject a person to a wide range of restrictions of liberty, movement and associations. Of particular concern is the fact that such orders are often administrative in nature and not the result of any court ruling. As indicated in the Case Studies under Article 9: Control Orders, among other measures, control orders may include conditions that:
- (a) stop the person going to certain places;
  - (b) stop the person leaving Australia;
  - (c) require the person to remain at specified premises during specified times; and/or
  - (d) require the person to wear a tracking device.
471. In addition to the issue of control orders and preventative detention orders, provisions of the *Australian Security Intelligence Organisation Act 1979* (Cth) require persons who are the subject of Australian Security and Intelligence Organisation (**ASIO**) questioning warrants to surrender their passports.<sup>453</sup> These warrants may be issued to any person who is believed to have information that is important in relation to a terrorism offence, including individuals who are not actually suspects themselves. Passports must be surrendered even if the warrant is not ultimately granted.<sup>454</sup>
472. Passports may also be removed from Australian citizens on the basis of an adverse security assessment by ASIO.<sup>455</sup> Individuals who have their passports revoked are not given details of the basis for the revocation and therefore have difficulty refuting the grounds on which their passports are revoked.
473. These measures raise concerns with Article 12 of the *ICCPR*.

## **J.2 Immigration Detention**

474. Australia's policy of mandatory detention of asylum seekers raises serious concerns under Article 12 of the *ICCPR*. The issue of mandatory detention is discussed in further detail under Articles 7 and 10: Mandatory Detention of Asylum Seekers and Article 9: Immigration Law, Policy and Practice.

## **J.3 People with Disability**

475. Currently, freedom of movement for people with disability is restricted by many barriers to the built environment and various transportation methods.
- (a) Access to Premises Standards**
476. The *Disability Discrimination Act 1992* (Cth) allows for the development of 'Disability Standards for Access to Premises' as a form of delegated legislation. Although work to draft the Standards commenced in 2000 and public consultations were finalised in 2005, the Standards remain at draft stage. Standards for Access to Premises must provide adequate

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<sup>453</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34Y.

<sup>454</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34W.

<sup>455</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 18.

standards and mechanisms to remove barriers to the built environment that restrict the freedom of movement of people with mobility impairments.

**(b) Public Transport Standards**

477. In 2002, the ‘Disability Standards for Accessible Public Transport’ were passed as delegated legislation under the *Disability Discrimination Act 1992* (Cth). The Standards establish minimum accessibility requirements to be met by providers and operators of public transport conveyances, infrastructure and premises. All conveyances, premises and infrastructure brought into use for public transport after the commencement of the Standards must comply with the Standards. A compliance timetable allows between five and 30 years for existing facilities to be made compliant. Compliance with the Standards is a defence to discrimination.
478. In 2007, the former Australian Government commenced a review of the Standards. In early 2008, the current Australian Government released a draft consultant’s report on the review of the Standards. The general quality of the analysis in the draft report is disappointing and many of the concerns experienced by people with disability in relation to access to public transport are not addressed.
479. One of the greatest concerns with the Standards is that there is no mechanism for reporting action plans and monitoring compliance against those plans and the Standards. At present, enforcement of the Standards relies on people with disability to bring complaints against a particular transport provider in relation to breaches of the Standards. Paradoxically, under this ‘complaints focussed’ regime, those who are often the most oppressed and least able bear the burden for implementing the goals and aims of the Standards.

**(c) Access to Air Travel**

480. In 2007, a report entitled *Flight Closed* highlighted the barriers that people with disability face regarding access to airline travel.<sup>456</sup> The report examines how equality of access for people with disability to airline travel has become, if anything, more difficult over the last five years due to, among other things, the deregulation of the domestic air travel industry and the increasingly competitive nature of the market.
481. Some of the areas in which restrictive and inconsistent practices deny air travel for people with a disability include:
- (a) refusal to transport wheelchairs;
  - (b) the application of ‘independent travel criteria’, which either denies access to travel or imposes a condition that the passenger travel with a carer at their own cost; and
  - (c) refusal of assistance animals on board.
482. These issues raise concerns in relation to the realisation of the right to freedom of movement for people with disability.

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<sup>456</sup> Public Interest Advocacy Centre, *Flight Closed: Report on the experiences of People with Disabilities in Domestic Airline Travel in Australia* (2007) available at [http://www.ddatransportreview.com.au/downloads/submissions/63\\_PIAAC.pdf](http://www.ddatransportreview.com.au/downloads/submissions/63_PIAAC.pdf).

**J.4 Deportation of Permanent Australian Residents**

483. Section 501 of the *Migration Act 1958* (Cth) (***Migration Act***) provides that non-citizens who, because of their criminal record, do not satisfy the Minister for Immigration that they are ‘of good character’ can be removed from the country. The types of offences committed by such people have typically been drug-related, or have involved property and theft crimes, armed robbery or assault. The individuals who have been removed include permanent residents who have lived in Australia the vast majority of their lives.
484. A person whose temporary or permanent visa is cancelled on the basis of character under section 501 of the *Migration Act* may also be held in prolonged or indefinite detention. There have been some cases where it is clear that the country of origin will not receive the deportee; in these circumstances the deportee may be in detention for many months or years.<sup>457</sup>

**Case Study: Stefan Nystrom**

Stefan Nystrom was born in Sweden in 1973. His mother, a permanent resident of Australia, was pregnant and had travelled to Sweden to visit family members. When it became clear that it would be difficult to return to Australia because of her advanced state of pregnancy, his mother stayed in Sweden for Mr Nystrom’s birth. When he was 25 days old, Mr Nystrom travelled with his mother to Australia and, until recently, had not left Australia since.

In November 2006, at the age of 32 years, Mr Nystrom’s residency visa was cancelled because of his failure to pass the ‘character test’ specified in section 501(6) of the *Migration Act* due to his ‘substantial criminal record’. Prior to being notified that the Minister for Immigration intended to cancel his visa in 2004, Mr Nystrom believed he was an Australian citizen. He was deported to Sweden on 29 December 2006 by the former Australian Government .

Despite being a Swedish citizen by accident of birth, Mr Nystrom does not speak Swedish and has no relevant ties or connections with Sweden (or indeed any country other than Australia). It has also resulted in his permanent separation from his mother, father, sister (who is an Australian citizen) and her children.<sup>458</sup>

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 12)**

- Please provide information as to what steps are being taken to adopt and strengthen standards, including legislative standards, pertaining to access to premises and to transportation for people with disability.

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<sup>457</sup> See *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>458</sup> Case study provided by the Human Rights Law Resource Centre. This case is currently the subject of an individual communication to the Human Rights Committee under the *First Optional Protocol to the ICCPR*: *Nystrom v Australia*, Communication No 1557/2007 (2007).

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 12)**

THAT Australia legislate to provide that control orders and preventative detention orders may only be made by a court and must be subject to frequent and periodic substantive judicial review.

THAT the Australian Government adopt and strengthen standards pertaining to access to premises and to transportation for people with disability.

## Article 13 — Procedural Rights against Expulsion

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**Article 13:**

*An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

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### **K. PROCEDURAL RIGHTS AGAINST EXPULSION**

485. Article 13 provides aliens who are lawfully within a State with certain procedural rights that protect against expulsion. These procedural rights include the right to present arguments against expulsion, to have their case reviewed by a designated authority and to be legally represented. In exceptional circumstances, such as where there are compelling reasons of national security, the rights afforded under Article 13 may be abrogated.

#### **K.1 Asylum Seekers**

486. Aspects of Australia's laws, policies and practices with respect to asylum seekers raise concerns with Article 13 of the *ICCPR*. These issues are discussed further under:

- (a) Article 9 (see [Article 9: Lack of Available Remedies](#)); and
- (b) Article 14 (see [Article 14: Asylum Seekers](#)).

**K.2 Deportation of Non-Citizens**

487. As discussed under [Article 12: Deportation of Permanent Australian Residents](#), section 501 of the *Migration Act 1958* (Cth) (***Migration Act***) enables the Minister for Immigration to remove from Australia people who do not meet the 'character test'. In 2006, the Commonwealth Ombudsman investigated and found many deficiencies in the content and application of policies and procedures for cancellation of long-term permanent residents' visas under section 501. The majority of cases examined had at least one, and often several, significant omissions or inaccuracies in the information provided to decision makers.
488. The standard of procedural fairness provided to those liable for cancellation was inconsistent and often fell below that which might be expected given the gravity of the decisions. The outcomes for affected long-term permanent residents can, in many instances, be unfair, disproportionate and unreasonable and raise concerns with Article 13 of the *ICCPR*.

**Case Study: Robert Jovicic**

Robert Jovicic was deported to Serbia after living in Australia for 36 years and despite never having been to Serbia. Mr Jovicic was born in France to Serbian parents, but lived in Australia from the age of two. His de facto spouse and sister are both Australian citizens. Mr Jovicic had his Australian permanent residency status revoked in 2004 on 'character grounds' after he committed various offences in connection with his drug addiction. He was placed in immigration detention for four months and subsequently deported to Serbia.

Serbia refused to recognise Mr Jovicic as a Serbian citizen, so his deportation from Australia rendered him stateless. Mr Jovicic found himself in a country that did not recognise him and whose language he did not speak, with no money or documents. Mr Jovicic also suffered a serious back-related medical condition and there were concerns that he may have been suffering from prostate cancer. Destitute, Mr Jovicic eventually camped outside the Australian Embassy in Belgrade until the Australian Ambassador organised temporary accommodation and medical tests for him.

Three years after he was deported, and following significant media attention, Mr Jovicic was allowed back into Australia, but only on a two-year special purpose visa (which was subsequently extended). The former Australian Government's position was that it was not possible under Australian law for Mr Jovicic to be granted Australian citizenship. However, after coming to office, the current Australian Government granted Mr Jovicic a permanent Australian visa.

489. As identified in the Case Study below, section 501 of the *Migration Act* was also recently used in extraordinary circumstances to undermine the rule of law and deport a non-citizen on the basis of alleged terrorist activity.

**Case Study: Mohamed Haneef**

Dr Mohamed Haneef was a 27 year old Indian physician who came to Australia to work at a Gold Coast Hospital in September 2006 on a temporary skills visa.

Dr Haneef was arrested on 2 July 2007 for suspected terrorist related activities, specifically in connection with the 2007 Glasgow International Airport attack. Dr Haneef was the first person arrested and detained under the *Anti-Terrorism Act 2004* (Cth).

After being detained for twelve days without charge, Dr Haneef was charged under section 102(7)(2) of the *Criminal Code Act 1995* (Cth) for intentionally providing support to a terrorist organisation, while being reckless as to whether it was a terrorist organisation. The basis for the charge was that, nine months earlier, Dr Haneef gave his mobile telephone SIM card to his second cousin, one of the operatives in the 2007 Glasgow International Airport attack. There were also allegations that Dr Haneef had been in frequent and extensive contact with his two second cousins in the lead-up to the failed terror attacks.

On 16 July 2007, the Magistrates Court of Queensland granted bail to Dr Haneef, after the Commonwealth Director of Public Prosecutions failed to convince the Magistrate that Dr Haneef should continue to be detained. A few hours later, however, the former Minister for Immigration, the Hon Kevin Andrews MP, cancelled Dr Haneef's visa on 'character grounds' under section 501 of the *Migration Act* because he 'reasonably suspected' that Dr Haneef had an association with people involved in terrorism.

On 27 July 2007, all charges against Dr Haneef were dropped after the Commonwealth Director of Public Prosecutions stated there was no reasonable prospect of securing Dr Haneef's conviction.

However, the Minister's decision to revoke Dr Haneef's visa was not changed, and Dr Haneef returned to India. While in India, Dr Haneef appealed to have his visa reinstated. The Federal Court of Australia quashed Minister Andrews' decision on 20 August 2007 ruling that the term 'association' should not include mere social, family or professional relationships.<sup>459</sup> The decision was affirmed on appeal.<sup>460</sup>

The current Commonwealth Attorney-General, the Hon Robert McClelland MP, appointed John Clarke QC to conduct an independent inquiry into the handling of Dr Haneef's case (**Clarke Inquiry**).<sup>461</sup> Evidence has emerged before the Clarke Inquiry that the Australian Security Intelligence Organisation did not consider Dr Haneef to be a security threat.<sup>462</sup>

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<sup>459</sup> *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40.

<sup>460</sup> *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

<sup>461</sup> Terms of reference, Clarke Inquiry into the case of Dr Mohammed Haneef, available at [http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Terms\\_of\\_Reference](http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Terms_of_Reference).

<sup>462</sup> ASIO, *ASIO Submission to the Clarke Inquiry* (2008), available at [http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)-ASIO+Submission+unclassified.pdf/\\$file/ASIO+Submission+unclassified.pdf](http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-ASIO+Submission+unclassified.pdf/$file/ASIO+Submission+unclassified.pdf).

**K.3 Expulsion of Foreign Nationals**

490. Under section 16 of the *Migration Act*, a foreign visitor to Australia can have their visa cancelled by the Minister for Immigration and Citizenship if they are ‘assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security’.<sup>463</sup> The Australian Security and Intelligence Organisation (**ASIO**) is the Australian authority that makes these ‘security assessments’. The process by which ASIO makes security assessments and the Minister subsequently cancels visitors’ visas raises serious concerns about Australia’s compliance with Articles 13 and 14 of the *ICCPR*.
491. ASIO conducts security assessments in private and does not disclose reasons for, or information considered in making, a security assessment. The only information ASIO provides is that an adverse security assessment has been made. The visa holder who is the subject of an adverse security assessment does not have the opportunity to attend a hearing, or be informed of the information that was considered to make a security assessment.
492. Article 14(1) provides that the public may be excluded from proceedings (in whole or in part), for reasons of ‘... national security ... [or] special circumstances’. However, those exceptions have been construed narrowly by the Human Rights Committee to require that the measures taken by States Parties must be limited to what is strictly necessary in proportion to the perceived threat to national security, or required by the special circumstance.<sup>464</sup> Where the ‘special circumstances’ exception is relied upon, courts must give reasons for holding a closed hearing.<sup>465</sup> Article 14(1) does not allow that the party the subject of a proceeding be absolutely excluded from a hearing.
493. Further, an independent merits review of an adverse security assessment by ASIO is not available to visa holders. The only avenue for appeal to individuals who are the subject of an adverse security assessment is to the Minister, who has a non-compellable and non-reviewable discretion.<sup>466</sup> These limited avenues for review also raise concerns with the right to a fair trial.
494. On 18 July 2008, a full bench of the Federal Court of Australia ruled that ASIO must disclose the reasons for making an adverse security assessment.<sup>467</sup> This decision assists in bringing Australia into compliance with its obligations under Article 14 of the *ICCPR*.

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<sup>463</sup> *Migration Regulations 1994* sch 4 4002.

<sup>464</sup> Sarah Joseph, ‘A rights Analysis of the Covenant on Civil and Political Rights’ (1999) 5 *Journal of International Legal Studies* 57, 58.

<sup>465</sup> *Estrella v Uruguay*, UN Doc CCPR/C/18/D/74/1980.

<sup>466</sup> John von Doussa, *Human rights and the use of national security information in civil proceedings* (2005), available at [http://arts.anu.edu.au/democraticaudit/papers/200510\\_doussa\\_sec\\_info.pdf](http://arts.anu.edu.au/democraticaudit/papers/200510_doussa_sec_info.pdf).

<sup>467</sup> *O’Sullivan v Parkin* [2008] FCAFC 134 (Unreported, Federal Court of Australia, Ryan, North and Jessup JJ, 18 July 2008).

**Case Study: Scott Parkin<sup>468</sup>**

Thomas Scott Parkin, a citizen of the United States of America, entered Australia in June 2005 under a tourist visa that permitted him to remain in Australia for up to six months. Before the expiration of that period, ASIO issued a security assessment which was adverse to Mr Parkin, and provided that assessment to the Minister for Immigration. The assessment contained a recommendation that Mr Parkin's visa be cancelled pursuant to section 116 of the *Migration Act*, and his visa was cancelled on 10 September 2005.

On 17 September 2005, Mr Parkin was removed from Australia and returned to the United States (at his own expense) without ever being informed of the reasons for his adverse security assessment. He is unable to travel to Australia and the fact of the assessment seriously impedes his ability to travel outside the United States.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 13)**

- Please explain how the current interpretation and application of section 501 of the *Migration Act* is consistent with the *ICCPR*, including particularly Articles 12, 13, 14, 17, 23 and 24.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 13)**

THAT section 501 of the *Migration Act* be amended and applied in a manner consistent with the *ICCPR*, including particularly Articles 12, 13, 14, 17, 23 and 24.

THAT Australia amend the *Migration Act 1958* (Cth) to provide that reasons for an adverse security assessment and visa cancellation under section 16 should be disclosed to the person the subject of the assessment, or his or her legal representative and THAT an independent merits review of adverse security assessments by ASIO be available to visa holders.

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<sup>468</sup> *O'Sullivan v Parkin* [2008] FCAFC 134 (Unreported, Federal Court of Australia, Ryan, North and Jessup JJ, 18 July 2008).

## Article 14 — Right to a Fair Trial

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**Article 14:**

1. *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
2. *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
3. *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
  - (a) *To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
  - (b) *To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
  - (c) *To be tried without undue delay;*
  - (d) *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
  - (e) *To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
  - (f) *To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
  - (g) *Not to be compelled to testify against himself or to confess guilt.*
4. *In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*
5. *Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
6. *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown*

*fact in time is wholly or partly attributable to him.*

7. *No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*
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## **L. RIGHT TO A FAIR TRIAL**

495. Article 14 is regarded as a fundamental rule of law which is essential to ensure the proper administration of justice. The right to a fair trial and equality before the courts is guaranteed in both civil and criminal trials via a series of due process rights. Added protections are provided in criminal trials, including the right to be presumed innocent until proven guilty according to law.

### **L.1 Adequacy of Funding of Legal Aid and Community Legal Centres**

496. In Australia, access to legal advice and representation for marginalised and disadvantaged groups is provided by legal aid commissions and community legal centres. In 2004, the Senate Legal and Constitutional Affairs Committee's inquiry into legal aid and access to justice found that current legal aid arrangements are having a serious adverse affect on legal aid commissions and community legal centres.<sup>469</sup> The inquiry found that many community legal centres and legal aid systems are facing a 'funding crisis'.<sup>470</sup>
497. The Senate Committee recommended that the diminishing capacity of community legal centres needs to be recognised and overcome by, for example:
- (a) providing increased levels of funding to enable community legal centres to better perform their core functions; and

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<sup>469</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004).

<sup>470</sup> *Ibid* [11.26].

- (b) establishing new community legal centres to ease some of the burden on existing community legal centres and to address unmet legal need.<sup>471</sup>
- 498. Services provided by legal aid commissions and community legal centres should be supported by making sure that they have adequate funding to ensure that the right of their clients to a fair trial is respected.
- 499. Inadequate funding of legal aid commissions has led to a significant heightening of eligibility criteria, meaning that legal aid is, practically, only available in some jurisdictions to the very poor and predominantly in relation to criminal matters. Minimal assistance is available with respect to civil and administrative law matters, even where they pertain to fundamental human rights.

**Case Study: Mental Health Review Board**

In 2006/07, only 5.6 per cent of individuals who appeared before the Mental Health Review Board in Victoria had legal representation. Many patients are unable to present their cases as well as they might wish because of their mental illness, or they may be reluctant to speak openly at a Board hearing.

The presence of an advocate provides support and ensures that the patient's rights are appropriately protected. Individuals who appear before the Board and have legal representation are two to three times more likely to successfully challenge their treatment order.

The very low level of representation in matters before the Board is particularly concerning given the extreme consequences of Board decisions on the liberty and security of persons who may be subjected to mental health treatment orders.<sup>472</sup>

**L.2 Counter-Terrorism Measures**

- 500. There are many aspects of Australia's counter-terrorism measures that raise concerns in relation to the right to a fair hearing and indeed the fundamental principle of the rule of law. Further details of aspects of Australia's counter-terrorism measures are discussed under Articles 7 and 10: Counter-Terrorism Measures and Article 9: Counter-Terrorism Measures.
- 501. The following measures are of particular concern in relation to the right to a fair trial:
  - (a) control orders and preventative orders which:
    - (i) apply to people who have not yet been found guilty of, or even charged with, any criminal offence, thereby removing the right to be presumed innocent until proven guilty;

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<sup>471</sup> Ibid [11.51] (Recommendation 60).

<sup>472</sup> Information taken from the Mental Health Legal Centre (Victoria) Annual Report 2006-07.

- (ii) may be made on the application of the police without the individual being present, thereby failing to inform the person promptly of the nature of the charge against them; and
  - (iii) may exclude the person subject to the order from accessing the information supporting the imposition of the order; and
- (b) incommunicado detention, where:
- (i) the person may be questioned in the absence of a lawyer;<sup>473</sup>
  - (ii) the person's lawyer may be denied access to information regarding the reasons for detention and also in relation to the conditions of detention and treatment of the person;<sup>474</sup> and
  - (iii) failure to provide information or to produce any record is subject to a penalty of imprisonment for five years.<sup>475</sup>
502. Recently, the Supreme Court of Victoria expressed its concern with the ability of unconvicted remand prisoners charged with terrorism related offences (see discussion under Articles 7 and 10: Conditions of Detention of Remand Prisoners) to be afforded a fair trial. The Court considered that the extraordinarily oppressive conditions of their detention, including the circumstances of their transportation to and from Court each trial day, had a detrimental affect on their mental health and their capacity to meaningfully participate in the trial.<sup>476</sup>
503. The situation of Dr Haneef (see Case Study on page 148) highlights the need for a review of Australia's counter-terrorism legislation. Ultimately, Dr Haneef was held for nearly one month in detention, two weeks of which were without charge or the ability to apply for bail. Dr Haneef's treatment by the former Australian Government seriously undermined a number of fundamental aspects of the right to a fair trial, including the presumption of innocence, access to judicial review of his detention, and many elements of procedural fairness.

### L.3 Asylum Seekers

504. There are many aspects of Australia's laws, policies and practices with respect to asylum seekers that raise concerns with Article 14 of the *ICCPR*. The lack of available remedies for detainees seeking to challenge their detention is discussed in detail under Article 9: Lack of Available Remedies. In addition to these concerns, practices relating to the excision of land from Australia's migration zone and limited avenues of review for individuals with adverse security assessments also raise concerns with Article 14 of the *ICCPR*.
- (a) The 'Pacific Solution'**
505. Amendments to the *Migration Act 1958* (Cth) (***Migration Act***) in 2001 excised many of Australia's northern islands from the 'migration zone'. As a result, individuals seeking to enter

<sup>473</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34TB.

<sup>474</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34VA.

<sup>475</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G(1), (3) and (6).

<sup>476</sup> *R v Benbrika (Ruling No 20)* [2008] VSC 80 (Unreported, Supreme Court of Victoria, Bongiorno J, 20 March 2008).

Australia without documentation were moved to an offshore processing facility, such as in Nauru or Papua New Guinea, to have their claims assessed. This policy was known as the ‘Pacific Solution’. While the current Australian Government has recently announced an end to the Pacific Solution, it now appears that Australia will continue to process claims of some asylum seekers offshore using a detention facility on Christmas Island.<sup>477</sup> The Committee against Torture noted that ‘excised’ offshore locations, notably Christmas Island, are still used for the detention of asylum seekers who are subsequently denied the possibility of applying for a visa, except if the Minister exercises discretionary power.<sup>478</sup>

506. The effect of this practice is that asylum seekers arriving on an excised island are barred from making an application for a protection visa in Australia. The asylum seekers can be removed from Australia and taken to another country from where they are able to apply for an offshore humanitarian visa. However, if an asylum seeker is denied refugee status, there is no right of independent review; persons detained outside of Australia’s mainland are excluded from accessing Australian courts or tribunals and lack access to any appropriate legal forums to challenge the legality of their detention. The remote location of Christmas Island also significantly impedes the ability of lawyers, advocacy groups and other community organisations to provide support to detainees.
507. Indeed, the fundamental purpose of offshore processing is to deny individuals rights which they may have otherwise been entitled to on mainland Australia. These aspects of the Pacific Solution raise serious concerns in relation to Article 14 of the *ICCPR*, in addition to issues with the right to freedom from arbitrary detention (discussed under [Article 9: Immigration Law, Policy and Practice](#)).

#### **Case Study**

On 20 February 2007, a group of 82 Tamil men were intercepted 30 nautical miles off the coast of Christmas Island by the Australian Navy. They were taken initially to Christmas Island and then flown to Nauru. In September 2007, the government announced that 72 of the group had been found to be refugees. However, the former Australian Government refused to grant them visas to travel to Australia, stating that they would look to third countries to resettle these refugees. The refugees were unable to challenge their detention on Nauru.

#### **(b) Detainees with ‘adverse security assessments’**

508. A person seeking asylum in Australia must apply for a ‘protection visa’. Under the *Migration Act* and associated regulations, applicants must satisfy the Minister for Immigration

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<sup>477</sup> Christmas Island is one of the many islands to the north of Australia which have been excised from the migration zone. A new immigration detention centre has been built on Christmas Island at a cost of more than \$396 million and is said to include a high-security section and capacity to lock down each cell individually.

<sup>478</sup> Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, [12], UN Doc CAT/C/AUS/CO/3 (2008).

that they are ‘not assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security’.<sup>479</sup> The Australian Security and Intelligence Organisation (ASIO) is the Australian authority that makes these ‘security assessments’. However, an independent merits review of an adverse security assessment by ASIO is not available to protection visa applicants. The only avenue for appeal to individuals who the subject of an adverse security assessment is to the Minister for Immigration, who has a non-compellable and non-reviewable discretion.<sup>480</sup> These limited avenues for review raise serious concerns with the right to a fair trial.

#### L.4 Abolition of the Rule against Double Jeopardy

509. Article 14(7) mandates that no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. However, recent legislation in New South Wales has abolished the rule against double jeopardy for certain offences. The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) abolished the rule against double jeopardy in cases where a person is acquitted:

- (a) of a ‘life sentence offence’<sup>481</sup> but there is ‘fresh and compelling’ evidence of guilt;
- (b) of a ‘15 years or more sentence offence’ where the acquittal was tainted, such as by perjury, bribery or perversion of the course of justice; or
- (c) in a judge-only trial, or in a jury trial in which the judge directed the jury to acquit.

510. At the Council of Australian Government meeting in April 2007, all other Australian jurisdictions (with the exceptions of Victoria and the ACT) agreed to pass similar legislation, which Queensland and South Australia have recently completed.<sup>482</sup> These recent legislative amendments raise serious concerns in relation to Article 14(7) of the *ICCPR*.

#### L.5 Compensation for Miscarriage of Justice

511. Article 14(6) of the *ICCPR* provides for compensation according to law in certain cases of a miscarriage of justice. The Human Rights Committee’s General Comment 32 on the right to a fair trial provides that States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

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<sup>479</sup> *Migration Regulations 1994* sch 4, 4002-4003.

<sup>480</sup> The Inspector General of Intelligence and Security (IGIS) recommended to the Attorney-General that the Government introduce legislation enabling protection visa applicants whose application would have been successful but for a adverse security assessment likewise to obtain independent merits review of that assessment (IGIS, Annual Report 1998-99 [90]). This recommendation was not implemented, apparently because the Minister for Immigration was not in favour of doing so for reasons not specified publicly (IGIS, Annual Report 1999-2000 [45]–[46]).

<sup>481</sup> A ‘life sentence offence’ is defined to include murder, violent gang rapes, large commercial supply or production of illegal drugs.

<sup>482</sup> *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld); *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (SA).

512. As referred to under Article 2: Australia's Reservations to the ICCPR, presently, in most Australian jurisdictions, the process of compensation for miscarriage of justice is ad hoc, involving the Attorney-General or a government minister, and other members of the government, assessing an application for compensation on an individual, *ex gratia* basis. In addition, guidelines often do not exist, or are not publicly available. For these reasons, the current system of ex gratia payments that exists in all Australian jurisdictions (other than the Australian Capital Territory) is arbitrary.<sup>483</sup> Political factors rather than the merits of the case largely determine whether compensation is paid.
513. Contrary to expert recommendations,<sup>484</sup> the Australian Government has not established an independent body to investigate, correct and compensate wrongful arrest, conviction and detention. Accordingly, there is no guarantee of compensation for miscarriages of justice in breach of its obligations under Article 14(6) of the *ICCPR*.

## L.6 Prisoners

### (a) *Lack of Effective Review Procedures and Remedies*

514. As a general principle, Australian courts are very reluctant to engage in review of prison conditions, classifications or management. In recent times, this judicial reluctance has been exacerbated by the operation of the legislation.
515. In Queensland, privative clauses have resulted in the removal of rights to challenge unlawful decisions concerning transfer and classification of prisoners.<sup>485</sup> The remaining internal review mechanisms have a seven-day limitation period. As a result, existing legal protections<sup>486</sup> cannot be enforced, and transferred prisoners can lose access to family and support networks. The Queensland Premier and the Minister for Police and Corrective Services have also indicated plans to restrict prisoners' rights to anti-discrimination law and personal injury compensation,<sup>487</sup> while in Victoria any compensation payable to prisoners for violations of their rights in prison is proposed to be paid into a quarantine fund.<sup>488</sup>
516. Prisoners are prevented from accessing 'risk assessment documents' in Queensland,<sup>489</sup> and recently enacted Victorian legislation further restricts prisoners' access to freedom of

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<sup>483</sup> See Hoel, above n 85.

<sup>484</sup> Lynne Weathered, 'Does Australia Need a Specific Institution for the Correction of Wrongful Convictions', (2007) 40 *Australian and New Zealand Journal of Criminology* 179 – 198. See also Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia', (2005) 17 *Journal of the Institute of Criminology*.

<sup>485</sup> *Corrective Services Act 2006* (Qld) ss 17, 66 and 71.

<sup>486</sup> See, eg, *Royal Commission into Aboriginal Deaths in Custody National Report Vol 1* (1991) Recommendations 168, 176.

<sup>487</sup> Anna Bligh, Premier (Qld), 'Victims to be Allowed to Claim Against Prisoners' (Press Release, 8 October 2007); Judy Spence, Minister for Police and Corrective Services (Qld), 'Correctives Minister Clamps Down on Petty Claims by Prisoners' (Press Release, 2 July 2006).

<sup>488</sup> *Corrections Amendment Bill 2008* (Qld).

<sup>489</sup> *Freedom of Information Act 1992* (Qld) s 11E.

information.<sup>490</sup> In New South Wales, there is no mechanism for High Risk Management Unit prisoners to challenge their placement and continued detention in the facility, and prisoners can no longer sue for breach of privacy.<sup>491</sup>

517. The above examples of restrictions on prisoners' access to legal procedures and remedies available to other persons are also contrary to Articles 26, 2(3), 10(1) and 17.

**(b) Access to Legal Services**

518. There is a nationwide need for adequately funded and accessible specialised legal services for prisoners. The prison population face multiple and compounding forms of disadvantage and have complex legal needs. A recent report by the Law and Justice Foundation of NSW has identified a lack of access to legal services as a specific barrier to prisoners in NSW wishing to access justice.<sup>492</sup> The report noted that this lack of resourcing resulted in each inmate having only five or 10 minutes to discuss their case with the visiting legal advice service.<sup>493</sup> Prisoner access to legal services is also hampered by access to telephones and prison libraries being restricted due to security concerns and clashes occurring between the hours that lawyers are available and the hours of operation within the prison.<sup>494</sup>

519. There is a need for additional specialised legal services for prisoners across Australia. Despite this, in Queensland, the funding of the Women's Legal Service to provide assistance to women in prisons has recently been reduced by Queensland Corrective Services.

**(c) Access to Legal Resources**

520. In Victoria, prisoners involved in criminal or civil proceedings have raised concerns regarding lack of access to legal resources with which to prepare their cases. This lack of access adversely impacts on these prisoners' opportunity for adequate time and facilities to prepare their case and, therefore, their right to a fair trial. The absence of a fair trial for prisoners may also engage the rights to liberty (specifically the right to challenge deprivation of liberty) and humane treatment when deprived of liberty under Articles 9 and 10 of the *ICCPR*.<sup>495</sup>

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<sup>490</sup> John Brumby, Premier (Vic), 'Brumby Government Introduces FOI Reforms' (Press Release, 20 November 2007); Freedom of Information Amendment Bill 2007 (Vic) pt 4.

<sup>491</sup> General Purpose Standing Committee No. 3, New South Wales Parliament, *Issues Relating to the Operations and Management of the Department of Corrective Services* (2006) [4.41].

<sup>492</sup> Anne Grunseit, Suzie Forell & Emily McCarron, *Taking justice into custody: the legal needs of prisoners* (2008).

<sup>493</sup> *Ibid* xxii.

<sup>494</sup> *Ibid* xxii-xxiii.

<sup>495</sup> The Human Rights Committee has stated that the right to challenge deprivation of liberty under article 9(4) of the *ICCPR* necessarily includes the right to access legal representation and advice: see *Concluding Observations on Ireland*, [17]–[18], UN Doc A/55/40 (2000); *Berry v Jamaica*, 60, UN Doc CCPR/C41/D/253/1987 (1991).

### Case Study 1

Prisoner H has had great difficulty accessing the justice system. In particular, H is given very limited access to typing equipment, has no access to legal resources such as legislation and case law, and he cannot obtain basic stationery supplies.

### Case Study 2

Prisoner F wishes to appeal a criminal conviction to the High Court. The High Court previously rejected his application for Special Leave to Appeal on the grounds that his application was hand-written and attempted to be filed by mail. F's complaints include that the prison borrowing service available is inadequate for the preparation of legal proceedings and that there are no means to research relevant case law. Further, he cannot afford to utilise the printing and photocopying service which is available, and he does not have any other means to lodge an appeal as he cannot afford to pay for legal representation or purchase the materials and facilities to prepare his appeal.

## L.7 Access to Interpreters

521. While the right to the free assistance of an interpreter is only guaranteed in criminal proceedings,<sup>496</sup> in certain circumstances, the right to a fair hearing in civil matters will include the right to an interpreter.
522. In many jurisdictions, Australian courts play no role in civil proceedings in organising an interpreter to be present or to ensure that the services of an interpreter are available where required. The unavailability of interpreting services in the courts presents a major barrier to access to justice. A party's ability to participate in the legal process is severely undermined where he or she is unable to afford to pay for an interpreter to attend a hearing.
523. A report recently released by the Aboriginal Resource and Development Services has found that many Indigenous Australians who come into contact with the criminal justice system have little comprehension of what is happening and how the legal system operates.<sup>497</sup> The report, entitled *An Absence of Mutual Respect*, found that:

Most of the language used inside a courtroom like bail, consent, remand, charge, alleged and accused leave the people confused, not sure of how they should respond, or even if they should respond.<sup>498</sup>

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<sup>496</sup> ICCPR art 14(3)(f). Similar provisions are contained in the *Human Rights Act 1998* (UK), *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>497</sup> Aboriginal Resource and Development Services, *An Absence of Mutual Respect* (2008), available at <http://www.ards.com.au/print/LawBookletWeb.pdf>.

<sup>498</sup> Aboriginal Resource and Development Services, 'Justice Out of Reach' (Press Release, 28 May 2008), available at <http://www.ards.com.au/media/media28.htm>.

524. This leads to many outcomes that are unjust and can also be a factor in some people getting into further trouble, raising concerns with Article 14(3)(a) of the *ICCPR*.

#### **L.8 Self-Represented Litigants**

525. Many community legal centres in Australia report instances where individuals have previously had claims rejected by courts because they have not been able to conform to the form of submission required by the court, and not because of the content or merit of their claim. Such results are contrary to the right of access to justice, which is an essential element of the right to a fair trial.

526. In order to ensure that the civil justice system is administered effectively:

- (a) sufficient resources must be provided to self-represented litigants to assist them to conform to court procedures; and
- (b) court procedures must be sufficiently flexible to accommodate individuals requiring assistance.

527. A support service for self-represented litigants has recently been introduced in Queensland.<sup>499</sup> The service provides assistance with procedural matters, photocopying, internet access and other facilities for self-represented litigants. Although it does not bridge the gap of access to a legal representative, this is a good example (albeit provided by an NGO, and not a government) of the needs of self-represented litigants being recognised and addressed.

528. The effect of the implementation of these principles will ensure compliance with Article 14 of the *ICCPR* and the principle of equal access to justice.

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<sup>499</sup> The support service was established by the Public Interest Law Clearing House, with support from the Queensland Attorney-General and the Chief Justice of the Queensland Supreme Court.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 14)**

- Please provide information as to measures, including budgetary measures, to increase and enhance access to legal advice and representation for marginalised and disadvantaged groups, including by legal aid commissions and community legal centres.
- Please advise of any proposals to either tighten or expand legal aid funding arrangements and eligibility criteria.
- Please inform the Human Rights Committee as to steps, including legislative amendments, being taken or proposed to ensure that all aspects of Australia's counter-terrorism measures are compatible with the right to a fair hearing.
- Please advise as to what steps, if any, the Australian Government is taking to establish an independent body to investigate, correct and compensate wrongful arrest, conviction and detention.
- Please provide information as to the legal advice, representation and resources available to prisoners and in relation to the availability of judicial review for conditions of detention.
- Please provide information as to the resources available to self-represented litigants to assist them to conform to court procedures and details as to how court procedures are modified or sufficiently flexible to accommodate self-represented individuals requiring assistance.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 14)**

THAT Australia take steps to ensure greater fairness and equality in access to justice, including by:

- (a) increasing funding to legal aid, community legal centres and impecunious and disadvantaged litigants, particularly for pre-litigation advice to prospective litigants;
- (b) increasing accessibility to courts by simplifying rules of procedure and reducing barriers such as costs and fees;
- (c) providing adequate services to assist individuals in accessing the justice system, including legal aid and free interpreters;
- (d) establishing a disbursements fund to aid pro bono, human rights and public interest matters; and
- (e) establishing model guidelines for government regarding costs in pro bono, human rights and public interest proceedings.

THAT Australia's counter-terrorism law, policy and practice, particularly with respect to control orders, preventative detention orders and questioning by ASIO, be reviewed and reformed to ensure compliance with the right to a fair hearing.

THAT all Australian jurisdictions reinstate the rule against double jeopardy.

THAT Australian law be amended to provide for a right to compensation for unlawful arrest, conviction or detention and THAT Australia establish an independent body to investigate, correct and compensate wrongful arrest, conviction and detention.

THAT Australia ensure that, consistent with the right to a fair hearing and equality before the law, prisoners have adequate access to legal advice and representation, legal resources, and judicial review of conditions of detention.

THAT Australia ensure that the free assistance of interpreters, including particularly Indigenous interpreters, is guaranteed in criminal proceedings and, where necessary for a fair hearing, in civil matters.

## Article 15 — Prohibition of Retroactive Criminal Laws

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### **Article 15:**

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*
2. *Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

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### **M. PROHIBITION OF RETROACTIVE CRIMINAL LAWS**

529. Article 15 is based on the premise that the retroactive application of criminal law is in contravention of the principles of ‘no crime except in accordance with the law’ and ‘no punishment except in accordance with the law’. It is further articulated that a heavier penalty cannot be enforced than one which was applicable when the criminal offence was committed.

#### **M.1 Extended Supervision Orders for Sex Offenders**

530. Australia’s Common Core Document refers to legislation in Western Australia and Queensland that allows for continued detention of certain prisoners beyond their sentence.<sup>500</sup>
531. Legislation in Queensland and Victoria currently enable a court to detain a convicted sex offender beyond the expiry of their sentence of imprisonment for potentially indefinite periodic terms. Extended detention and supervision orders may be issued where a court is satisfied, to a high degree of probability, that the individual may commit a serious sexual offence if

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<sup>500</sup> Common Core Document, above n 4 [290].

released.<sup>501</sup> There is no requirement that the offender have committed any additional known offence for a court to make an order for a period of further detention. The order is based on:

- (a) third party (usually medical professionals) opinion and prediction;
- (b) the individual's antecedents and pattern of offending behaviour;
- (c) what steps (if any) the individual took while incarcerated to address their offending behaviour; and
- (d) the perceived need to protect the community from the risk of the individual's re-offending if released.

532. Extended supervision orders in many circumstances raise issues with Australia's obligations under Article 15 of the *ICCPR*.

**Case Study: Trevor Toms**<sup>502</sup>

In 1986, Trevor Toms was convicted (on his own plea) of three counts of rape and numerous counts of breaking, entering and stealing. He had committed the crimes in 'calculated, predatory and violent' circumstances at the age of 21 when he was a 'wild delinquent'. He was sentenced to 22 years imprisonment and was ultimately due to be released in November 2006.

Prior to his release, the Queensland Attorney-General applied for Mr Toms' indefinite detention under the Queensland legislation on the basis that that Mr Toms posed an unacceptable risk of re-offending if released.

Mr Toms had been assessed by three experts. Two psychiatrists considered that Mr Toms would not be a serious risk to the community if released. However, in support of the application, the Queensland Attorney-General relied on the evidence of a third expert, a prison psychologist whose evidence was, according to the trial judge, 'deeply flawed' and contained a 'serious dishonesty'. However, the corrective services authorities had effectively refused to assist in preparing Mr Toms for release into society. Mr Toms' 'inexperience of life outside an institution' was the deciding factor for the Queensland Supreme Court, which indicated that, had he received such support, Mr Toms would have fallen below the relevant threshold. In the circumstances, the Court ordered that Mr Toms be subject to supervision orders for a period of five years.<sup>503</sup>

Mr Toms sought employment upon release, which (as a result of his supervision order) was required to be approved by the Department of Corrective Services. The Department took 'some months' to approve Mr Toms' employment.<sup>504</sup>

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<sup>501</sup> *Serious Sex Offenders Monitoring Act 2005* (Vic) s 11; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13.

<sup>502</sup> Case study details taken from *Attorney-General (Qld) v Toms* [2006] QSC 298 (Unreported, Supreme Court of Queensland, Chesterman J, 20 October 2006).

<sup>503</sup> *Attorney-General (Qld) v Toms* [2006] QSC 298 (Unreported, Supreme Court of Queensland, Chesterman J, 20 October 2006).

Following his release, Mr Toms was arrested in April 2008 for contravening the supervision order (by, among other things, consuming a small amount of alcohol and failing to comply with curfew requirements). The Attorney-General sought orders (which were not opposed) that Mr Toms be detained pending further psychiatric assessment to determine whether the conduct ‘had any impact on his risk of re-offending’.

## M.2 Retrospective Life Sentences for Juvenile Offenders

533. In New South Wales, a series of legislative amendments has resulted in the retrospective application of effective life sentence for two offenders who were sentenced when they were juveniles.
534. In 1988, Bronson Blessington and his co-offender, Matthew Elliott, were convicted for crimes of rape and murder and sentenced to life sentences under the *Sentencing Act 1989* (NSW) (***Sentencing Act***). At that time, the *Sentencing Act* imposed a mandatory life sentence on all adults found guilty of murder, but made the imposition of a life sentence discretionary for juvenile offenders. However, the *Sentencing Act* allowed prisoners serving a life sentence to apply for release after they had served ten years’ imprisonment. In sentencing Blessington and Elliott to life sentences, who were aged 16 and 14 respectively at the time, the trial judge made a recommendation that they should never be released.
535. Blessington and Elliott’s appeal against the length of their sentences was dismissed by the NSW Court of Criminal Appeal.<sup>505</sup> In dismissing the appeal, the Court held that their sentences were not ‘excessive’ and noted the provisions of the *Sentencing Act* that allowed them to apply for determination of their sentence and release after ten years. The Court also criticised the no-release recommendation made by the trial judge on the basis that the court did not have authority to make such recommendations.
536. A series of subsequent amendments to the *Sentencing Act* altered the determination and release provisions by creating a regime whereby:
- (a) any offender who received a non-release recommendation could only apply for the determination of a non-parole period after 30 years have been served; and
  - (b) parole will only be granted if the offender is in imminent danger of dying and does not pose a risk to the community.
537. These legislative amendments were introduced to specifically apply to Blessington, Elliot and a small number of other offenders; non-release recommendations had only been made in three cases involving a total of ten defendants. At the time the amendments were introduced, the Premier of New South Wales publicly stated that he wanted to ‘cement in concrete’ these offenders.
538. The effect of the subsequent legislative amendments is that Blessington and Elliott are now serving effective life sentences, without the possibility of parole, for offences they committed

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<sup>504</sup> Transcript of Proceedings, *Attorney-General (Qld) v Toms* (Supreme Court of Queensland, Chesterman J, 8 April 2008).

<sup>505</sup> (1992) 60 A Crim R 68.

while they were juveniles. The retrospective application of these greater penalties raises concerns in relation to Article 15(1) of the *ICCPR*, as well as concerns in relation to the particular rights of juvenile offenders under Article 24.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 15)**

- Please explain how the following legislation is compatible with Article 15 of the *ICCPR*:
  - (a) legislation in a number of Australian jurisdictions which provides for the continued detention and supervision of certain prisoners beyond their sentence, including in circumstances where the legislation was not in force at the time of the conviction; and
  - (b) legislation in New South Wales which has resulted in the retrospective application of effective life sentence for certain offenders who were sentenced when they were juveniles.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 15)**

THAT the *Sentencing Act* be amended to ensure that no person shall be subject to a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

## Article 16 — Right to Recognition as a Person Before the Law

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**Article 16:**

*Everyone shall have the right to recognition everywhere as a person before the law.*

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### **N. RIGHT TO RECOGNITION AS A PERSON BEFORE THE LAW**

539. Article 16 enshrines the right to legal personhood.

#### **N.1 Asylum Seekers**

540. Aspects of Australia's laws, policies and practices with respect to asylum seekers raise concerns with Article 16 of the *ICCPR*. These issues are discussed further under:

- (a) Article 9 (see [Article 9: Lack of Available Remedies](#)); and
- (b) Article 14 (see [Article 14: Asylum Seekers](#)).

#### **N.2 People with Mental Illness**

541. The inability of people subjected to involuntary detention to challenge their detention in a timely manner raises serious concerns with Article 16 of the *ICCPR*. This issue is discussed in further detail under [Article 9: People with Mental Illness](#).

## Article 17 — Right to Privacy

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### **Article 17:**

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.*
  2. *Everyone has the right to the protection of the law against such interference or attacks.*
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### **O. RIGHT TO PRIVACY**

542. Article 17 recognises that the private individual is sovereign and is entitled to specific rights in relation to privacy, namely that one’s privacy, family, home and correspondence shall not be subject to unlawful or unwarranted interference. The concept of privacy is broad and subsumes considerations as to identity, autonomy and relationships. Article 17 also underlines the protection by law that should be afforded to those individuals whose such rights have been interfered with or attacked.

#### **O.1 Lack of Legislative Protection**

543. The legal safeguards of privacy in Australia remain limited. Neither the Australian Constitution nor any state or territory constitutions contain any express provisions relating to privacy. Recently, the legislative protection of human rights in both the Australian Capital Territory and Victoria (discussed further in paragraph 167) has provided increased protection of the right to privacy in those jurisdictions.<sup>506</sup>

544. The unauthorised collection and disclosure of information privacy is protected in a limited way in various federal and state and territory legislation and residual common law protections.

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<sup>506</sup> *Human Rights Act 2004 (ACT)* s 12 creates a right of ‘privacy and reputation’. See also *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 13.

The *Privacy Act 1988* (Cth) is the key federal law that protects against unlawful interference with personal information. That legislation establishes:

- (a) 'Information Privacy Principles', based on the OECD Guidelines, which apply to most federal government agencies; and
- (b) 'National Privacy Principles' that apply to the collection, use and disclosure of personal information by private sector organisations.

545. The Australian Law Reform Commission has recently conducted a review of the Privacy Act, which culminated in a 2,700 page report titled *For Your Information: Australian Privacy Law and Practice*.<sup>507</sup> This report indicates that 'rapid advances in information, communication and surveillance technologies have created a range of previously unforeseen privacy issues'.<sup>508</sup> The report recommends 295 changes to privacy laws and practice and identifies 10 key areas of concern, including: children; credit reporting; health; data breach notification (fraud and identity theft); emerging technologies; and creating a statutory action for serious invasion of privacy. The review and report are likely to result in significant reforms to the federal framework of protection in respect of personal information.
546. The common law supports privacy rights through actions for breach of confidence, defamation, trespass or nuisance. In 2006, the New South Wales Law Reform Commission examined the desirability of developing a statutory tort of privacy. It is expected to report in 2008.
547. Until recently, there been no recognition of a general tort of protection of privacy. The Queensland District Court and the Victorian County Court have recently affirmed the existence of a common law right to privacy.<sup>509</sup> In one case, the County Court in Victoria provided affirmation of this common law right in a case in which a broadcaster was ordered to pay a rape victim compensation after she was named on air.<sup>510</sup> The damages were awarded for breach of privacy and breach of confidence caused by the unjustified publication. This decision is currently the subject of an appeal.
548. In relation to defamation laws, in 2005 the state and territory governments agreed to the establishment of uniform defamation laws across Australia. The first of these laws were enacted in 2006. Importantly, the protections:
- (a) apply almost exclusively to human persons rather than extending to corporations;
  - (b) provide for a defence of 'truth';
  - (c) place a one year time limit on commencing proceedings;
  - (d) abolish exemplary or punitive damages; and

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<sup>507</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008).

<sup>508</sup> *Ibid.*

<sup>509</sup> *Grosse v Purvis* (2003) Aust Torts Reports 81-706; *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (Unreported, County Court of Victoria, Hampel J, 3 April 2007).

<sup>510</sup> *Doe v Australian Broadcasting Corporation*, *ibid.*

(e) leave the question of damages to the judge rather than a jury.<sup>511</sup>

## **O.2 National ‘Access Card’**

549. The proposal for an access card system, which would introduce a new card to replace a number of existing cards such as Medicare and Centrelink related benefit cards, was first announced in April 2006 by then Prime Minister, John Howard. Exposure drafts of the legislative proposal for the access card system were released in June 2007 in the form of the Human Services (Enhanced Service Delivery) Bill 2007 and the Human Services (Enhanced Service Delivery) (Consequential Amendments) Bill 2007.
550. There are a range of human rights concerns associated with the proposed access card system, in particular, the effect of stringent proof of identity requirements on people experiencing homelessness and significant privacy issues.
551. Given that fraud prevention is the underlying reason for introducing the access card system, it is very likely that the proof of identity requirements for obtaining an access card will be more stringent than the procedures that currently exist in respect of participating agencies such as Medicare and Centrelink. Stringent proof of identify requirements generally operate discriminatorily against the homeless, many of whom are unlikely to hold the requisite documents or have the money or resources to obtain them. Accessing documents may be especially difficult, if not impossible, for women and children escaping family violence, homeless youth or for refugees and asylum seekers. Stringent proof of identity provisions could have the effect of certain Commonwealth benefits being withheld or people experiencing homelessness being excluded from the social security system altogether. Failure to receive Commonwealth benefits occasions significant physical, financial and psychological hardships on the people penalised, often results in a vicious cycle of poverty and homelessness as individual’s energies are directed towards surviving, and is a violation of the right to a secure and adequate income (as recognised under Article 9 of the *International Covenant of Economic, Social and Cultural Rights*).
552. The exposure drafts provided that for an individual to be eligible to obtain an access card, certain personal information would be collected and entered into a Register. The Register would create an unprecedented central database that records the personal details of each recipient of Commonwealth benefits. It is of particular concern that the information on the Register that is generally protected by privacy laws would be exempted in order to enable disclosure of protected information to Police, the Australian Crime Commission, intelligence agencies, Department of Immigration and other government departments and Ministers. Such exemptions amount to a violation of the right to privacy under Article 17 of the *ICCPR*, which requires that the collection, use and disclosure of personal information be regulated by law and that appropriate steps are taken to ensure such information is accurate, complete and up to date.
553. The proposed access card system was sidelined by the Government prior to the 2007 Federal Election. There are no indications that the new Labor Government will adopt the proposed access card system.

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<sup>511</sup> See, eg, *Defamation Act 2005* (SA) and *Defamation Act 2005* (Qld).

### O.3 CCTV Surveillance of Public Places

554. The use of closed circuit television cameras (**CCTV**) by the Australian Government and private organisations is increasing.<sup>512</sup> In 2003, there were 33 open street CCTV systems in operation in Australia, with the Northern Territory being the only Australian jurisdiction without CCTV surveillance in public spaces. However, the Northern Territory has since joined the Australian 'surveillance revolution'.<sup>513</sup> As recently as 26 August 2008, the Chief Minister of the Northern Territory announced that the Territory Government would provide the Alice Springs Town Council with \$1.1 million to expand the town's CCTV network, plus an additional \$200,000 in funding to monitor the network.<sup>514</sup> Plans to install or extend CCTV networks have also been approved in other areas of Australia, in particular in the community of Aurukun on Queensland's Cape York Peninsula.<sup>515</sup>
555. The use of CCTV in public places raises significant human rights concerns due to the invasion of the privacy of individuals. In a recent serious privacy breach, a man was mistakenly arrested for a sex crime after police released CCTV footage of him for television broadcast.<sup>516</sup>
556. Public surveillance has a particularly detrimental impact on marginalised sections of the community. Homeless people and people who can only afford cramped housing must conduct many of their personal affairs in public spaces. As a result, they are forced to spend more time in public places compared to other members of the community, and suffer a disproportionately intense invasion of privacy.
557. While the use of CCTV in public places is generally intended to pursue the legitimate purpose of reducing crime, '[t]he perceived success of CCTV in relation to controlling crime in Australia is almost totally anecdotal'<sup>517</sup> and 'the effectiveness of CCTV as a crime prevention tool is

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<sup>512</sup> Bruce Arnold, *Caslon Analytics Privacy Guide: CCTV and other visual surveillance*, available at <http://www.caslon.com.au/privacyguide20.htm>; and Victorian Law Reform Commission, *Privacy Law: Options For Reform Information Paper*, (2001), available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb1ef54e859bc99/Privacy%20Information%20Paper.pdf>.

<sup>513</sup> Dean Wilson & Adam Sutton, *Open-Street CCTV in Australia: A Comparative Study of Establishment and Operation*, 24, available at <http://www.criminologyresearchcouncil.gov.au/reports/200102-26.pdf>.

<sup>514</sup> Northern Territory Government, 'CCTV Expansion in Alice Springs', (Press Release, 26 August 2008) available at <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=4394&d=5>.

<sup>515</sup> Australian Broadcasting Corporation, 'Council criticised over CCTV plan for Aurukun', *The World Today*, 21 August 2008, available at <http://www.abc.net.au/worldtoday/content/2008/s2342462.htm>. On 30 September 2005, the Federal government also announced that it was committing \$6 million to fund security related infrastructure, including CCTV systems: Attorney-General's Department, 'National Community Crime Prevention Programme: Funding for Security Related Infrastructure including Closed Circuit Television' (Press Release, undated), available at <http://www.crimeprevention.gov.au/agd/WWW/ncphome.nsf/Page/RWPE2AD9E105B1E5E57CA2570BA001488EB>.

<sup>516</sup> Daniel Emerson, 'CCTV Blunder: Wrong "Sex Attacker" Charged', *The Sydney Morning Herald* (Sydney), 5 August 2008, available at <http://www.smh.com.au/news/national/cctv-gaffe-the-sex-fiend-who-wasnt/2008/08/05/1217701983353.html>.

<sup>517</sup> Helene Wells, Troy Allard & Paul Wilson, *Crime and CCTV in Australia: Understanding the Relationship* (2006) *Bond University Humanities & Social Sciences papers* 4 available at [http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1071&context=hss\\_pubs](http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1071&context=hss_pubs).

questionable'.<sup>518</sup> As the use of CCTV in public places infringes the right to privacy, it should not be used unless such use is justified by significant evidence as to its effectiveness and proportionality.

558. Current Australian legislation regarding video surveillance provides inadequate human rights protection because it focuses on surveillance in the workplace or covert surveillance by government agencies or commercial operators, rather than surveillance of public places.<sup>519</sup> Current legislation also depends on the malleable notion of whether an individual has a 'reasonable expectation of privacy,' which is generally deemed not to be the case if the person is in a public space.<sup>520</sup>

559. In July 2001, the Victorian Law Reform Commission identified surveillance in public spaces as a priority area for reform:

The regulation of mass surveillance in public places is a substantial gap in the privacy protection offered in Victoria, as is the use of surveillance by employers. Extensive surveillance without limitations has the potential to significantly effect the nature of a free society. Abuse of these technologies may severely damage the lives of individuals as well as making us all feel less free. At the same time, used responsibly, surveillance may offer greater protection for individuals' personal safety and property. Finding a balance between these interests is an important challenge.

The Commission believes that the regulation of mass surveillance and of surveillance in the workplace are priority areas for reform within Victoria.<sup>521</sup>

560. The Victorian Law Reform Commission indicates that a consultation paper about surveillance in public places will be released in 2008 formally inviting submissions from the public.<sup>522</sup> According to the Australian Law Reform Commission, it is anticipated that the recommendations resulting from that inquiry will be considered by the Standing Committee of Attorneys-General.<sup>523</sup>

561. Until major reforms to the regulation of public surveillance occur, there remain significant potential human rights infringements as a result of CCTV systems.

#### **O.4 Policing Practices**

562. The exercise of stop and search powers by police poses particular concerns in relation to the right to privacy. Subject to authorisation by a court or the Minister responsible for police in a jurisdiction, police in all Australian jurisdictions have the power to stop and search persons based on:

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<sup>518</sup> Ibid iii.

<sup>519</sup> Arnold, above n 512. See also, eg, *Surveillance Devices Act 2004* (Vic).

<sup>520</sup> See, eg, *Surveillance Devices Act 2004* (Vic) and *Surveillance Devices Act 2007* (NSW).

<sup>521</sup> Victorian Law Reform Commission, above n 512.

<sup>522</sup> Ibid.

<sup>523</sup> Australian Law Reform Commission, above n 507, 330.

- (a) a suspicion that an individual may be involved with terrorist activity; or
- (b) an individual being is found in close physical proximity to a person, vehicle or place suspected to have a link to terrorism.<sup>524</sup>

563. Given that detention is preventative (not punitive) in nature, and rests entirely on the exercise of personal discretion, it is likely to be arbitrary.
564. These powers also impact on individuals' right to privacy, in two ways. First, police are given broad powers to question individuals within designated areas and require them to provide reasons for their presence in that location. These powers are arguably disproportionate to the aim of preventing terrorism, since there are many legitimate reasons for passing through public spaces which may be designated as potential terrorist targets. Therefore, these powers constitute an unjustified abrogation of individuals' right to privacy. Second, although the legislation requires police to respect the privacy of persons under investigation, officers are only required to comply where it is 'reasonably practicable' in the circumstances. This limitation on the right to privacy exposes search powers to abuse, especially as stop and search powers in some jurisdictions include the power to conduct strip searches at a police officer's discretion.
565. There is little documented evidence of racial bias in the exercise of stop and search powers in Australia.<sup>525</sup> However, there is general concern in the community about police racism and the possibility that stop and search powers may result in the victimisation of groups such as Aboriginal Australians, Muslims, and immigrants from Africa.<sup>526</sup>

## **O.5 Prisoners**

566. Prisoners, being deprived of their liberty, have little ability or capacity to control many aspects of their daily lives. For this reason, the right to freedom from unlawful or arbitrary interference with privacy, family and correspondence has particular relevance to prisoners.
567. Queensland has recently introduced a Bill that would allow direct discrimination on the basis of race in some circumstances. The Bill would also delay the right of prisoners to complain about sexual harassment, vilification and discrimination perpetrated by 'protected' government

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<sup>524</sup> See *Crimes Act 1914* (Cth); *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Police Powers) Act 2005* (SA); *Terrorism (Emergency Powers) Act 2003* (NT); *Police Powers (Public Safety) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Extraordinary Powers) Act 2005* (WA).

<sup>525</sup> However, note that the Victorian Equal Opportunity and Human Rights Commission is currently working on a report about discrimination against African young people in the city of Greater Dandenong.

<sup>526</sup> See, eg Liz Porter, 'Police Accused of Race Attacks on Africans', *The Age* (Melbourne) 30 September 2007; *Flemington Kensington Community Legal Centre v Victoria Police (General)* [2007] VCAT 1237 (Unreported, Victorian and Administrative Appeals Tribunal, Macnamara DP, 10 July 2007); Adrienne Agg, 'Race Attack: Sudanese Youths Complain of Police Harassment' *The Dandenong Journal* (Dandenong), 21 April 2008; Kenneth Byrne, *Racial Bias and Police Selection* (1998) Australian Police Multicultural Advisory Bureau, available at [http://www.apmab.gov.au/news/news98/98\\_01.html](http://www.apmab.gov.au/news/news98/98_01.html).

employees and contractors.<sup>527</sup> A similar trend has been reflected in Victoria, following the enactment of the *Corrections Amendment Act 2008* (Vic). Under this Act, any compensation paid to prisoners by the state or private prison operators is quarantined for at least 12 months and publicised in newspapers and on the internet for the benefit of victims and others with potential claims against the prisoner. As a result, Victorian prisoners can no longer make confidential out-of-court settlements with the state or private prison operators. Such legislation denies prisoners adequate protection against harassment, discrimination and wrongful treatment, creating a significant risk of infringement of the right to privacy, including the right to psychological and bodily integrity, as well as the right to non-discrimination and equality before the law.

568. In Victoria, reports have emerged in recent months that, from time to time, officers from the crime investigation and traffic management units of Victoria Police have been searching all visitors to the Dame Phyllis Frost Centre and the Melbourne Remand Centre. In addition to searches of the visitors, officers have also been carrying out other checks such as breath tests and roadworthy assessments of vehicles.
569. As a result of these searches, some individuals are choosing not to visit their family members or friends in prison.<sup>528</sup> This raises concerns with Article 17 of the *ICCPR*, as well as the right to protection of families in Article 23.

#### Case Study

J is the mother of a child whose father is in prison. She was banned from visiting him after the Department of Correction Services decided she had brought in marijuana. J asked for the video of the cell search, but was told that the matter had been referred to the police and the video was evidence. However, the police said there was no investigation. The Ombudsman would not take up J's case because it was regarded as a discretionary decision by a public authority.<sup>529</sup>

570. Legislation in some states relating to the interception of prisoners' correspondence also raises concerns under Article 17 of the *ICCPR*. For example, in Victoria, legislation was recently introduced to enable a prison Governor to intercept or censor any letter sent either by or to a prisoner containing written or pictorial matter that may be regarded by a victim as distressing or traumatic.<sup>530</sup> In addition to the overly broad terms of this provision, the justification for intercepting or censoring correspondence sent to prisoners is inappropriate. The censure of prisoners' correspondence in this regard is inconsistent with the Human Rights Committee's views that the 'integrity and confidentiality of correspondence should be guaranteed de jure

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<sup>527</sup> Corrective Services and Other Legislation Amendment Bill 2008 (Qld) and Jane Fynes-Clinton, 'Cry Freedom at Abuse of Prisoner Rights', *The Courier Mail* (Brisbane), 11 September 2008.

<sup>528</sup> Information provided by Victorian Association for the Care and Resettlement of Offenders, Victoria.

<sup>529</sup> Case study provided by the Federation of Community Legal Centres, Victoria.

<sup>530</sup> *Justice Legislation Amendment Act 2007* (Vic) s 17, which amended *Corrections Act 1986* (Vic) s 47D(1)(d).

and de facto’, and further, that correspondence ‘should be delivered to the addressee without interception and without otherwise being read’.<sup>531</sup>

## O.6 Homelessness

571. People experiencing homelessness or at risk of homelessness will often face interference with their right to privacy and home. Many homeless people are forced to conduct their private lives in public spaces. In addition, many Australians live in precarious situations without security of tenure. In a 2002 case, *Pretty v United Kingdom*, the European Court recognised:

the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual’s physical and social identity. ... Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. **(emphasis added)**<sup>532</sup>

572. This case illustrates that a person’s home is critical to their development, education, peace of mind, formation of friendships and overall well-being. The eviction of a family from public accommodation, which results in their homelessness, is a breach of the right to privacy and home. The right to privacy encompasses a right not to be summarily evicted into a state of homelessness or inadequate housing.<sup>533</sup> However, in a number of Australian jurisdictions, landlords may summarily evict tenants, including public housing tenants, without providing any reason for the eviction or attempting to assist the tenant in finding alternative accommodation.<sup>534</sup> In Victoria, this position may be modified by the Victorian *Charter*.<sup>535</sup> Without federal protection of human rights, the residential legislation infringes on the right to privacy without requiring limitation to be proportionate or reasonably adapted to legitimate aims.

573. People residing in short-term crisis accommodation are also often searched for drugs or other items. Anecdotal evidence suggests that some transitional accommodation providers in Victoria threaten to invoke ‘no cause’ eviction notices to require tenants to meet additional terms and conditions in their tenancy (such as drug testing). Requiring tenants to undergo drug testing or body searches amounts to a violation of the tenant’s right to privacy.

### PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 17)

- Please provide details of any proposal to introduce or adopt a national access (or ‘identity’) card system.

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<sup>531</sup> Human Rights Committee, *General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art 17)* (1988) [8].

<sup>532</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, [61].

<sup>533</sup> *Connors v United Kingdom* [2005] 40 EHRR 189. See also *Stanková v Slovakia* [2007] ECHR 7205/02.

<sup>534</sup> *Residential Tenancies Act 1987* (NSW) s 50.

<sup>535</sup> *Residential Tenancies Act 1997* (Vic) s 263.

- Please provide information as to proposed national, state and territory reforms, if any, regarding CCTV and video surveillance in public places.
- Please advise the Human Rights Committee as to the Government's response, including legislative response, to the recent Australian Law Reform Commission report on privacy.
- Please explain how legislation, such as section 17 of the *Justice Legislation Amendment Act 2007* (Vic), which enables interception and censorship of prisoner correspondence, is consistent with the Human Rights Committee's jurisprudence that prisoner correspondence should be delivered to the addressee without interception and without otherwise being read.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 17)**

THAT Australia develop legislation to ensure that the conduct and use of video and mass surveillance in public places is consistent with the right to privacy.

THAT Australia enact legislation requiring that police powers to stop and search persons are exercised consistently with human rights, including particularly the right to privacy.

THAT Australia enshrine in legislation and practice the principle that prisoners are not to be subject to any deprivations of rights or freedoms that are not a necessary consequence of the deprivation of liberty itself, including particularly with respect to the right to privacy.

THAT all Australian jurisdictions amend residential tenancy legislation to require that reasons be provided to a tenant for any proposed eviction.

THAT relevant public tenancy laws, policies and practices be amended to require that public authorities assist public tenants to find alternative suitable accommodation prior to any eviction from public housing AND that any such eviction be reasonable, necessary and proportionate.

## Article 18 — Freedom of Thought, Conscience and Religion

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### **Article 18:**

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

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### **P. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION**

574. Article 18 enshrines the right to freedom of thought, conscience and religious belief and observances, both individually and in community with others. The right encompasses freedom of theistic, non-theistic and atheistic beliefs and the right not to adopt a religion or belief.

#### **P.1 Lack of Prohibition against Discrimination**

575. As discussed under [Article 2: Religion](#), despite the recommendations of the *Ismaε — Listen* report in 2004, there is currently no federal legislation that prohibits discrimination or vilification on the ground of religion. One effect of this is that some aspects of the law, particularly counter-terrorism measures, are administered in a discriminatory fashion or in a way that imposes a discriminatory burden on those who hold certain opinions and beliefs.

576. On 17 September 2008, the Australian Human Rights Commission released a discussion paper calling for submissions about freedom of religion and belief in the 21st century.<sup>536</sup> The discussion paper also explores the interaction of the right to freedom of religion with other human rights. This is a positive step and it is hoped that the recommendations made in the final report will lead to legislative and policy reform.

## **P.2 Counter-Terrorism Measures**

577. Many aspects of Australia's counter-terrorism measures raise concerns in relation to Article 18 of the *ICCPR*. In particular, many of the measures have had particular implications for Australia's Muslim and Arab populations.

### **(a) Definition of 'Terrorism'**

578. The *Criminal Code Act 1995* (Cth) (***Criminal Code***) criminalises all serious violence, actual or threatened, that is politically, religiously or ideologically motivated, and that is intended to intimidate any government, or any public or section of the public, wherever in the world such violence or threats occur.<sup>537</sup> The *Criminal Code* also criminalises a wide range of conduct ancillary to, or directly or indirectly connected to, such acts or threats of violence. This includes being a member of any organisation, training with any organisation, or giving or receiving funds or assets to or from any organisation that directly or indirectly fosters such violence, even where the membership, training, funds or assets are not themselves connected in any way to violence.

579. In establishing these crimes under Australian law, the *Criminal Code* does not draw the distinction, familiar to international humanitarian law and international criminal law, between violence threatened or perpetrated by or against civilians and by or against soldiers. As a result, very many individuals are potentially subject to prosecution under these provisions of the *Criminal Code*.

### **(b) Listing of 'Terrorist Organisations'**

580. The *Criminal Code* gives the Australian Government the power to list organisations as 'terrorist organisations' on the grounds that they are directly, or indirectly, engaged in, assisting, preparing, planning or fostering acts or threats of violence or on the basis that they directly advocate 'terrorist acts'.<sup>538</sup> To date, 19 organisations have been listed as 'terrorist organisations', with all but one of those organisations being self-identified Islamic organisations. Only a small number of the listed organisations have actually threatened violence against Australia.

581. The effect of a listing is to increase, in certain circumstances, the scope of criminal liability for involvement with the organisation in question. Listing also acts as a significant condemnation by public authorities of the political, religious or ideological goals of the organisation in question. The disproportionate representation of Islamic organisations among those listed

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<sup>536</sup> Australian Human Rights Commission, *Freedom of Religion and Belief in the 21 Century*, Discussion Paper (2008), available at [http://www.humanrights.gov.au/frb/frb\\_2008.pdf](http://www.humanrights.gov.au/frb/frb_2008.pdf).

<sup>537</sup> *Criminal Code* s 100.1(1).

<sup>538</sup> *Criminal Code* s 102.1(2)

suggests a discriminatory application of the relevant laws by the Australian Government, as explored in further detail below.

**(c) Administration and Policing**

582. Very few prosecutions have been brought under Australia's counter-terrorism laws. Where they have been brought, however, there is reason to believe that the prosecution has been motivated, in part, by considerations of the political or religious beliefs and affiliations of those prosecuted.<sup>539</sup>
583. Information received by community legal centres in Australia from their clients indicates that the Australian Federal Police and Australian Intelligence Security Organisation, in undertaking inquiries in relation to political violence, focus disproportionately upon those members of the Australian community who have links (by way of family and/or country of origin) with Tamil, Pakistani, Arab and East African communities overseas.

**P.3 Impact of Counter-Terrorism Measures on Muslim and Arab Populations**

584. This discriminatory application of counter-terrorism measures, discussed in the previous section, has a particularly adverse effect on the enjoyment by Australian Muslims and Arabs of their rights to freedom of religion, opinion and association. Following the events of 11 September 2001, Australia's Muslim and Arab Australian population have reported increased anti-Muslim and anti-Arab prejudice, yet Australian state and federal legislation fails to adequately protect against such prejudice. The increasing negative public attitudes towards Muslim and Arab members of Australian society raise concerns in relation to Article 18 of the *ICCPR*.

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<sup>539</sup> The vast majority of charges made under the *Criminal Code* have been made against Muslims: *R v Mallah* (2003); *R v Thomas* (2004); *R v Lodhi* (2006); *R v Khazal* (2006); *R v ul-Haque* (2006); *R v Benbrika & ors* (2006). Charges have also been brought against two alleged members of the Liberation Tigers of Tamil Eelam: *R v Vinayagamoorthy & Yathavan*. Only one other charge, unrelated to membership of a political or religious group, appears to have been brought: *R v Amundsen* (2006). See also Submission to the Senate Legal and Constitutional Committee on the Anti-Terrorism Bill 2005 (Cth), Parliament of Australia, 9 November 2005 (National Association of Community Legal Centres) available at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/terrorism/submissions/sub145.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/terrorism/submissions/sub145.pdf).

585. In 2003, based on reports from Muslim and Arab community organisations of increasing anti-Muslim and anti-Arab prejudice, the Human Rights and Equal Opportunity Commission (HREOC) launched the *Ismaḫ* project.<sup>540</sup> *Ismaḫ* means ‘listen’ in Arabic. The findings of the *Ismaḫ — Listen* report, released in 2004, are disturbing. In his foreword to the report, Dr William Jonas, former Acting Race Commissioner of HREOC, describes Arab and Muslim Australians being ‘abused, threatened, spat on, assailed with eggs, bottles, cans and rocks, punched and even bitten’. Women in Islamic dress, including the hijab, niqab, chador and burqa, were reported as being particularly at risk. People identifiable as Arab or Muslim experienced discrimination and vilification in employment, at school and university, in shopping centres, on public transport and on the street. Participants in the *Ismaḫ* project reported ‘a substantial increase in fear, a growing sense of alienation from the wider community and an increasing distrust of authority’.<sup>541</sup>
586. These findings also raise serious concerns in relation to Articles 2, 26 and 27 of the ICCPR and are discussed in further detail under Article 27: Arab and Muslim Communities.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 18)**

- Please advise the Human Rights Committee as to the steps, including legislative steps, that the Australian Government is taking to implement the recommendations of HREOC’s *Ismaḫ — Listen* report, to address the issue of discrimination against and vilification of Arab and Muslim Australians.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 18)**

THAT Australia implement the recommendations of HREOC’s *Ismaḫ — Listen* report, to address the issue of discrimination against and vilification of Arab and Muslim Australians.

THAT the Australian Government enact legislation to prohibit religious discrimination and vilification.

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<sup>540</sup> Human Rights and Equal Opportunity Commission, *Ismaḫ — Listen Report*, above n 105

<sup>541</sup> *Ibid* 4.

## Articles 19 and 20 — Freedom of Opinion and Expression

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### **Article 19:**

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
  - (a) *For respect of the rights or reputations of others;*
  - (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

### **Article 20:**

1. *Any propaganda for war shall be prohibited by law.*
2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

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### **Q. FREEDOM OF OPINION AND EXPRESSION**

587. Article 19 of the *ICCPR* guarantees the right to hold opinions without interference and the right to freedom of expression. The rights guaranteed protect the freedom to seek, receive and impart information and ideas of all kinds. The Covenant allows for the rights to be subject to restriction, if provided for by law and if necessary for the respect of rights or reputations of others or for the protection of national security, public order or public health or morals.

### Q.1 Silencing of NGOs

588. Non-government organisations (**NGOs**) play an important role in the promotion and protection of human rights, a role which has been recognised and supported internationally within the United Nations.
589. However, of particular concern under the former Australian Government, as well as under state and territory governments, has been the systematic practice of placing restrictions on the operations of NGOs within Australia, which has directly impacted on their capacity to advocate and speak out on a range of issues and human rights violations. This has been achieved primarily through a range of restrictions and conditions placed by governments on the funding provided to NGOs. This is particularly problematic given that Australian NGOs are heavily reliant and dependent on government funding.
590. This use of government funding to ‘silence dissent’ has been well researched and documented.<sup>542</sup> Some of the ways in which both federal and state and territory governments have limited the activities of NGOs include:
- (a) imposing conditions in funding agreements that prohibit or limit advocacy activities;
  - (b) micro-management of the activities of organisations by, for example, replacing core funding with project-based funding which constricts the provision of funding with the delivery of specific outcomes and leaves little room for other activities such as advocacy;
  - (c) imposing confidentiality agreements within funding agreements that constrain an NGO from speaking to the media without the approval of the appropriate department or minister;<sup>543</sup> and
  - (d) reduction in funding for advocacy organisations, particularly peak organisations who undertake an advocacy role rather than a service provision role.
591. The reduction of funding, or threat of reduction of funding, creates considerable pressure on NGOs to either support government policy or remain silent, and raises serious concerns in relation to the right to freedom of expression in Australia.

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<sup>542</sup> See, eg, Bronwen Dalton and Mark Lyons, ‘Representing the Disadvantaged in Australia: Role of Advocacy Organisations’, Discussion Paper 4/2005, Democratic Audit of Australia (2005), available at [http://www.democraticaudit.anu.edu.au/papers/focussed\\_audits/200503\\_dalton\\_lyons\\_advoc.pdf](http://www.democraticaudit.anu.edu.au/papers/focussed_audits/200503_dalton_lyons_advoc.pdf), John Casey and Bronwen Dalton, ‘The best of times, the worst of times: Community sector advocacy in the age of the compact’, (2006) 41 *Australian Journal of Political Science* 23; and Jenny Onyx et al, *Implications of government funding of advocacy for nonprofit independence and exploration of alternative advocacy funding models* (2007) Federation of Community Legal Centres (Vic.) Inc, available at [http://www.communitylaw.org.au/cb\\_pages/images/Onyx%20re%20Public%20Interest%20funding.pdf](http://www.communitylaw.org.au/cb_pages/images/Onyx%20re%20Public%20Interest%20funding.pdf).

<sup>543</sup> Joan Staples, *NGOs Out in the Cold: The Howard Government Policy Towards NGOs* (2007) *University of New South Wales Faculty of Law Research Series* 10, available at <http://www.austlii.edu.au/au/journals/UNSWLRS/2007/8.html>.

592. Further, in the absence of a large national philanthropic funding base,<sup>544</sup> many Australian NGOs are reliant upon being characterised as ‘charities’ in order to obtain available philanthropic funding and some government funding. Under Australian law, ‘charities’ are only allowed to engage in advocacy to a relatively limited degree. This is a significant impediment to advocacy work by NGOs who rely on tax deductible public donations for their existence and activities. In 2001, an *Inquiry into Definitional Issues Relating to Charitable, Religious and Community Service Not-for-Profit Organisations* proposed an easing of this limitation on advocacy by charities.<sup>545</sup> However, to date the Australian Government has not acted on this recommendation.
593. Under the former Australian Government, there was also a practice of limiting government consultation to selected NGOs. Organisations and individuals that highlight human rights violations, and therefore appear critical of the Australian Government, tend not to be granted access to meet with or consult with governments.<sup>546</sup>
594. The current Australian Government has indicated a positive shift in policy in the area of advocacy by NGOs. In a media conference on 9 January 2008, the Hon Julia Gillard MP, the Minister for Education, Employment and Workplace Relations and Social Inclusion, announced that the Government will be ‘changing contracts with the voluntary sector to make sure that people ...who work with the most disadvantaged can have their voices heard’.<sup>547</sup> She referred specifically to removing ‘gag clauses’ that required organisations funded by government to notify the government beforehand of any public statements.<sup>548</sup>
595. Despite the policy change, there is still work to be done in ensuring a free voice for NGOs in Australia. For instance, the current Australian Government has not committed to reforms which would broaden the availability of charitable status for NGOs engaged in advocacy.

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<sup>544</sup> Australian NGOs do not have access to the range of funding available to NGOs internationally. Most international funding sources are commonly restricted to funding NGOs from developing nations. NGOs in countries such as the USA and the UK are able to access funds from a range of national private foundations.

<sup>545</sup> Charities Definition Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), available at <http://www.cdi.gov.au/html/report.htm>.

<sup>546</sup> Staples, above n 543, 14.

<sup>547</sup> Hon Julia Gillard MP, Voluntary Sector contracts, SES funding arrangements, education revolution, cricket, US primaries, (Transcript of media conference, Melbourne, 9 January 2008).

<sup>548</sup> Ibid.

**Case Study**

Between 1996 and 2007, under the former Australian Government the NGO sector experienced an intense period of de-funding of NGOs which expressed criticism of the government – over 20 nationally-funded peak bodies were defunded. More than 50 per cent of peak groups in the areas of social welfare, non-English speaking background, health, aged, disability, women’s and children’s peaks lost significant amounts of funding and were 20 per cent totally defunded. A third of these have been found to have lost funding because of their public advocacy on government policy.<sup>549</sup> Many of these groups were working on issues concerning the poorest and most disempowered Australians, including National Shelter, Association of Civilian Widows, Australian Youth Policy and Action Coalition and Association of Non-English Speaking Background Women Australia.<sup>550</sup> To maintain their funding, NGOs sometimes constrain which human rights issues they will raise.<sup>551</sup>

Some specific examples of funding threats faced by Australian NGOs include:

- The Australian Council of Social Service is under contractual obligations to provide advance notice to the Australian Government of any submissions, media releases and commentary they make.<sup>552</sup>
- The Environment Defenders Office is restricted from using Australian Government funding to undertake litigation.

**Q.2 Anti-Vilification Laws**

596. Article 20 of the *ICCPR* provides that States must prohibit ‘national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence’. Anti-vilification legislation exists in most Australian jurisdictions.<sup>553</sup> Only the Northern Territory has no racial vilification provisions.

<sup>549</sup> Rose Melville, *Changing Roles of Community-Sector Peak Bodies in a Neo-liberal Policy Environment in Australia* (2003) University of Wollongong, available at <http://www.communitybuilders.nsw.gov.au/download/peakbodyreport.pdf>.

<sup>550</sup> Marion Sawyer, ‘Governing for the Mainstream: Implications for Community Representation’ (2006) *Australian Journal of Public Administration* 1.

<sup>551</sup> Onyx et al, above n 542, 14.

<sup>552</sup> Ibid 8.

<sup>553</sup> *Racial Discrimination Act 1975* (Cth) pt IIA (racial hatred); *Anti-Discrimination Act 1977* (NSW) pt 2 div 3A (racial vilification), pt 3A div 5 (transgender vilification), Part 4C div 4 (vilification based on sexual preference), pt 4F (vilification based on HIV/AIDS status); *Racial and Religious Tolerance Act 2001* (Vic) (racial and religious vilification); *Anti-Discrimination Act 1991* (Qld) s 124A (racial and religious vilification); *Anti-Discrimination Act 1998* (Tas) s 19 (inciting hatred on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or activity); *Discrimination Act 1991* (ACT) pt 6 (racial vilification); and *Racial Vilification Act 1996* (SA) s 4 (racial vilification).

597. Broadly speaking, Australia’s anti-vilification legislation prohibits public acts of vilification, verbal abuse and hatred on a range of grounds, including race. Some statutes contain civil proscriptions and processes alone,<sup>554</sup> while other statutes impose criminal sanctions.<sup>555</sup> Criminal sanctions are generally imposed only when a perpetrator threatens or incites *physical harm* to a person or their property.
598. All Australian statutes are based on a separation of public and private spheres. Each statute differentiates between the public sphere, which is regulated by legislation, and the private sphere, which is untouched by the legislation.
- (a) Prohibited Forms of Vilification**
599. There is little consistency in the treatment of racial and religious vilification across jurisdictions. For example, although the Australian Government and all Australian states and the Australian Capital Territory (but not the Northern Territory) have legislated to prohibit public incitement of racial hatred,<sup>556</sup> religious vilification is proscribed only in Victoria,<sup>557</sup> Queensland<sup>558</sup> and Tasmania.<sup>559</sup> Significantly, there is no federal prohibition against religious vilification.
600. There are further state laws prohibiting vilification based on characteristics other than race and religion. New South Wales and the Australian Capital Territory both prohibit, and in certain circumstances criminalise, vilification based on sexual orientation/preference and HIV status.<sup>560</sup> In Tasmania, vilification of a person or group on the basis of sexual orientation is prohibited.<sup>561</sup> Tasmania is also the only State to prohibit the vilification of people with disability,<sup>562</sup> although given Australia’s recent ratification of the *UN Convention on the Rights of Persons with Disabilities* further anti-vilification laws may follow. In Queensland, vilification based on gender identity and sexuality is prohibited.<sup>563</sup>

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<sup>554</sup> See, eg, *Racial Discrimination Act 1975* (Cth) and *Anti-Discrimination Act 1998* (Tas).

<sup>555</sup> See, eg, *Anti-Discrimination Act 1997* (NSW) s 20D (serious racial vilification), s 38T (serious transgender vilification), s 49ZTA (serious homosexual vilification), s 49ZXC (serious HIV/AIDS vilification); *Racial and Religious Tolerance Act 2001* (Vic) pt 4 (serious racial or religious vilification); *Anti-Discrimination Act 1991* (Qld) s 131A (serious racial or religious vilification). Note that Western Australian legislation creates criminal offences for intending or likely to racially harass or incite racial hatred, and possessing material for dissemination or display for such purposes; *Criminal Code Amendment (Racial Vilification) Act 2004* (WA).

<sup>556</sup> *Discrimination Act 1991* (ACT) s 66; *Anti-Discrimination Act 1977* (NSW) s 20C; *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial Vilification Act 1996* (SA) s 4; *Anti-Discrimination Act 1998* (Tas) s 19(a); *Racial and Religious Tolerance Act 2001* (Vic) s 7; *Criminal Code 1913* (WA) ss 77–8.

<sup>557</sup> *Racial and Religious Tolerance Act 2001* (Vic) s 8.

<sup>558</sup> *Anti-Discrimination Act 1991* (Qld) s 124A.

<sup>559</sup> *Anti-Discrimination Act 1998* (Tas) s 19(d).

<sup>560</sup> *Anti-Discrimination Act 1977* (NSW) ss 38S–38T, 49ZXB–49ZXC, 49ZT–49ZTA; *Discrimination Act 1991* (ACT) s 66.

<sup>561</sup> *Anti-Discrimination Act 1998* (Tas) s 19.

<sup>562</sup> *Anti-Discrimination Act 1998* (Tas) s 19.

<sup>563</sup> *Anti-Discrimination Act 1991* (Qld) s 124A.

**(b) Attempts to widen scope of anti-vilification laws**

601. There have been numerous attempts to introduce legislation which widens the scope of anti-vilification laws. A number of examples include:
- (a) In 2003, the then Federal Opposition introduced the Racial and Religious Hatred Bill 2003 (Cth) to create offences for both racial and religious vilification.<sup>564</sup> The Bill did not proceed.
  - (b) In 2004, the Democrats attempted (for a second time) to introduce national anti-vilification laws on grounds of sexuality through a private member's bill entitled the Sexuality Anti-Vilification Bill 2003 (Cth).<sup>565</sup> This Bill lapsed on 15 October 2007.
  - (c) In December 2005, the then Federal Opposition introduced the Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth), again with the intention of creating offences based on racial and religious hatred.<sup>566</sup> This Bill was discharged on 12 September 2006.
602. In 2004, a report by the Human Rights and Equal Opportunity Commission (**HREOC**), entitled *Ismaξ — Listen: National Consultation on Eliminating Prejudice Against Arab and Muslim Australians*, found that the majority of Arab and Muslim women surveyed had experienced an increase in violence or offensive remarks since the September 11 attacks and the first Bali bombings. HREOC recommended that Commonwealth vilification laws on the ground of religion or belief be introduced.<sup>567</sup> To date, these recommendations have not been acted upon.

**Q.3 Impact of Counter-Terrorism Measures**

603. Many of Australia's counter-terrorism measures impinge on the right to freedom of opinion and expression of particular ethnic groups. These measures are discussed in further detail under Articles 7 and 10: Counter-Terrorism Measures and Article 9: Counter-Terrorism Measures.
604. In particular, the broad definitions of 'terrorist acts' and 'terrorist organisations', and the evidence that has been relied on to prosecute offences relating to these definitions, have had the affect of silencing certain ethnic groups for fear of being connected with overseas organisations that under Australian law would fall within the ambit of counter-terrorism laws. This silencing effect is exacerbated by the discriminatory application of the laws, as discussed under Article 18: Counter Terrorism Measures.
605. In addition to the measures discussed above, in 2007, the former Australian Government amended its federal classification scheme to ban film, literature and video game material that

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<sup>564</sup> Available at [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/8EEEE012A62CCE701CA256F720025A4D7/\\$file/03191bs.rtf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/8EEEE012A62CCE701CA256F720025A4D7/$file/03191bs.rtf).

<sup>565</sup> Available at [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/F95B6BBE7EB9685BCA256F72002537BF/\\$file/03053b.rtf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/F95B6BBE7EB9685BCA256F72002537BF/$file/03053b.rtf).

<sup>566</sup> Available at [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/724AFD4E58E7E683CA2570CE007DE3BA/\\$file/05187b.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/724AFD4E58E7E683CA2570CE007DE3BA/$file/05187b.pdf).

<sup>567</sup> *Ismaξ — Listen report*, above n 105, 4.

advocates terrorist acts.<sup>568</sup> In light of the broad definitions of terrorist acts and organisations (as discussed above), the classification scheme has the scope to prevent circulation of an inordinate array of political and entertainment material. The potential for the selective and discriminatory banning of certain political material raises concerns in relation to Articles 19 and 20 of the *ICCPR*.

#### Case Study

X is of Tamil origin and hosts a Tamil radio program on a community radio station. Under Australian law, the Liberation Tigers of Tamil Eelam (**LTTE**) would fall within the legal definition of a 'terrorist organisation'. X has observed that, in the prosecution of two Tamil-Australians in relation to their links with the LTTE, part of the prosecution case was that the defendants held political materials relating to the plight of Tamils in Sri Lanka. X is therefore reluctant to speak about matters relating to the situation in the north-eastern region of Sri Lanka in his radio program for fear of being linked with the LTTE and for fear that political commentary might be used to incriminate him. He therefore avoids speaking about Sri Lankan politics on his radio program altogether.

#### Q.4 Sedition Laws

606. Amendments made to the *Criminal Code Act 1995* (Cth) by the former Australian Government in November 2005 significantly broadened the definition of the offence of sedition, as well as increasing penalties and reducing the standard of proof required to prove the offence.<sup>569</sup> The stricter laws establish the following prohibitions:

- (a) urging another person to overthrow the Australian Government or the Australian Constitution by force or violence;
- (b) urging another person to interfere by force or violence in processes for a parliamentary election;
- (c) urging a group, or groups, to use force or violence against another group where that use of force would threaten the peace, order and good government of the Commonwealth; and
- (d) urging another person to assist an organisation or country that is at war with or engaged in armed hostilities against Australia (other than in relation to the provision of humanitarian aid).

607. Each of these offences carries a maximum penalty of imprisonment for seven years. The concepts of 'urging' another person or group and 'assisting' an organisation are not defined in the legislation.

608. In September 2006, the Australian Law Reform Commission (**ALRC**) undertook an inquiry into whether Australia's sedition laws effectively address the problem of 'intentionally urging others

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<sup>568</sup> *Classification Amendment (Terrorist Material) Act 2007* (Cth).

<sup>569</sup> *Anti-Terrorism Act (No. 2) 2005* (Cth).

to use force or violence’ and whether ‘sedition’ is the appropriate term to describe these offences. The ALRC produced a report entitled *Fighting Words: A Review of Sedition Laws in Australia* which made 27 recommendations for reform of the legislation.<sup>570</sup> Key recommendations of the ALRC Report were that:

- (a) the term ‘sedition’ should be dropped from federal laws;
- (b) there needs to a clear distinction in the legislation between free speech and conduct calculated to incite violence in the community;
- (c) the laws must be drafted in sufficiently precise terms to ensure they cannot be applied inappropriately or used in a way that would infringe upon freedom of expression;
- (d) the existing laws should be refined to require the Crown to prove that a person urged others to use force or violence against community groups or the institutions of democratic government, and with the intention that this violence would eventuate; and
- (e) state and territory laws, ‘which mostly are a good deal worse than the federal law’ must also be reformed.

609. To date these recommendations have not been implemented, which continues to raise issues in relation to Articles 19 and 20 of the *ICCPR*.

#### **Q.5 Freedom of Speech**

610. The right to free speech is not comprehensively protected under Australian law. Although the High Court of Australia has found an implied ‘freedom of political communication’ in the Australian Constitution, this is limited in its protection to communications pertaining to Australia’s system of representative and responsible government.<sup>571</sup>

611. ‘Australia’s Right to Know Coalition’ conducted an independent audit of the state of free speech in Australia. The audit reviewed legislation and practices related to free speech as it particularly affects the media in Australia today. The audit broadly concluded that free speech and media freedom are being whittled away by gradual and sometimes almost imperceptible degrees. The most serious findings of the audit were:<sup>572</sup>

- (a) There are 500 pieces of legislation which contain ‘secrecy’ provisions or restrict the freedom of the media to publish certain information.
- (b) Freedom of Information laws and regulatory tools that are meant to facilitate the flow of information do not serve the public well on matters of government accountability and there are inconsistencies between jurisdictions. For example, some freedom of information requests have taken months or even years to process, have involved high costs and have been obstructed by legal technicalities and blanket claims. The audit identified a ‘culture of secrecy’ still evident in many government agencies.

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<sup>570</sup> ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006), available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/104/>.

<sup>571</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>572</sup> Irene Moss, *The Independent Audit of the State of Free Speech in Australia* (2007), available at <http://abc.net.au/unleashed/documents/Audit-Report-Final-31-Oct.pdf>.

- (c) Legislation protecting whistleblowers, important for exposing corruption or maladministration, contains significant gaps, varies widely between jurisdictions and the administration of these laws is carried out with very little leadership commitment.
- (d) Shield laws give inadequate protection to journalists in relation to this ability to protect the identity of their sources.
- (e) The *Anti-Terrorism Act (No. 2) 2005* (Cth), which replaced Australia's existing sedition laws, is problematic for a number of reasons, including the use of imprecise terminology such as 'to urge' and its implicit extension to indirect methods of urging.
- (f) The principle of open justice has eroded over recent years, largely due to the threat of terrorism. Courts are making suppression orders far more often and there are difficulties obtaining information in relation to such orders.
- (g) Australia's privacy laws are complex and confusing, with large areas of overlap, gaps and inconsistencies.

612. These findings raise serious concerns regarding the degree to which Australia has implemented Article 19 of the *ICCPR*.

#### **Q.6 People with Disability**

613. Article 13 of the *Convention on the Rights on Persons with Disabilities* provides for the right of people with disability to freedom of expression and opinion including the freedom to seek, receive and impart information and ideas on an equal basis with others and through sign languages, and Braille and augmentative and alternative communication and all accessible means, modes, and formats of communication of the person's choice.

614. A recent national survey of disability found 206,600 Australians have a condition that impacts on their ability to communicate<sup>573</sup> and 3.55 million Australians suffer from some form of hearing loss.<sup>574</sup> People with disability often require positive support to express themselves and information in appropriate accessible formats so they can contribute meaningfully to public debate.

615. The Australian Government has developed the Commonwealth Disability Strategy which seeks to enable the full participation of people with disabilities in its many programs, services and facilities by removing barriers which prevent access for people with disability through the development of Disability Action Plans. Many government departments have not met the obligations contained in the Strategy nor developed Disability Action Plans and the provision of government information in accessible formats remains the exception, rather than the rule.

616. State government support for teaching Australian Sign Language (**Auslan**) is extremely limited in Australia, particularly at the crucial early years of schooling. As a result many deaf students have poor literacy, and poorer educational and employment outcomes than the rest

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<sup>573</sup> Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings* (2003), 33, available at [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/978A7C78CC11B702CA256F0F007B1311/\\$File/44300\\_2003.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/978A7C78CC11B702CA256F0F007B1311/$File/44300_2003.pdf).

<sup>574</sup> Access Economics, *Listen Hear: The economic cost and impact of hearing loss in Australia* (2006), available at <http://www.audiology.asn.au/pdf/ListenHearFinal.pdf>.

of the Australian population. Federal and state government support for the provision of Auslan interpreters is limited and inconsistent, therefore limiting the right to self expression of Australians who are deaf.

617. The provision of accessible electronic media is integral to ensuring freedom of self expression for deaf and blind people and those with a vision or hearing impairment. However, the current level of captioning on free-to-air television in Australia is estimated to be 70 per cent of programming between 6am and midnight.<sup>575</sup> There is no regularly scheduled audio description on free-to-air television in Australia.<sup>576</sup> Only ten cinemas in Australia provide films with captions and there is no legislative requirement in relation to the captioning or audio describing of audio-visual content on the internet.

#### **Q.7 Prisoners' Access to Publications**

618. In recent years, the removal of prisoners' access to publications raises concerns in relation to the right to freedom of expression. For example, the governments of New South Wales, South Australia and Queensland have banned access to the prisoner support publication, *JUST US* (formerly *Framed*).<sup>577</sup> The magazine *Framed* had been distributed in prisons throughout Australia for nearly 20 years.

619. According to Justice Action, the publisher of the magazine, *Framed*:

is the only independent publication distributed in prisons which deals with political and legal information from the point of view of prisoners. 'Framed' is intended as a means of self expression for prisoners, a source of information about their human rights and the realities of life in prison

620. The banning of publications such as *Framed* raises concerns in relation to the right to freedom of expression for prisoners. The opportunity to express themselves and to inform themselves about issues which affect them both legally and personally is particularly important for prisoners.

#### **PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLES 19 AND 20)**

- Please provide information as to the steps and measures, including legislative steps, that the Australian Government is taking to remove restrictions imposed by public funding arrangements and taxation laws with respect to NGOs engaging in lobbying and advocacy to promote human rights.

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<sup>575</sup> HREOC, *Notice of temporary exemption under the DDA: Broadcast Television Captioning* (2003) available at [http://www.hreoc.gov.au/disability\\_rights/exemptions/tvcap/dec.htm](http://www.hreoc.gov.au/disability_rights/exemptions/tvcap/dec.htm).

<sup>576</sup> Department of Broadband, Communications and the Digital Economy, *Access to Electronic Media for the Hearing and Vision Impaired Discussion Paper* (2008) available at [http://www.dbcde.gov.au/media\\_broadcasting/television/television\\_captioning/television\\_captioning\\_discussion\\_paper](http://www.dbcde.gov.au/media_broadcasting/television/television_captioning/television_captioning_discussion_paper).

<sup>577</sup> HREOC, *Report of an inquiry into a complaint made on behalf of federal prisoners detained in New south Wales correctional centres*, Report No 32 (2006), available at [http://www.hreoc.gov.au/legal/hreoca\\_reports/index.html](http://www.hreoc.gov.au/legal/hreoca_reports/index.html).

- Please explain whether and how the Australian Government considers the law relating to sedition to be proportionate and the minimal impairment necessary with human rights, particularly the right to freedom of expression.
- What steps, including legislative and budgetary steps, does the Australian Government propose to take to ensure that, consistently with Articles 19 and 20 of the *ICCPR* and Article 13 of the *Convention on the Rights on Persons with Disabilities*, people with disability in Australia enjoy the freedom to seek, receive and impart information and ideas on an equal basis with others?

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLES 19 AND 20)**

THAT Australia enact comprehensive constitutional or legislative protection of the right to freedom of expression.

THAT the Australian Government remove any restrictions on public funding to NGOs which may fetter freedom of expression, particularly with respect to the promotion and protection of human rights.

THAT the Australian Government amend the *Income Tax Assessment Act*, and other legislation as appropriate, to recognise ‘the advancement of human rights’ as a charitable purpose and to increase the ability of NGOs to engage in lobbying and advocacy to promote human rights.

THAT the Australian Government enact legislation to prohibit religious vilification.

THAT Australia undertake a comprehensive review and reform of counter-terrorism laws, including the law of sedition, to ensure that such laws are compatible with the right to freedom of expression.

THAT Australia take steps, including legislative and budgetary steps, to ensure that people with disability in Australia, including deaf and blind people and those with a vision or hearing impairment, enjoy the freedom to seek, receive and impart information and ideas on an equal basis with others.

THAT Australia review and implement the recommendations of the Australian Law Reform Commission report, *Fighting Words: A Review of Sedition Laws in Australia*.

## Articles 21 and 22 — Freedom of Assembly and Association

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### **Article 21:**

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

### **Article 22:**

1. *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*
3. *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

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## **R. FREEDOM OF ASSEMBLY AND ASSOCIATION**

621. Article 21 of the *ICCPR* provides for the right of peaceful assembly. Article 22 of the *ICCPR* provides that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests. The right to strike is also considered an integral part of the principle of freedom of association.

**R.1 Counter-Terrorism Measures****(a) Proscribed ‘Terrorist Organisations’**

622. As discussed under Article 18: Counter Terrorism Measures, the *Criminal Code Act 1995* (Cth) (**Criminal Code**) gives the Australian Government the power to proscribe organisations as ‘terrorist organisations’. The power of the Australian Government to effectively ban organisations and to expose individuals associated with the organisation to criminal liability raises significant issues in relation to the right to freedom of assembly and association.

**(b) Offences of Association**

623. Amendments to the *Criminal Code* in 2002 introduced a range of offences that relate to the conduct of a person who is connected with or associated to a ‘terrorist organisation’.<sup>578</sup> Following the amendments, it is now an offence to:

- (a) direct the activities of a terrorist organisation;
- (b) be a member of a terrorist organisation;
- (c) recruit a person to join or participate in the activities of a terrorist organisation;
- (d) receive from or provide training to a terrorist organisation;
- (e) receive funds from or make funds available to a terrorist organisation;
- (f) provide support or resources that would help a terrorist organisation engage in preparation for, planning, assisting or fostering of the doing of a terrorist act; or
- (g) on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation.

624. Many aspects of these “association” offences raise serious concerns with Articles 21 and 22 of the *ICCPR*. These offences potentially criminalise the activities of a broad range of people who may not be directly or indirectly supporting acts of terrorism. As demonstrated by the Case Study below, the breadth of the offences raises significant concerns with Articles 21 and 22 of the *ICCPR*.

625. By shifting the focus of criminal liability from an individual’s conduct to their association, these offences raise serious concerns in relation to the right to freedom of assembly and association.

**Case Study: Mohamed Haneef**

Dr Mohamed Haneef was a 27 year old Indian physician who was arrested and detained under the *Anti-Terrorism Act 2004* (Cth) for suspected terrorist related activities (see Case Study on page 148). After being detained for twelve days without charge, Dr Haneef was charged under s 102(7)(2) of the *Criminal Code*. The basis of the charge was that he had intentionally provided support to a terrorist organisation, whilst being reckless as to whether the organisation was a terrorist organisation.

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<sup>578</sup> *Criminal Code Act 1995* (Cth) Div 102, introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

The charge centred on the ‘association’ of Dr Haneef with his second cousin, Sabell Ahmed, one of the operatives in the 2007 Glasgow International Airport Attack. More than nine months earlier, Dr Haneef had given his SIM card to Mr Ahmed. There was also other evidence that allegedly indicated Dr Haneef was in frequent and extensive contact with his two second cousins in the lead-up to the failed terror attacks.

On 16 July 2007, Dr Haneef was ordered to be freed on surety after the public prosecutor failed to convince the magistrate that the doctor should be remanded in custody. A few hours later, the former Minister for Immigration and Citizenship cancelled Dr Haneef’s visa on ‘character grounds’ under s 501 of the *Migration Act 1958* (Cth) because he ‘reasonably suspected’ that Dr Haneef had an association with people involved in terrorism. Despite this view of the Minister for Immigration and Citizenship, all charges against Dr Haneef were subsequently dropped after the prosecutor stated there was no reasonable prospect of securing a conviction against Dr Haneef.

In August 2007, Dr Haneef successfully appealed against the decision of the Minister for Immigration and Citizenship to cancel his visa. The Minister’s decision was quashed on 20 August 2007 when the Federal Court of Australia ruled that the term ‘association’ should not include mere social, family or professional relationships.<sup>579</sup>

## R.2 Public Assembly

626. Specific laws have been passed to apply to a number of major public events that raise concerns with Articles 21 and 22 of the *ICCPR*. Most notably, legislation was passed specifically to limit the ability of particular groups to participate in public assembly in relation to the meeting of the Asia-Pacific Economic Cooperation Economic Leaders in Sydney in September 2007 (**APEC Meeting**) and World Youth Day in Sydney in July 2008 (**World Youth Day**).<sup>580</sup>
627. Specific laws were introduced for the APEC meeting that included:
- (a) giving police the power to: establish roadblocks, checkpoints and cordons; search people, vehicles and vessels; seize and detail prohibited items; give reasonable directions; and exclude or remove people from APEC security areas;<sup>581</sup>
  - (b) giving police powers of entry and search of premises within particular restricted areas,<sup>582</sup> and the power to request disclosure of identity;<sup>583</sup>
  - (c) making it an offence, punishable with up to six months imprisonment, to be in a restricted area without special justification.<sup>584</sup> The injustice of the severity of this penalty was compounded by confusion as to what constituted a restricted area;<sup>585</sup>

<sup>579</sup> *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40.

<sup>580</sup> *APEC Meeting (Police Powers) Act 2007* (NSW); *World Youth Day Act 2006* (NSW).

<sup>581</sup> *APEC Meeting (Police Powers) Act 2007* (NSW) ss 10–14, 24–6.

<sup>582</sup> *APEC Meeting (Police Powers) Act 2007* (NSW) s 21.

<sup>583</sup> *APEC Meeting (Police Powers) Act 2007* (NSW) s 22.

- (d) providing for a presumption against bail for certain offences,<sup>586</sup> and
  - (e) giving persons exercising powers or functions under the laws, including law enforcement officials, with immunity in nuisance.<sup>587</sup>
628. Concerns have also been expressed over the manner in which many of these powers were exercised. During the APEC Meeting, there were reports of unlawful arrests and excessive use of force by the police.<sup>588</sup>
629. In addition, prior to the APEC Meeting, it was reported that a number of groups and individuals were targeted by police with the aim of deterring them from attending APEC protests.<sup>589</sup>
630. Specific laws were also introduced to expand police powers for World Youth Day.<sup>590</sup> These laws were introduced by regulation just weeks before the event and were aimed at reducing protest activity by:
- (a) creating offences applying within zones designated as ‘World Youth Day declared areas’. When gazetted, the offences applied to many hundreds of areas across Sydney, including over 40 city locations such as the Sydney Opera House, the Sydney Harbour Bridge, Hyde Park, many schools and numerous public transport stations including major hubs;
  - (b) requiring that people entering or exiting declared areas submit to being searched, including vehicles or baggage, if so requested;<sup>591</sup>
  - (c) allowing for a fine of \$5,500 to be imposed for causing ‘annoyance or inconvenience’ to World Youth Day participants;<sup>592</sup> and
  - (d) allowing enforcement of the laws not only by police, but also the Rural Fire Service and the State Emergency Service, which do not usually have law enforcement powers.<sup>593</sup>

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<sup>584</sup> *APEC Meeting (Police Powers) Act 2007* (NSW) s 19.

<sup>585</sup> See, eg, ‘Chaser APEC Charges Dropped’, *SBS World News Australia*, 28 April 2008, available at [http://news.sbs.com.au/worldnewsaustralia/chaser\\_apec\\_charges\\_dropped\\_545833](http://news.sbs.com.au/worldnewsaustralia/chaser_apec_charges_dropped_545833).

<sup>586</sup> *APEC Meeting (Police Powers) Act 2007* (NSW) s 31.

<sup>587</sup> *APEC Meeting (Police Powers) Act 2007* (NSW) s 35.

<sup>588</sup> Liz Snell, Combined Community Legal Centres’ Group (NSW) and Kingsford Legal Centre, *Protest, Protection Policing: The Expansion of Police Powers and the Impact on Human Rights in NSW* (2008) 21.

<sup>589</sup> *Ibid.*

<sup>590</sup> *World Youth Day Act 2006* (NSW); *World Youth Day Regulation 2008* (NSW).

<sup>591</sup> *World Youth Day Regulation 2008* (NSW) reg 8.

<sup>592</sup> *World Youth Day Regulation 2008* (NSW) reg 7. This part of the Regulations was challenged by two activists from the No to Pope Coalition in the Federal Court of Australia. *Evans v New South Wales* [2008] FCAFC 130 (Unreported, Federal Court of Australia, French, Branson and Stone JJ, 15 July 2008). The Full Court of the Federal Court struck down the part of the Regulations which made it unlawful to ‘annoy’ a participant, but kept in the section prohibiting the ‘inconveniencing’ participants.

<sup>593</sup> *World Youth Day Act 2006* (NSW) s 46D.

631. A report released in 2007 also found that police used disproportionate and unjustifiable force against protesters and bystanders during the Group of 20 Summit in Melbourne in November 2006 (**G20 Summit**).<sup>594</sup> Among other concerns, the report cited:
- (a) incidents of arbitrary detention and arrest, in some cases of people who were not even involved in any protest action;
  - (b) inappropriate or excessive use of force, including the use of batons, mostly in situations where protestors were not using any physical force, resisting physically or threatening police officers and without any warning that force would be used; and
  - (c) failure to render assistance to injured people or to respond to requests for assistance in a timely manner.
632. This use of police powers to deter people from peaceful assembly raises concerns under Articles 21 and 22 of the *ICCPR*.

**Case Study: G20 Summit**

While walking with friends in Melbourne, Tim Davis-Frank, who took part in the G20 Summit protests, was snatched by about eight unidentifiable men and forced into an unmarked white van. Without identifying themselves, the men in the van tied his hands behind his back, forced him to lie face down on the floor and proceeded to interrogate him, punching him repeatedly in the face if he didn't answer their questions quickly enough and once for accidentally calling one of them 'mate'.

Four months later, a further incident took place at his parents' house in Sydney. The house was one of a number which were raided by teams of up to ten police in a 'dawn sweep through Sydney' to arrest G20 demonstrators four months after the event.<sup>595</sup>

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<sup>594</sup> Federation of Community Legal Centres (Vic) Inc. *Human Rights Observer Team Final Report: G20 Protests*, (2007), available at <http://www.communitylaw.org.au/fedclc/resources/HROFinalReportforwebrelease.pdf>.

<sup>595</sup> See Tim Davis-Frank, G20 Protestor: 'We are not the Dangerous Ones' (23 March 2007), Green Left Weekly, available at <http://www.greenleft.org.au/2007/704/36552>; see also David Marr, 'His Master's Voice: Corruption of Public Debate Under Howard' (2007) 26, Quarterly Essay 33.

### R.3 Workplace Relations Laws

633. Australia's industrial relations laws are primarily found in the *Workplace Relations Act 1996* (Cth). In 2005, the former Australian Government passed the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and related amendments (**Work Choices**). Work Choices involved a significant regression of workers' rights and has been described as the most radical change to Australia's industrial relations system in 100 years.<sup>596</sup> Indeed, the Work Choices amendments raise serious concerns in relation to many social, economic and cultural rights, in particular the right to work and to just and favourable conditions of work. These concerns are examined in detail in a recent NGO Submission to the UN Committee on Economic, Social and Cultural Rights on Australia's compliance with the *ICESCR*.<sup>597</sup>
634. In March 2008, the current Australian Government introduced legislation to amend certain aspects of Work Choices.<sup>598</sup> Notwithstanding these amendments, Work Choices remains largely in effect. Particular aspects of these laws raise concerns in relation to the right to freedom of assembly and association, in particular the rights of trade unions and of workers to strike.
635. The current Australian Government has also announced that it will introduce a new industrial relations system to commence in 2010. While the exact details of the new system, including the extent to which it will respect the right to freedom of association, are unclear, the new system seems set to retain many aspects of Work Choices.

#### (a) Trade Unions

636. Freedom of association covers the rights of workers to join and be represented by trade unions, to organise and to collectively bargain. Rights are also extended to the organisations themselves to draw up rules and constitutions, vote for officers, and organise administrative functions without interference from public authorities.
637. The introduction of Work Choices in 2005 further eroded freedom of association rights, which were already limited. While the *Workplace Relations Act 1996* (Cth) protects the right of workers to join trade unions, it does not protect the benefits and consequences of being a member of a trade union. The Act limits the right to freedom of association by providing that:
- (a) employees have no right to engage in collective bargaining if their employer refuses;
  - (b) employees' rights to bargain collectively are further limited as certain content is prohibited in collective agreements, a great deal of which relates to union rights;
  - (c) employees have no automatic right to be represented by their union in individual discussions and negotiations;
  - (d) union officials are restricted from entering worksites to speak to or recruit members; and

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<sup>596</sup> Joe Isaac, 'Reforming Australian Industrial Relations?' (2007) 1(4) *Insights* 1, 1.

<sup>597</sup> ICESCR NGO Report, above n 25.

<sup>598</sup> *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).

- (e) members of unions are denied the right to freely draw up their own rules by mandating what matters may be included in union rules.
638. The former Australian Government was repeatedly reprimanded by the International Labour Organisation (**ILO**) for restricting freedom of association rights. In 2007, the ILO Committee of Experts on the Application of Conventions and Recommendations requested that the Australian Government amend sections of the *Workplace Relations Act 1996* (Cth) that interfere with the right of members to freely draw up the rules of their union and commented on the restrictive conditions imposed on the right of union representatives to visit workplaces.<sup>599</sup>
639. In addition to Work Choices, the former Australian Government also introduced the *Building and Construction Industry Improvement Act 2005* (Cth) which severely limits the freedom of association of building and construction industry workers and exposes their unions to steep penalties, including imprisonment, for conducting legitimate union business. The laws are enforced by the Australian Building and Construction Commission.
640. The current Australian Government has not only failed to address the problems with the *Building and Construction Industry Improvement Act 2005* (Cth), but has committed to retaining the Australian Building and Construction Commission until January 2010. Under the current Australian Government, the Australian Building and Construction Commission has maintained the same powers, policies and resources as it has had since its inception in October 2005.

**Case Study: Noel Washington**

Noel Washington, an official of the Construction, Forestry, Mining and Energy Union, is currently facing the prospect of a jail sentence for refusing to answer questions about a union meeting that he attended last year. The meeting took place during a work break and was not on the employer's premises.

The Australian Building and Construction Commission sought to investigate what occurred at the meeting. Mr Washington refused to reveal what was said at the union meeting. He has been charged by the Department of Public Prosecutions and is set to appear in the Magistrates Court of Victoria in August 2008. He faces six months imprisonment if found guilty.

**(b) Right to Strike**

641. As discussed in relation to the freedom of association, the *Workplace Relations Act 1996* (Cth) severely interferes with the rights of workers to take industrial action, including strike action. Whereas international law provides that strikes are legal and may be limited only in certain circumstances, Australian law is essentially the reverse; that is, strikes are *prima facie* illegal and are only permitted in certain instances. While there has never been a general right

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<sup>599</sup> International Labour Organization, *Individual Direct Request concerning Freedom of Association and Protection of the Right to Organise Convention: Australia* (2007).

to strike in Australian law, the Work Choices amendments further limited the circumstances in which workers can take industrial action, including strike action.

642. The restrictions on the right to strike include:

- (a) lawful strikes can only be taken in pursuit of a collective agreement which does not contain prohibited content;<sup>600</sup>
- (b) strikes are unlawful if in pursuit of common wages and conditions for more than one agreement (pattern bargaining);<sup>601</sup>
- (c) a requirement for secret ballots before lawful strikes;<sup>602</sup>
- (d) the Australian Industrial Relations Commission must terminate a bargaining period in certain circumstances. When a bargaining period is terminated any strike action is then unlawful;<sup>603</sup>
- (e) the Minister has unprecedented powers to halt strikes, beyond an essential services exemption;<sup>604</sup> and
- (f) strikes are outlawed during the life of an agreement.<sup>605</sup>

643. These measures combine to effectively deny the right to strike for many workers in Australia.

#### Case Study

The *Building and Construction Industry Improvement Act 2005* (Cth), referred to above in paragraph 639, effectively abolished the right to strike for workers in the building and construction industry. Along with the prohibitions on the right to strike referred to above in paragraph 642, the Act also provides for financial penalties of up to \$110,000 for unions and \$22,000 for individuals who engage in ‘unprotected’ strike action.

The building and construction laws also restrict the right to associate freely by establishing the Australian Building and Construction Commissioner which has wide ranging powers to monitor and investigate the activities of unions and their members.

The ILO has requested Australia amend these laws to comply with the *Freedom of Association and Protection of the Right to Organise Convention (ILO Convention No 87)*.<sup>606</sup>

<sup>600</sup> ‘Prohibited content’ is defined by regulation and is content that cannot be included in agreements made under the Act. Examples of prohibited content includes a term of an agreement that allows employees to receive leave to attend union training sessions or paid leave to attend union meetings; deals with the rights of employee or employer organisations to be involved in dispute resolution (unless the organisation is the representative of the employer or employee’s choice); or deals with right of entry by unions and employer associations.

<sup>601</sup> *Workplace Relations Act 1996* (Cth) ss 439, 447.

<sup>602</sup> *Workplace Relations Act 1996* (Cth) 445,447.

<sup>603</sup> *Workplace Relations Act 1996* (Cth) ss 430–1.

<sup>604</sup> *Workplace Relations Act(1996)* (Cth) s 498.

<sup>605</sup> *Workplace Relations Act 1996* (Cth) ss 440, 494–5.

644. Both the Committee on Economic, Social and Cultural Rights, in its previous Concluding Observations on Australia,<sup>607</sup> and the International Labour Organisation have recommended that Australia limit its prohibitions on the right to strike to essential services, in accordance with the *Freedom of Association and Protection of the Right to Organise Convention (ILO Convention No 87)*.<sup>608</sup> Instead of acting on these recommendations, the former Australian Government increased its prohibitions on the right to strike.<sup>609</sup>
645. In announcing its new industrial relations system for 2010, the current Australian Government has not outlined detailed proposals with respect to industrial action. However, it has indicated that it will:<sup>610</sup>
- (a) retain the prohibition on strikes during the life of an existing agreement;
  - (b) retain the requirement for a secret ballot authorising industrial action;
  - (c) retain the ban on pattern bargaining;
  - (d) retain provisions rendering strike pay illegal;
  - (e) retain existing right of entry laws; and
  - (f) retain the arrangements with respect to obtaining orders to stop or prevent industrial action.

**PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLES 21 AND 22)**

- Please explain how the right to strike is protected by Australian law and how restrictions on the right under domestic law are compatible with the *ICCPR*.
- Please explain how legislation passed in association with a number of major events, such as the Asia-Pacific Economic Cooperation Economic Leaders meeting in Sydney in September 2007 and World Youth Day in Sydney in July 2008, is consistent with the right to freedom of peaceful assembly and association.

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<sup>606</sup> International Labour Organization, *Complaint against the Government of Australia Presented by the Australian Council of Trade Unions (ACTU) and Supported by the Trade Unions International of Workers of the Building, Wood and Building Materials Industries (UITBB)*, Report No 338, Case No 2326, Document No 0320053382326 (2005).

<sup>607</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [29], UN Doc E/C.12/1/Add.50 (2000).

<sup>608</sup> See, eg, International Labour Organization, *dual Direct Request concerning Freedom of Association and Protection of the Right to Organise Convention: Australia*, above n 599.

<sup>609</sup> See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

<sup>610</sup> Australian Labour Party, 'Protection From Unlawful Industrial Action – Federal Labor's Policy Implementation Plan' (Press Release, 28 August 2007), available at: <http://www.alp.org.au/media/0807/msdloploo283.php>.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLES 21 AND 22)**

THAT Australia undertake a comprehensive review and reform of counter-terrorism laws, including particularly the *Criminal Code*, to ensure that such laws are compatible with the right to freedom of assembly and association.

THAT Australia ensure that industrial relations laws and practices adequately reflect the principle of freedom of association embodied in Article 22.

THAT all Australian jurisdictions undertake a comprehensive review and reform of public space and assembly laws to ensure that such laws are compatible with the right to freedom of assembly and association.

## Article 23 — Protection of the Family

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### **Article 23:**

1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
  2. *The right of men and women of marriageable age to marry and to found a family shall be recognized.*
  3. *No marriage shall be entered into without the free and full consent of the intending spouses.*
  4. *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*
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### **S. PROTECTION OF THE FAMILY**

646. Article 23 recognises every individual’s right to found a family and to marry if they wish to do so. Article 23 requires Australia to provide *all* families with protection, regardless of marital status, gender, socio-economic status or ability.

#### **S.1 Family Separations**

647. Amendments to the *Family Law Act 1975* (Cth) in 2006<sup>611</sup> were ‘designed to bring about a generational change in how family conflicts are managed after separation’.<sup>612</sup> However, there are significant concerns that the changes will cause a decline in Australia’s protection of, and

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<sup>611</sup> See *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

<sup>612</sup> Phillip Ruddock, ‘Family Law: A New System, A New Culture’ (Press Release, 12 May 2005).

assistance to, families responsible for the care of dependent children, as well as a decline in the protection of children following dissolution of marriage.

648. The *Family Law Act 1975* (Cth) now places a greater emphasis on the role of both parents in the life of a child. The ‘best interests of the child’, which is the paramount consideration in making decisions about parenting orders,<sup>613</sup> has been re-defined to include primary considerations of ‘the benefit to the child of having a meaningful relationship with both of the child’s parents’ and ‘the need to protect the child from physical or psychological harm and from being subject to, or exposed to, abuse, neglect or family violence’.<sup>614</sup> In addition, there is now a presumption that ‘equal shared parental responsibility’ is in the best interests of the child, although this presumption does not apply if there are reasonable grounds to believe that family violence or child abuse is involved.<sup>615</sup> Where a court makes an equal shared responsibility order, it must consider giving parents equal time, or if not equal time then ‘substantial and significant time’ with the child.<sup>616</sup>
649. While there are some legislative safeguards for cases involving family violence or abuse,<sup>617</sup> concern remains that the safety of children and their families is inadequately protected in practice. There was already a pro-contact culture that permeated family law practice prior to the 2006 amendments, which promoted the right to contact over a child’s safety.<sup>618</sup> There is a concern that this is likely to be exacerbated by the 2006 amendments and that the emphasis on ‘the benefit to the child of having a meaningful relationship with both of their parents may directly conflict with and override the provisions that are intended to recognise the need to protect children from family violence and abuse’.<sup>619</sup>
650. A further concern is that the provisions requiring the consideration of equal time or substantially shared time arrangements prioritise parents’ claims to equality and diminish the significance of the principle that the best interests of the child are paramount in deciding where a child will live and with whom the child will spend time.<sup>620</sup> Early research into the impact of these new provisions indicates that children in shared care arrangements may be subject to significant parental conflict, impacting on a child’s development over time.<sup>621</sup>

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<sup>613</sup> *Family Law Act 1975* (Cth) s 60CA.

<sup>614</sup> *Family Law Act 1975* (Cth) s 60CC.

<sup>615</sup> *Family Law Act 1975* (Cth) s 61DA.

<sup>616</sup> *Family Law Act 1975* (Cth) s 65DAA.

<sup>617</sup> *Family Law Act 1975* (Cth) ss 60I(9)(b), 61DA(2).

<sup>618</sup> Submission to the Senate Legal and Constitutional Committee Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, Parliament of Australia, 28 February 2006 (Women’s Legal Services Australia) available at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/family\\_law/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/family_law/submissions/sublist.htm).

<sup>619</sup> *Ibid* 4.

<sup>620</sup> *Ibid*.

<sup>621</sup> Jennifer McIntosh and Caroline Long, *The Child Responsive Program, Operating within the Less Adversarial Trial: A Follow Up Study of Parent and Child Outcomes — Report to the Family Court of Australia* (2007). The study found that found that 73 per cent of parents involved in shared care arrangements following a court

651. The Australian Institute of Family Studies is currently conducting a review of the family law reforms on behalf of the Australian Government and is due to report in 2009. However, the terms of reference for the review do not specifically include the impact of the reforms on the safety of women and children.
652. The current Australian Government has also prioritised developing an integrated family law system 'where situations of family violence and child abuse are managed safely and effectively' and will be holding a summit on strengthening the family law system in late 2008.<sup>622</sup> The current Australian Government's present focus is predominately on non-legislative changes within existing resources. However, in order to ensure women and children are safe, a thorough review of the impact of the family law reforms on the safety of women and children is necessary, along with additional resources to implement the necessary policy and legislative changes.

## S.2 Paid Maternity Leave

653. In its recent report, entitled *It's about Time: Women, Men, Work and Family*, the Human Rights and Equal Opportunity Commission (HREOC) recommends that the Australian Government, among other things, introduce as a matter of priority a national, government-funded scheme of paid maternity leave.<sup>623</sup> The Committee on Economic, Social and Cultural Rights in its previous Concluding Observations also recommended that Australia consider enacting legislation on paid maternity leave.<sup>624</sup>
654. Despite these recommendations, Australia remains one of only two OECD countries in the world not to have introduced a national paid maternity leave scheme.<sup>625</sup> Under current workplace relations laws (see [Articles 21 and 22: Workplace Relations Laws](#)), the current system requires women to negotiate paid maternity leave with their employers, which is inadequate for a number of reasons:
- (a) women in low-pay, casual positions rarely receive any maternity support; and
  - (b) as the sole financiers of paid maternity leave, employers may discriminate against women of child bearing age during employment and promotional processes.
655. In February 2008, the current Australian Government released terms of reference for a Productivity Commission inquiry into the introduction of a paid maternity, paternity and parental leave scheme, which is to be released by February 2009.<sup>626</sup>

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decision reported as 'almost never' cooperating with each other and 39 per cent reported that they are 'never' able to protect their children from their conflict: at 18.

<sup>622</sup> Hon Robert McClelland MP, 'Opening Address: Queensland Law Society & Family Practitioners Association' (Speech delivered at Gold Coast, Queensland, 15 August 2008).

<sup>623</sup> HREOC, *It's about Time: Women, Men, Work and Family* (2007) 82–4.

<sup>624</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [28], UN Doc E/C.12/1/Add.50 (2000).

<sup>625</sup> HREOC, above n 623, 82.

<sup>626</sup> Julia Gillard, Jenny Macklin and Wayne Swan, 'Productivity Commission to Investigate Paid Maternity Leave' (Press Release, 17 February 2008), available at <http://www.alp.org.au/media/0208/msewrfcstres170.php>.

### S.3 Child Care

#### (a) 'Baby Bonus'

656. The Common Core Document refers to the entitlement of families to a lump sum 'Baby Bonus' after the birth or adoption of a child to recognise 'the extra costs associated with the birth or adoption of a child, including the loss of income while on unpaid maternity leave'.<sup>627</sup> However, the lump sum of \$5,000<sup>628</sup> awarded for each child is inadequate to cover the costs of pregnancy, childbirth and the first year of a baby's life. While government contributes to the cost of childcare, long day childcare services are scarce with extensive waiting lists.<sup>629</sup>
657. Article 23 of the *ICCPR* requires that families should be afforded the widest possible protection and assistance. Consequently, the Australian Government should provide a supportive framework for parents and/or guardians to care for their children, and provide the special protection minors require. Supporting parents to care for their children can be achieved in a range of ways; for example, by increasing subsidised childcare, income support, tax relief, statutory-paid maternity leave and employment opportunities for parents.
658. From 1 July 2008, the current Australian Government increased the childcare tax rebate from 30 per cent to 50 per cent, paid quarterly.<sup>630</sup> It is also consulting on a National Quality Standards Framework to improve outcomes and opportunities for children during their critical early years. The current Australian Government's initiatives in this area are welcomed.

#### (b) Child Support

659. Since 2006, the Australian Government has introduced staged changes to the child support scheme, including changing the minimum liability to \$6 per week and introducing additional review and appeal avenues.<sup>631</sup> In July 2008, changes to the child support formula used to calculate child support payments were implemented. The new formula treats both parents' incomes equally and takes into account the level of care parents provide.<sup>632</sup>
660. It is difficult to determine the impact of the new formula due to its complex nature and recent introduction. However, there is already concern that the formula is resulting in less financial support for children from separated families. This is because the payments made to primary

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<sup>627</sup> Common Core Document, above n 4, [347].

<sup>628</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* (2008) 3.3, available at [http://www.facsia.gov.au/guides\\_acts/fag/faguide-3/faguide-3.3.html](http://www.facsia.gov.au/guides_acts/fag/faguide-3/faguide-3.3.html). Unlike other mothers, mothers under the age of 18 are paid the amount in 13 equal fortnightly payments rather than a lump sum: at 2.4.3.

<sup>629</sup> Rebecca Bartel, 'The Child-Care Problem Can't be Denied Away', *The Age* (Melbourne)(16 May 2006), available at <http://www.theage.com.au/news/opinion/the-childcare-problem-cant-be-denied-away/2006/05/15/1147545259719.html>.

<sup>630</sup> Hon Kevin Rudd MP and Hon Jenny Macklin MP, 'Federal Labor's Affordable Child Care Plan — A 50% Child Care Tax Rebate Paid Quarterly' (Press Release, 22 October 2007); Australian Labor Party, *Labor's Affordable Child Care Plan: Election 2007 Policy Document* (2007).

<sup>631</sup> See *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006* (Cth).

<sup>632</sup> Hon Joe Ludwig MP, 'A Fairer Child Support Scheme Begins' (Press release, 30 June 2008).

carers — mostly women — are generally lower under the new scheme.<sup>633</sup> While the accompanying changes to the family tax benefit<sup>634</sup> may compensate for some of this reduction, it is not expected to make up for the decrease in financial support provided to primary carers.<sup>635</sup> An Australian Government evaluation of the impact of the reforms found that, generally, payers of child support fared better than payees under the new scheme.<sup>636</sup>

#### S.4 Same-Sex Couples and their Families

661. As identified in Article 2: Sexual Orientation and Gender Identity, discrimination on the basis of sexual orientation continues to occur in many aspects of public and private life. In 2004, the former Australian Government amended the *Marriage Act 1961* (Cth) specifically to exclude to exclude the recognition of same-sex couples marriage.<sup>637</sup> The current Australian Government, which was in opposition at the time, supported the substance of the legislation and, since taking office, has indicated that it does not intend to remove the exclusion.<sup>638</sup>
662. In 2007, HREOC released a report on discrimination against same-sex couples in relation to financial and work-related benefits and entitlements, entitled *Same-Sex: Same Entitlements*.<sup>639</sup> The report identified 58 federal laws that discriminate against same-sex couples and their children, including in the areas of employment, tax, workers compensation, veterans entitlements, health care, superannuation, aged care, immigration and family law. HREOC found that these discriminatory laws impact negatively on the rights of children in numerous areas and that ‘the best interests of children would be better protected if federal, state and territory laws changed to recognise the relationship between a child and both parents in a same-sex couple’.<sup>640</sup>

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<sup>633</sup> Melanie Christiansen, ‘Plight of Single Mums “to Worsen” as Child Support Changes’, *The Courier Mail* (Brisbane), 6 May 2008, available at <http://www.news.com.au/couriermail/story/0,23739,23650252-5012912,00.html>; Erin O’Dwyer, ‘Divorced from Wealth’, *The Sydney Morning Herald* (Sydney), 19 April 2008, available at <http://www.smh.com.au/news/national/divorced-from-wealth/2008/04/18/1208025479846.html>.

<sup>634</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Child Support Scheme Reforms: Fact Sheet Seventeen: Changes to Family Tax Benefit (FTB)* (2008), available at [http://www.facsia.gov.au/internet/facsinternet.nsf/family/cssr\\_factsheet17.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/cssr_factsheet17.htm).

<sup>635</sup> Christiansen, above n 633.

<sup>636</sup> ‘Thirty-seven per cent of payees and around 51 per cent of payers have net increases as a result of the reforms (that is, they receive more overall). Around 49 per cent of payees and 33 per cent of payers have net reductions (that is, they receive less overall). Australian Government, *Report on the Population Impact of the New Child Support Formula* (2008), 4.

<sup>637</sup> See *Marriage Amendment Act 2004* (Cth).

<sup>638</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 314 460 (Nicola Roxon, Shadow Attorney-General).

<sup>639</sup> HREOC, *Same-Sex: Same Entitlements — National Inquiry into Discrimination against People in Same-Sex Relationships* (2007).

<sup>640</sup> Ibid chapter 5; HREOC, ‘Simple Changes Could End Discrimination for Thousands of Australian Couples’ (Press Release, 21 June 2007). HREOC noted that in the majority of cases, ending discrimination would only require a simple amendment to the definition of ‘de facto relationship’ in existing legislation.

663. In early 2008, an ‘audit’ by the current Australian Government revealed that approximately 100 laws discriminate against same-sex couples.<sup>641</sup> In April 2008, the current Australian Government announced that it will honour its pre-election commitment to remove discrimination on the basis of sexual orientation in federal laws.<sup>642</sup> The first legislative bill in this series of reforms was introduced into the Australian Parliament in May 2008 and the second bill was introduced in early September 2008. The bills have been referred to a Senate Committee by the current Opposition party. Despite some resistance from the Opposition, it is hoped that the series of reforms will be steadily introduced and, if passed, are expected to be fully in effect by mid-2009.

#### Case Study

Darren is an employee of a local government authority. It is a condition of his employment that contributions are paid to the local government superannuation scheme. Darren is gay and has had a male partner for 7 years. Federal superannuation laws prohibit the trustees of the superannuation fund from paying a death benefit to a same-sex partner of a deceased fund member unless an interdependency relationship is established. Heterosexual married and de facto couples are not required to establish a relationship of interdependency for a death benefit to be paid to a surviving partner.<sup>643</sup>

### S.5 Immigration Law, Policy and Practice

664. The Geneva Expert Roundtable, organised by the United Nations High Commissioner for Refugees, has stated that ‘[r]espect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated’.<sup>644</sup> However, under Australia’s immigration laws and policies, it is particularly common for refugee families to be separated. Family unity issues arise most frequently where:

- (a) there are moves to deport a non-citizen family member;
- (b) a family member is denied the ability to bring family members to Australia; or
- (c) entry is denied to an individual seeking to join family members already residing in Australia.

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<sup>641</sup> Patricia Karvelas, ‘100 Laws Ignore Same-Sex Couples’, *The Australian* (Sydney), 1 March 2008, available at <http://www.theaustralian.news.com.au/story/0,25197,23300057-5013871,00.html>.

<sup>642</sup> Hon Joe Ludwig MP, Shadow Attorney-General ‘Labor Welcomes Human Rights and Equal Opportunity Report on Same-Sex Entitlements’ (Press Release, 21 June 2007). The Australian Labor Party Platform also commits the party to providing equitable treatment to same-sex couples, including in respect of superannuation: Australian Labor Party, *National Platform and Constitution 2007* (2007) [195].

<sup>643</sup> Case study provided by Inner City Legal Centre, NSW.

<sup>644</sup> Geneva Expert Roundtable, UN High Commissioner for Refugees, *Summary Conclusions on Family Unity*, [5], UN Doc UNHCR/IOM/08/2002 Annex 8 (2001).

665. An additional concern is the requirement for all family members migrating to Australia to pass strict health criteria.<sup>645</sup> Most permanent visas require all members of the family unit to undergo health examinations and satisfy the health requirement. This applies regardless of whether that family unit member is a visa applicant and/or intends to join the visa applicant in Australia. Thus, 'where one member of the family fails any of the public interest criteria, the entire family unit fails'.<sup>646</sup> There is provision for Department of Immigration and Citizenship officers to exercise discretion and to 'waive' the requirement. Particularly in relation to people with disability, this policy effectively provides for lawful discrimination and raises concerns in relation to Article 2 of the *ICCPR*.

**Case Study**

Shahraz was recognised as a refugee in 1996. He attempted to sponsor his family members to Australia several times over a period of four and a half years. The Department of Immigration and Citizenship refused to exercise its discretion to waive the health requirement in respect of his disabled child who, together with his wife and two daughters, was seeking to join him.

Shahraz lost all hope of ever being reunited with his wife and children and died as a result of self-inflicted injuries sustained when he set fire to himself outside Parliament House. As a result of an investigation, the Commonwealth Ombudsman stated that 'the history of this case is one of administrative ineptitude and of broken promises' and recommended that the health requirements for immediate family members be no different than those for their proposers.<sup>647</sup> To date, this recommendation has not been implemented.

666. Section 501 of the *Migration Act 1958* (Cth) (***Migration Act***) can also operate in a manner inconsistent with the right to family under Article 23 of the *ICCPR*. As discussed under [Article 12: Deportation of Permanent Australian Residents](#), section 501 entitles the Minister to refuse or cancel a visa, including a permanent residency visa, on character grounds. There are numerous cases where this has resulted in the separation of families, including families with children.

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<sup>645</sup> Health criteria are found in *Migration Regulations 1994* (Cth) sch 4, cl 40.

<sup>646</sup> Commonwealth Ombudsman, *Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application* (2001) 2.

<sup>647</sup> *Ibid* 1.

**Case Study: Stefan Nystrom**

Stefan Nystrom was deported to Sweden on 29 December 2006 after a decision by the Minister for Immigration to cancel his permanent residency visa under section 501 of the *Migration Act* (see Case Study on page 144). After spending the first 25 days of his life in Sweden, Mr Nystrom never left Australia until he was deported.

Mr Nystrom's entire immediate family lives in Australia. His deportation has resulted in his permanent separation from his mother and father, both permanent residents of Australia, and his sister and her two children, who are Australian citizens.<sup>648</sup>

**S.6 Parents with Intellectual Disability**

667. The lack of appropriate parenting support services in Australia has contributed to a disproportionate number of parents with intellectual disability having their children removed by child-protection services.<sup>649</sup> General parenting support services, particularly those provided by state and territory child-protection authorities, often do not have the knowledge, skills and resources to provide appropriate services to parents with intellectual disability. Moreover, child protection workers commonly hold stereotypical views about the parenting capacity of people with intellectual disability.<sup>650</sup>
668. There is a tendency for workers to favour removing the child of a parent with intellectual disability rather than instituting early-intervention measures and providing services to support the adult's parenting capacity.<sup>651</sup> Further, child protection workers often lack knowledge of specialist support services that are available for parents with intellectual disability such as the Commonwealth funded program 'Healthy Start'.<sup>652</sup>

**S.7 Prisons**

669. The scope of Article 23 of the *ICCPR* also extends to families where a parent is imprisoned. Studies suggest that the majority of female prisoners in Australia are mothers of dependent children who are most likely to be under the age of 12.<sup>653</sup> Approximately 5 per cent of all Australian children, and 20 per cent of Indigenous children, have experienced the

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<sup>648</sup> Case study provided by the Human Rights Law Resource Centre. This case is now the subject of a communication to the Human Rights Committee under the First Optional Protocol to the *ICCPR*: see *Nystrom v Australia*, Communication No 1557/2007 (2007).

<sup>649</sup> Robyn Mildon, Catherine Wade and Jan Matthews, 'Intellectual Disability and Parenting' (2006) 12 *Every Child* 12.

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid.*

<sup>652</sup> For more information on the 'Healthy Start' program, see <http://www.healthystart.net.au>.

<sup>653</sup> See Rosemary Woodward, 'Families of Prisoners: Literature Review on Issues and Difficulties' (Occasional Paper No 10, Department of Family and Community Services, 2003) 5.

incarceration of one of their parents.<sup>654</sup> Children who have parents in prison are more likely to have emotional, social and behavioural problems, as well as health problems and difficulties at school.<sup>655</sup>

670. Protocols and policies for arresting and incarcerating parents with dependent children are minimal and, where they do exist, are inconsistent between jurisdictions.<sup>656</sup> To use Victoria as an example:

- (a) Victoria Police has no guidelines or policies that cover the apprehension, arrest, charging or detention of primary carers with dependent children,<sup>657</sup>
- (b) Victorian bail laws do not refer to the needs of dependent children, and there are no court, police, prisons or human services guidelines or policies in place regarding who takes responsibility for children when a mother is unable to obtain bail,<sup>658</sup> and
- (c) on entering a Victorian prison, no policy exists for ascertaining the existence of dependent children and whether the children are currently at risk.<sup>659</sup>

671. Where a parent must be incarcerated, all attempts should be made to maintain the parent–child relationship. Whilst parents may have statutory rights to personal visits, Australian prisoners frequently report difficulties in maintaining a relationship with their children.

#### **PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 23)**

- Please provide details of the steps the Australian Government is taking to ensure children and their families are safe following relationship breakdown, particularly in light of the recent changes to family law.
- Please provide details of the outcomes of Productivity Commission inquiry into the establishment of a paid parental leave scheme.
- What steps is the Australian Government taking, together with state and territory governments, to develop a nationally consistent approach to relationship recognition, in particular one that includes both same-sex and mixed-sex couples on terms of equality?

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<sup>654</sup> Victorian Association for the Care and Resettlement of Offenders, *Children: Unintended Victims of Legal Process* (2006) Executive Summary, 2.

<sup>655</sup> Standing Committee on Law and Justice, Legislative Council, Parliament of New South Wales, *Crime Prevention through Social Support: First Report* (1999); Victorian Association for the Care and Resettlement of Offenders, above n 654, 6.

<sup>656</sup> Renee Lees, *Stop the Women's Jail Anti-Prisons Resource Kit* (2001).

<sup>657</sup> Victorian Association for the Care and Resettlement of Offenders, above n 654, 3.

<sup>658</sup> *Ibid.*

<sup>659</sup> *Ibid* 4.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 23)**

THAT Australia ensure children and their families are safe following separation and throughout the family law process by reviewing the effect of family law on their safety, and by committing to implement and resource necessary changes to legislation and policy.

THAT Australia implement a comprehensive national paid parental leave scheme, including compulsory paid maternity leave, consistent with the internationally-recognised standard of 14 weeks.

THAT Australia make it a priority to resettle family members of individual refugee and humanitarian permanent residents.

THAT Australia commit to working with state and territory governments towards a nationally consistent approach to relationship recognition, in particular one that includes same-sex and mixed-sex couples, on terms of equality.

THAT Australia legislate to remove discrimination against same-sex couples and their families, including by implementing the recommendations contained in HREOC's report on *Same-Sex: Same Entitlements*.

THAT Australia take immediate steps to ensure minimum entitlements such as personal/carer's leave, compassionate leave and parental leave are afforded to all employees regardless of sexual orientation.

THAT Australia take steps to ensure that families can access housing, health and employment services following the release of a parent from prison.

THAT Australia ensure that all states and territories implement consistent policies addressing the needs of dependent children during the arrest and incarceration of their primary carer, in particular by considering alternative sentencing options such as the suitability of home detention, periodic detention or community-based orders.

## Article 24 — Protection of Children

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### **Article 24:**

1. *Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*
  2. *Every child shall be registered immediately after birth and shall have a name.*
  3. *Every child has the right to acquire a nationality.*
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### **T. PROTECTION OF CHILDREN**

672. In general, public policy in Australia has failed to develop in its recognition and provision for the human rights of children. Most recent public policy has focused on economic development and therefore has only considered children in the context of their relationship to workforce participation (in education and training or child care to enable their parents to participate). A number of other recent legislative and policy developments in Australia have threatened (rather than strengthened) the rights that children are entitled to under the *ICCPR*.

#### **T.1 Juvenile Justice System**

673. In 1997, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (**HREOC**) completed a national inquiry into young people and the legal system in Australia. The inquiry's report, *Seen and Heard: Priority for Children in the Legal Process* examined the difficulties children face in accessing systems and services for

review, advocacy and remedy as well as the circumstances in which the rights of children are violated.<sup>660</sup>

674. The inquiry received extensive evidence of the problems and failures of legal processes for children. This included evidence of:<sup>661</sup>
- (a) discrimination against children;
  - (b) a consistent failure by the institutions of the legal process to consult with and listen to children in matters affecting them;
  - (c) a lack of co-ordination in the delivery of, and serious deficiencies in, much needed services to children, particularly to those who are already vulnerable;
  - (d) the increasingly punitive approach to children in a number of juvenile justice systems;
  - (e) the over-representation of some groups, particularly Indigenous children, in the juvenile justice and care and protection systems;
  - (f) the concentration of specialist services and programs in metropolitan areas, disadvantaging rural and remote children in their access to services, the legal process and advocacy;
  - (g) court processes which are bewildering and intimidating for children; and
  - (h) school exclusion processes which deny young people basic rights of procedural fairness and natural justice and seriously diminish their life chances.
675. The recommendations of the *Seen and Heard Report* aim to give full effect to the right of children to be seen and heard in the legal process. However, more than 10 years after the release of the report, many of the recommendations of the report remain unimplemented.
- (a) Sentencing of Juveniles**
676. One of the key aspects of the *Seen and Heard Report* was the consideration that was given to how Australian sentencing practice could become more consistent with the *Convention on the Rights of the Child*.
677. The juvenile justice sentencing system should be based on the principle that young offenders can and should be rehabilitated, as reflected by Article 40 of the *Convention on the Rights of the Child*. The *Convention on the Rights of the Child* also requires in Article 37(b) that children be deprived of liberty only as a last resort and for the shortest appropriate period of time.
678. Despite these principles, mandatory sentencing laws continue to operate in Western Australia. Mandatory sentencing laws are discussed in further detail under Article 9: Mandatory Sentencing Laws. The particular impact of these laws on Indigenous Australians, and in particular young Indigenous people, is also discussed under Articles 7 and 10: Indigenous Australians.

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<sup>660</sup> Australian Law Reform Commission and HREOC, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) (**Seen and Heard Report**).

<sup>661</sup> Taken from the summary on HREOC website, available at [http://www.hreoc.gov.au/Human\\_RightS/children/seen\\_and\\_heard.html](http://www.hreoc.gov.au/Human_RightS/children/seen_and_heard.html).

679. Mandatory sentencing laws have a particular impact on young people. By imposing a compulsory detention term without any regard to alternative, less restrictive means of rehabilitation, and by ignoring whether the punishment of detention fits the actual offence, the laws do not enable the particular circumstances of young people to be taken into account. The laws remove courts' discretion to take into account a child's age and to promote rehabilitation in administering the courts' procedures.
680. Australia's mandatory sentencing laws have previously been the subject of criticism by the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination.<sup>662</sup> Indeed, in its 2000 Concluding Observations on Australia, the Committee on the Elimination of Racial Discrimination expressed concern that the laws appear to target offences that are committed disproportionately by Indigenous Australians, especially young Indigenous people, leading to a racially discriminatory impact on their rate of incarceration.<sup>663</sup>
681. There is a range of other, more suitable sentencing options, such as:
- (a) conferencing schemes, which involve the offender meeting with the victim;
  - (b) probation orders as a means of providing guidance and support; and
  - (c) community service orders and other non-custodial sentencing options, which are culturally appropriate and take into account the particular needs and problems of children from different backgrounds and especially Indigenous children.

#### Case Study

In the space of two years, one 13 year old boy from the north of Western Australia received two sets of 12 months detention, two 12 month conditional release orders, and one supervised release order of six months. The offences he had committed were a result of him stealing food from houses because he was hungry. He has had little family care.<sup>664</sup>

#### (b) Bail Conditions

682. Most states and territories continue to provide inadequate options for young people, particularly homeless or at-risk children, appearing in court on criminal charges. The *Seen and Heard Report* made a number of recommendations in relation to bail proceedings involving children.<sup>665</sup>

<sup>662</sup> Committee on the Rights of the Child, *Concluding Observations: Australia*, [73]–[74], UN Doc CRC/C/15/Add.268 (2005); Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, [16], UN Doc CERD/C/304/Add.101 (2000).

<sup>663</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, [16], UN Doc CERD/C/304/Add.101 (2000). See also Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, [20], UN Doc CERD/C/AUS/CO/14 (2005).

<sup>664</sup> Case study drawn from the Joint Submission.

<sup>665</sup> *Seen and Heard Report*, above n 660, Recommendation 228.

- (a) there should be a presumption in favour of bail for all children appearing on charges before the court. The absence of a traditional family network should not negate this presumption;
- (b) children should be legally represented at bail application proceedings;
- (c) monetary and other unrealistic bail criteria should not be imposed on children;
- (d) where a child is released on bail, police should have a statutory duty of care to ensure that the child is able to return to his or her carers promptly or is provided with alternative accommodation;
- (e) lack of accommodation is not sufficient reason to refuse bail to a child; and
- (f) bail 'hostels' should be established in all regions for children on bail who do not have alternative accommodation.

683. These recommendations have not been implemented and children charged with offences continue to be detained in criminal detention settings due to lack of accommodation. This is also in breach of the principle that children should be detained as a matter of last resort.<sup>666</sup>

**(c) Children Held in Adult Facilities**

684. Children continue to be held in adult facilities across Australia, which raises concerns in relation Article 24 of the *ICCPR*, as well as Articles 10(2)(b) and 10(3). In particular, children in remote and regional areas face the most time in adult lock-ups and remand centres. In this respect, in 2005 the Committee on the Rights of the Child stated in its Concluding Observations that Australia's reservation to Article 37(c) of the *Convention on the Rights of the Child* is unnecessary.

685. Since 2005, Queensland has continued to treat 17 year old children as adults for the purposes of criminal justice, including incarcerating them in adult prisons.<sup>667</sup> The New South Wales Government has also enacted measures which provide for the transfer of offenders serving sentences for offences committed as children to adult correctional facilities.<sup>668</sup>

**(d) Identification of Children**

686. Unlike all other states and territories in Australia, the Northern Territory has failed to enact legislation to prohibit the publication of material identifying children appearing in criminal proceedings. This approach fails to take adequate account of the age and status of children and the primacy of the objective of rehabilitation<sup>669</sup> and also raises issues under Article 14(4) of the *ICCPR*.

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<sup>666</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(b) (entered into force 2 September 1999).

<sup>667</sup> *Juvenile Justice Act 1992* (Qld) sch 4.

<sup>668</sup> *Children (Detention Centres) Act 1987* (NSW) s 28.

<sup>669</sup> Legal Aid Queensland, 'Naming + Shaming = ?' (2007) 61 *Head Note* 22, available at [http://www.legalaid.qld.gov.au/NR/rdonlyres/549D6124-BA97-4912-9813-A0BC81DA8B3F/0/01\\_complete\\_ed61\\_headnote07.pdf](http://www.legalaid.qld.gov.au/NR/rdonlyres/549D6124-BA97-4912-9813-A0BC81DA8B3F/0/01_complete_ed61_headnote07.pdf).

## T.2 Counter-Terrorism Measures

687. As discussed under Articles 7 and 10: Counter-Terrorism Measures, the Australian Government has introduced an extraordinary suite of powers relating to questioning and detention of those suspected of involvement in terrorism. The scope of these powers extends to children and raises concerns in relation to the rights of young people subject to criminal proceedings.
688. Of particular concern are the provisions that permit the detention of a child aged 16 or over and to question them for up to 24 hours over a one week period.<sup>670</sup> These provisions violate the principle that the detention of a child shall be used only as a measure of last resort and for the shortest appropriate period.

## T.3 Children in Immigration Detention

689. In 2004, HREOC released a report entitled *A Last Resort? National Inquiry into Children in Immigration Detention*.<sup>671</sup> In its report, HREOC concluded that Australia's immigration detention laws, which are administered by the Australian Government and apply to unauthorised arrival children, create a detention system that is fundamentally inconsistent with the *Convention on the Rights of the Child*.<sup>672</sup> Between 1999 and 2003, 2,184 children were held in immigration detention, of whom 92 per cent were subsequently found to be refugees.<sup>673</sup>
690. In 2005, the former Australian Government amended the *Migration Act 1958 (Cth) (Migration Act)* to require that the detention of children be a 'measure of last resort'.<sup>674</sup> However, refugee and asylum seeker children and families remain inadequately protected and unaccompanied minors continue to be detained.<sup>675</sup> In particular, the non-detention of children is not legislatively guaranteed. Rather, the *Migration Act* gives the Minister for Immigration a non-compellable discretion to determine that a person is to reside somewhere other than in immigration detention 'if the Minister thinks that it is in the public interest to do so'.<sup>676</sup> In addition, the use of offshore detention centres and in excised territories, such as Christmas Island, to detain children is unclear.

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<sup>670</sup> *Australian Security Intelligence Organisation Act 1979 (Cth)* s 34ZE.

<sup>671</sup> HREOC, *A Last Resort?*, above n 271, 5.

<sup>672</sup> *Ibid* 9.

<sup>673</sup> HREOC, *A Last Resort? A Summary Guide to the National Inquiry into Children in Immigration Detention* (2004) 15, available at [http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/summaryguide/summary.pdf](http://www.humanrights.gov.au/human_rights/children_detention_report/summaryguide/summary.pdf).

<sup>674</sup> *Migration Amendment (Detention Arrangements) Act 2005 (Cth)*.

<sup>675</sup> See, eg, HREOC, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities* (2007) 24.

<sup>676</sup> *Migration Act 1958 (Cth)* s 197AB. The current Australian Government has maintained since 2002 (when it was in opposition) that 'immigration detention centres are no place for children': Stephen Smith, 'Howard Government Slammed by HREOC for Children in Detention Policy and Administration' (Press Release, May 2004).

691. With respect to unaccompanied children arriving ‘unlawfully’ in Australia, the *Migration Act* requires these children to undergo ‘pre-screening’ in order to ascertain whether or not the child is eligible to claim asylum.<sup>677</sup> Children are not entitled to an adviser or any other representative at this initial stage, even though this interview establishes whether or not the child can make a full asylum claim.<sup>678</sup> The determination of eligibility for an asylum claim without legal representation is particularly damaging for unaccompanied children.

#### **T.4 Child Labour**

692. Western Australia, Tasmania, Northern Territory, and New South Wales do not impose restrictions on the number of hours that children can work, nor do they prescribe a minimum age for most industries. This legislative gap demonstrates the Australian Government’s failure to work with state and territory governments to ensure Australia’s child-employment laws are consistent with Article 24 of the *ICCPR*.

693. Unlike all other industrialised nations, Australia has not ratified *ILO Convention 138 Concerning the Minimum Age for Admission to Employment*.<sup>679</sup> *ILO Convention 138* states that the minimum age of admission into paid employment should be no less than the age of completion of compulsory schooling, although light work may be undertaken below this age with a restriction on the number of hours.<sup>680</sup>

694. Australia lacks uniform laws across industries that specifically protect children from the particular health risks in the workplace. While health and safety among child workers has not been extensively studied in Australia, the Victorian Government has recognised that factors including inexperience, failure to recognise unsafe conditions and a reluctance to ask for assistance put children at increased risk in an employment environment. Specific industries of risk include farming, construction sites and clothing manufacture outsourcing — industries in which children frequently work with parents.<sup>681</sup> Consistent with this recognition, Victoria has enacted the *Child Employment Act 2003* (Vic), which seeks to protect the health, safety and moral welfare of children who work.<sup>682</sup> However, it is important to note that this statutory protection is only available at the state level (and only in Victoria) and lacks the coordinated national treatment required of Australia consistent with its obligations under Article 24 of the *ICCPR*.

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<sup>677</sup> See Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: A Comparative Study — Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (2007) 11.

<sup>678</sup> Ibid 80.

<sup>679</sup> See International Labour Organization, *Ratifications by Country* (2008), available at <http://www.ilo.org/ilolex/english/newratframeE.htm>.

<sup>680</sup> International Labour Organization, *Minimum Age Convention*, adopted 26 June 1973, ILO No C138, arts 2(3) and 7(3) (entered into force 19 June 1976).

<sup>681</sup> Work Safe Victoria, *Keeping Children Safe in the Workplace* (September 2006) 5–6,10, available at [http://www.worksafe.vic.gov.au/wps/wcm/resources/file/eb5a6b4176b9155/children\\_workplace\\_guidance.pdf](http://www.worksafe.vic.gov.au/wps/wcm/resources/file/eb5a6b4176b9155/children_workplace_guidance.pdf).

<sup>682</sup> See Business Victoria, *Key Aspects of the Child Employment Act* (2008), available at [http://www.business.vic.gov.au/BUSVIC/STANDARD/PC\\_50560.html](http://www.business.vic.gov.au/BUSVIC/STANDARD/PC_50560.html).

695. The Australian Fair Pay Commission is currently undertaking a review of junior wage rates in the Australian labour market.<sup>683</sup> Competency-based wages would be a positive step for young people in removing state-sanctioned discrimination on the basis of age.

## T.5 Education

696. Education in Australia is reaching crisis point at all levels — from early childhood education through to tertiary education. Australian research has linked education to better life outcomes, including higher rates of employment, higher wages, lower reliance on welfare, better health, and lower levels of violence, suicide and depression.<sup>684</sup> While school attendance is compulsory in all jurisdictions to the age of 15 or 16 years,<sup>685</sup> many children face issues regarding equal access to schools or are excluded from the education system altogether. In particular, children with disability, children from low income backgrounds and Indigenous children have lower levels of access to education from preschool to tertiary levels.

697. In its Concluding Observations in 2005, the Committee on the Rights of Child made the following recommendations in relation to Australia:

61. The Committee recommends that the State Party:
  - (a) Take all necessary measures to ensure that articles 28 and 29 [right to education] of the Convention are fully implemented, in particular with regard to children belonging to the most vulnerable groups (i.e. indigenous children, homeless children, children living in remote areas, children with disabilities, etc.);
  - (b) Continue to take appropriate measures to combat the phenomenon of bullying in schools, including by carrying out periodic surveys among students, staff and parents to learn more about the peer relations being fostered by the school;
  - (c) Ensure that public education policy and school curricula reflect in all their aspects the principle of full participation and equality, include children with disabilities in the mainstream school system to the extent possible and provide them with the necessary assistance.<sup>686</sup>

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<sup>683</sup> Australian Fair Pay Commission, 'Commission Launches Pay Scale and Junior and Training Wages Reviews' (Press Release, 26 September 2007).

<sup>684</sup> Australian Council of Social Service, *A Fair Go for All Australians: International Comparisons, 2007: 10 Essentials* (2007) 18, available at [http://www.australiafair.org.au/upload/site/pdf/publications/3078\\_Australia%20Fair%20Report.pdf](http://www.australiafair.org.au/upload/site/pdf/publications/3078_Australia%20Fair%20Report.pdf).

<sup>685</sup> School attendance is compulsory for all children between the ages of 6 and 15 years in the Australian Capital Territory, New South Wales and the Northern Territory, and between the ages of 6 and 16 years in all other states.

<sup>686</sup> Committee on the Rights of the Child, *Concluding Observations: Australia*, [61], UN Doc CRC/C/15/Add.268 (2005).

**(a) School Attendance**

698. In 2005, secondary school completion rates were 67 per cent, a figure which had not improved in the last decade.<sup>687</sup> Female students are more likely to complete secondary schooling than male students, and students from low socio-economic backgrounds are less likely to complete secondary school than students from high-income backgrounds.<sup>688</sup>
699. While a high percentage of Australian children attend pre-school education, there is no guaranteed access to pre-school education.<sup>689</sup> As a result, children from non-English speaking backgrounds, low income families, Indigenous children or those with additional needs are less likely to attend early childhood education.<sup>690</sup>

**(b) Bullying and Violence in Schools**

700. In 1997, a national survey of more than 38,000 children (aged between seven and 17 years) established that approximately one child in six was bullied by peers each week in Australian schools.<sup>691</sup> In 2003, the Ministerial Council on Education, Employment, Training and Youth Affairs developed the National Safe Schools Framework.<sup>692</sup> While the Framework has resulted in some measures being developed at both federal and state and territory levels to deal with this issue, the occurrence of bullying and violence in schools remains prevalent. In 2005, Kids Helpline reported 4,370 calls from children seeking assistance for bullying experiences.<sup>693</sup>
701. Australia's response to concerns raised by the Committee on the Rights of the Child about corporal punishment and the root causes of child abuse and violence<sup>694</sup> has been inadequate. Bullying and violence has a serious effect on school retention and further education. Students who are bullied tend to leave school earlier, and many victims of bullying or violence at school report that bullying affected their plans for further education.<sup>695</sup>

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<sup>687</sup> Australian Bureau of Statistics, *Australian Social Trends* (2006), available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/9FA90AEC587590EDCA2571B00014B9B3?opendocument>.

<sup>688</sup> Productivity Commission, *Report on Government Services 2007* (2007) [3.63].

<sup>689</sup> In 2005, the Australian Council of Social Service estimated that 83.4 per cent of Australian children attended state and territory funded and/or provided pre-school services in the year before school, for an average of 11 hours per week: see Australian Council of Social Service, *Fair Start: 10 Point Plan for Early Childhood Education and Care* (2006) 8.

<sup>690</sup> Kathy Walker, *For All Our Children: National Preschool Education Inquiry Report* (2004) 11.

<sup>691</sup> Ken Rigby, 'What Children Tell Us about Bullying in Schools' (1997) 22(2) *Children Australia* 28.

<sup>692</sup> See Ministerial Council on Education, Employment, Training and Youth Affairs, *National Safe Schools Framework* (2003), available at [http://www.dest.gov.au/sectors/school\\_education/publications\\_resources/profiles/national\\_safe\\_schools\\_framework.htm](http://www.dest.gov.au/sectors/school_education/publications_resources/profiles/national_safe_schools_framework.htm).

<sup>693</sup> See Kids Helpline, *Newsletter: October 2005* (2005).

<sup>694</sup> Committee on the Rights of the Child, *Concluding Observations: Australia*, [35], [36], [42]–[44], UN Doc CRC/C/15/Add.268 (2005).

<sup>695</sup> See VicHealth, *Victorian Attitudes Towards Bullying* (2001), available at <http://www.togetherwedobetter.vic.gov.au/resources/research.asp>.

**(c) Exclusion from Education**

702. Students who are suspended or expelled from schools may be ‘blacklisted’ and unable to find a school willing to accept them. There is a lack of investment and support by all levels of government in models of alternative education, meaning that there are limited opportunities for participation in education for many young people with behavioural issues.
703. In 1996, the Parliamentary House of Representatives Standing Committee on Employment, Education and Training reported that truancy and exclusion required ‘urgent remedial action’ and recommended the collection of national data on the incidence of truancy, formal and informal exclusion and expulsion.<sup>696</sup> In 2004, research by the Australian Council of Educational Research attempted an analysis of the limited available data and estimated that rates of exclusions were increasing.<sup>697</sup> However, there remains no national statistical data collection on suspensions and exclusions.

**Case Study**

Nadia is 16. She started at a new high school where she found herself in trouble. She was harassed and threatened by an older girl and her relationship with the school deteriorated when her mother became involved. She was accused of stealing and suspended for arguing about it. During the school holidays, the school left a message for her mother that she ‘wasn’t welcome’ at the school any more and that she should find another school.

She tried to enrol in her previous school, but found that there was a new principal who wouldn’t take her because they didn’t want trouble. She is scared and depressed and wants to finish school, but doesn’t know where she will find a school to take her.<sup>698</sup>

**T.6 Indigenous Children****(a) Northern Territory Intervention**

704. As discussed under [Article 1: Intervention into Northern Territory Indigenous Communities](#), in June 2007, the former Australian Government passed a range of extraordinary legislative measures purportedly designed to address the issue of the sexual abuse of children in Indigenous communities. Of particular concern in relation to Article 24 of the *ICCPR* is the failure of the ‘national emergency intervention’ to use a children’s rights framework to ensure the stated purpose of the intervention; that is, the protection of children.
705. The Northern Territory Intervention has failed to recognise and respect the rights of Indigenous children, and their communities, to be consulted about appropriate and effective measures to protect Indigenous children from sexual abuse. As a result, many aspects of the

<sup>696</sup> House of Representatives Standing Committee on Employment, Education and Training, Parliament of Australia, *Truancy and Exclusion from School* (1996).

<sup>697</sup> Graeme Withers, *Disenchantment, Disengagement, Disappearance* (Unpublished paper presented at the 2004 Learning Choices Expo, Dusseldorp, 2004).

<sup>698</sup> Case study provided by National Children and Youth Law Centre.

measures implemented as part of the Northern Territory Intervention raise concerns in relation to both Article 1 and Article 24 of the *ICCPR*.

706. The Northern Territory Intervention includes a measure to enforce school attendance by withholding welfare payments from Indigenous parents (who will be mostly mothers) whose children do not attend school.<sup>699</sup> However, it is estimated that if the participation rate of Indigenous school students in the Northern Territory was 100 per cent, at least another 660 teachers would be needed.<sup>700</sup> The punitive approach to school attendance has not yet been accompanied by adequate funding of school services and communities.

**(b) Juvenile Justice**

707. As discussed in greater detail above (see Juvenile Justice System), there are many laws, such as mandatory sentencing offences, which have a particular impact on Indigenous children. The ongoing over-representation of Indigenous children in the criminal justice system raises issues in relation to Article 24 of the *ICCPR* and remains a fundamental challenge facing Australia's legal and political system.<sup>701</sup>

**(c) Indigenous Education**

708. Indigenous children have lower levels of access to education, from pre-school through to tertiary levels. In 2005, the retention rate for Indigenous students was 86 per cent to year 10, and 40 per cent to completion of secondary school.<sup>702</sup> This figure is worse for females, with only 20 per cent of Indigenous women having completed secondary school compared with 45 per cent of non-Indigenous women. While the gap between Indigenous and non-Indigenous students is decreasing, Indigenous students are still only half as likely to complete secondary school.<sup>703</sup> The number of adult Indigenous women who did not attend school at all is more than double that of non-Indigenous women.<sup>704</sup>
709. The education system's ability to attract and retain Indigenous students is seriously affected by a lack of culturally-appropriate education, Indigenous language schools and human rights education.<sup>705</sup> If schools are culturally inappropriate or otherwise inaccessible, Indigenous students will not attend.<sup>706</sup> Students who speak Indigenous languages at home but attend schools that teach only in English are more likely to fail or drop out than those taught by a

<sup>699</sup> This now applies to all Indigenous communities in the Northern Territory (*Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) sch 1) and may be expanded to many other Indigenous communities.

<sup>700</sup> Michaela Kronemann, *Education is the Key: An Education Future for Indigenous Communities in the Northern Territory* (2007) 33. This estimation was based on all Indigenous persons aged 3–17 attending schools, with a teacher ratio of 1:10 for bilingual schools.

<sup>701</sup> James McDougall and Huetta Lam, 'Sentencing Young Offenders in Australia' (2005) 86 *Reform* 39–46.

<sup>702</sup> Dennis Trewin and Richard Madden, Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2005* (2005) 18.

<sup>703</sup> *Ibid.*

<sup>704</sup> Australian Bureau of Statistics, *2006 Census of Population and Housing* (2007).

<sup>705</sup> See discussion in Kronemann, above n 700.

<sup>706</sup> *Ibid* 20.

bilingual or trilingual teacher.<sup>707</sup> Further Indigenous community consultation and input into schools and curriculum is essential.

710. Despite recognition in the Common Core Document that significant investment is still required to improve education for Indigenous people,<sup>708</sup> under-spending on Indigenous education continues to be a serious problem. As explained above in paragraph 706, adequate funding of schools and communities must accompany measures introduced by the Northern Territory Intervention to increase school attendance.

## T.7 Children with Disability

### (a) Education for Children with Disability

711. Most Australian children with disability who are enrolled in school attend mainstream schools (86.3 per cent).<sup>709</sup> However, peak bodies of people with disability in Australia, and advocacy and support organisations of families and carers, have voiced concerns about the accessibility of educational institutions, the curricula and the levels of support and resources available to students with disability.<sup>710</sup>
712. Some of these concerns are reflected in the following statistics:
- (a) 84 per cent of all children with disability attending ordinary classes in mainstream schools were not provided with any education support arrangements;<sup>711</sup>
  - (b) only 32 per cent of young people aged between 15 and 24 years with a disability completed the final year of secondary school compared with 53 per cent of young people without a disability;<sup>712</sup> and
  - (c) 69 per cent of all young people with a disability aged between 20 and 24 years did not have a post-school qualification compared with 56 per cent of their same-age peers without a disability.<sup>713</sup>
713. Educational opportunities in turn affect the realisation of other fundamental human rights. According to the OECD, more than half (58 per cent) of Australia's adults with disability were unemployed in the late 1990s.<sup>714</sup> Women with disability are particularly disadvantaged in this regard, with lower employment rates than males with similar disability. If they are employed,

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<sup>707</sup> Ibid.

<sup>708</sup> Common Core Document, above n 4, [575]–[579].

<sup>709</sup> Phil Foreman (ed), *Integration and Inclusion in Action* (2<sup>nd</sup> ed, 2001).

<sup>710</sup> National Children's and Youth Law Centre and Defence for Children International (Australia), *The Non Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005) 53.

<sup>711</sup> Australian Institute of Health and Welfare, *Children with Disabilities in Australia* (2004) 73, available at <http://www.aihw.gov.au/publications/dis/cda/cda.pdf>.

<sup>712</sup> Australian Institute of Health and Welfare, *Australia's Young People: Their Health and Well-Being 2003* (2003), available at <http://www.aihw.gov.au/publications/phe/ayp03/ayp03.pdf>.

<sup>713</sup> Ibid 68.

<sup>714</sup> Organisation for Economic Co-operation and Development, *Transforming Disability into Ability: Policies to Promote Work and Income Security for Disabled People* (2003).

they earn less than males with a similar disability.<sup>715</sup> In addition, women with disability are less likely than their male counterparts to receive a senior secondary and/or tertiary education.

714. In Victoria, despite figures that show that the number of students with disability in schools has increased every year,<sup>716</sup> the Victorian Government has tightened its funding criteria to reduce the eligibility of students with language disorders for individual funding. As a result, the number of supported students has declined from 6,760 to 219 students between 2005 and 2007.<sup>717</sup> This is despite research linking lack of access to education for students with language disorders to higher risks of long-term negative outcomes such as psychiatric illness, unemployment and over representation in the criminal justice system.
715. There is also an exceptionally large number of claims lodged in relation to discrimination in education under the *Disability Discrimination Act 1992* (Cth). The Disability Discrimination Legal Service in Victoria reports that complaints in relation to people with disability and their access to education have continued unabated over the last ten years.
716. Some of the difficulties facing young people with disability and their access to education include:
- (a) the trend towards mainstream schools persuading parents to move their children to Special Schools;
  - (b) high levels of bullying of children with disability in mainstream schools and an inability of many schools to tackle this problem effectively;
  - (c) the fact that transport to Special Schools can require young children with multiple disability to sit on buses for three to four hours per day; and
  - (d) the unwillingness of most Special Schools to provide academic curricula, even to children who have no intellectual disability.
717. These concerns indicate many of the impediments faced by children with disability in realising their right to education.

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<sup>715</sup> Women with Disabilities Australia, *Submission to the National Competition Policy Review of the Disability Discrimination Act 1992* (2003).

<sup>716</sup> Ministerial Working Group Program for Students with Disabilities, Victoria, *Report of the Ministerial Working Group Program for Students with Disabilities* (2005).

<sup>717</sup> Bridie Smith, 'That'll teach you — student wins payout', *The Age* (Melbourne), 8 February 2008, available at <http://www.theage.com.au/articles/2008/02/07/1202234066300.html>.

### **Case Study 1**

Luke is an 8 year old mildly autistic child who attends a specialist school for intellectually disabled and autistic students. The school provides transport to students attending the school, however the bus trip for Luke takes between one and a half and two hours each way to travel only nine kilometres.

During the bus journey, all of the children, including Luke, are restrained in their seats by the use of seat belt locks, regardless of whether a child has any behavioural problems. In Luke's case, he can be incontinent from time to time which often results in him wetting himself and being forced to stay in his seat for the remainder of the journey because there is no one on the bus to attend to him. Given his autism, Luke is unable to communicate to the bus driver to express his discomfort.

In addition to the conditions and length of the bus journey, this significant period of time spent on the bus per day — sometimes up to four hours — has broader implications for the opportunity for children with disability to enjoy their family, rest and leisure time and to ensure the full growth and development of their personality and opportunities.<sup>718</sup>

### **Case Study 2**

Students with a visual impairment are increasingly reliant on texts in electronic form. However, in Australia, it is difficult for blind people to access a wide range of electronic texts and no scheme exists to enable such access.<sup>719</sup> At the same time, sighted people are using electronic text and other digital media at an ever-increasing rate. As a consequence, visually impaired students in Australia face significant disadvantage when compared with the level of access to electronic versions of all published material for sighted people, which has implications for their educational opportunities.

### **(b) Forced Sterilisation of Children with Disability**

718. Forced sterilisation refers to 'surgical intervention resulting either directly or indirectly in the termination of an individual's capacity to reproduce' that is undertaken without the informed consent of the individual.<sup>720</sup> The Committee on the Rights of the Child has expressed its serious concern about the practice of forced sterilisation of children with disability, particularly girls with disability, and has emphasised that forced sterilisation 'seriously violates the right of

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<sup>718</sup> Case study provided by the Disability Discrimination Legal Service, Victoria.

<sup>719</sup> See Suzor, Harpur and Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13 *Media and Arts Law Review* 1.

<sup>720</sup> Women with Disabilities Australia, *The Development of Legislation to Authorise Procedures for the Sterilisation of Children with Intellectual Disabilities: Policy and Position Paper* (2007).

the child to her or his physical integrity and results in adverse life-long physical and mental health effects'.<sup>721</sup>

719. HREOC also expressed similar concerns in its 2001 report, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress*.<sup>722</sup> In that report, HREOC highlighted the need for uniform national standards prescribing the circumstances in which children can be sterilised and recommended that the Commonwealth and State Attorneys-General debate possible avenues of legislative reform to achieve increased accountability in relation to sterilisation decisions, such as, for example, through increased judicial oversight.<sup>723</sup>
720. In its previous Concluding Observations, the Committee on the Rights of the Child encouraged Australia to 'prohibit the sterilisation of children, with or without disability'.<sup>724</sup> Despite this, Australian legislation still fails to prohibit forced sterilisation.
721. In 2001, Women with Disabilities Australia, the national peak body representing women and girls with disability in Australia, completed a national research study into sterilisation and reproductive health of women and girls with disability. Its report, entitled *Moving Forward*, recommended the banning of all sterilisations of girls under the age of 18 years and the prohibition of sterilisation of adults in the absence of informed consent, except in circumstances where there is a serious threat to health or life.<sup>725</sup>
722. Despite these recommendations, the former Australian Government released draft legislation which set out procedures relating to authorisation of the sterilisation of children with an intellectual disability.<sup>726</sup> While this proposed legislation was dropped by the current Australian Government in March 2008, this means that the status quo now remains with no uniform national standards in place.
723. In addition to concerns regarding Article 24 of the *ICCPR*, the current practices relating to the sterilisation of children also raise concerns under Article 17 of the *Convention on the Rights of Persons with Disabilities* (which has recently been ratified by Australia), which relates to respecting every woman's physical and mental integrity on an equal basis.<sup>727</sup>

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<sup>721</sup> Committee on the Rights of the Child, *General Comment No 9 (2006): The Rights of Children with Disabilities*, [60], UN Doc CRC/C/GC/9 (2007).

<sup>722</sup> Human Rights and Equal Opportunity Commission, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress* (2001), available at [http://www.hreoc.gov.au/disability\\_rights/sterilisation/index.html](http://www.hreoc.gov.au/disability_rights/sterilisation/index.html).

<sup>723</sup> *Ibid* chapter 6.

<sup>724</sup> Committee on the Rights of the Child, *Concluding Observations: Australia*, [46(e)], UN Doc CRC/C/15/Add.268 (2005).

<sup>725</sup> Leanne Dowse and Carolyn Frohmader, *Moving Forward: Sterilisation and Reproductive Health of Women and Girls with Disabilities, A Report on the National Project Conducted by Women with Disabilities Australia* (2001).

<sup>726</sup> Standing Committee of Attorneys-General, *Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006 (Cth)* (draft).

<sup>727</sup> *Convention on the Rights of Persons with Disabilities*, adopted by the UN General Assembly on 13 December 2006, opened for signature 30 March 2007.

## T.8 Curfews

724. HREOC's *Seen and Heard Report* recommended that laws permitting preventative apprehension or restricting movement of persons not suspected of any crime (particularly those targeting children) should be repealed.<sup>728</sup> This recommendation has not been implemented.
725. In New South Wales, police are empowered to remove young people from public spaces in 'operational' local government areas for behaviour that is not criminal.<sup>729</sup> In Victoria, statutory provisions allow for the imposition of curfews on youth offenders as conditions of certain orders.<sup>730</sup> In Western Australia, the entertainment district of Northbridge has a 'curfew' that seeks to prevent children (particularly Indigenous children) from being in the district unaccompanied during certain hours of evening and night.<sup>731</sup>
726. A report undertaken in Sydney in the early 1990s surveyed a group of young people and found that a staggering 80 per cent had been stopped and spoken to by the police in public spaces. A further 50 per cent had been taken to the police station.<sup>732</sup> In Western Australia, a report from the mid-1990s documented a similar experience and suggested that these interactions with police (for non-criminal behaviour) often developed into conflict, resulting in criminal charges against the young person who has been approached.<sup>733</sup>
727. The picture has not improved since the 1990s; in fact, with the introduction of move-on orders in many jurisdictions<sup>734</sup> and the mooting of anti-social behaviour orders,<sup>735</sup> young people are more policed in public space than ever before. While these measures purport to be for general application there is growing evidence that they are used disproportionately against young, Aboriginal and homeless people.<sup>736</sup>
728. These restrictions on freedom of movement of children raise issues under both Article 24 and Article 12 of the *ICCPR*.

## T.9 Care and Protection

729. In 1997, the *Seen and Heard Report* identified consistent and persistent criticism of all care and protection systems in Australia and recommended that the Australian Government

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<sup>728</sup> *Seen and Heard Report*, above n 660, Recommendation 205.

<sup>729</sup> *Children (Protection and Parental Responsibility) Act 1997* (NSW).

<sup>730</sup> See, eg, *Children and Young Person's Act 1989* (VIC) s 144(3)(d).

<sup>731</sup> The police rely on a broad child protection power in the *Children and Community Services Act 2004* (WA) s 37. the framework is examined in Anna Copeland and Jo Goodie, 'The Child, the Young Person and the Law' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (2008) 158.

<sup>732</sup> Christine Alder et al', *Perceptions of the Treatment of Juveniles in the Legal System* (1992).

<sup>733</sup> Harry Blagg and Meredith Wilkie, *Young People and Police Powers* (1995).

<sup>734</sup> Move-on notices have been introduced in Western Australia, South Australia, Tasmania, Australian Capital Territory, Queensland and the Northern Territory.

<sup>735</sup> Anti-social behaviour orders have been considered by Western Australia, and are in place in the Northern Territory.

<sup>736</sup> See Taylor and Walsh, above n 447, 23.

undertake to coordinate these various systems.<sup>737</sup> Among other recommendations, the report proposed:

- (a) national standards for legislation and practice (Recommendation 161) to be reviewed and evaluated in light of national and international initiatives (Recommendation 162);
- (b) national research and data collection (Recommendations 163 and 166) including on the effectiveness of mandatory reporting (Recommendation 168) and conferencing models (Recommendation 169); and
- (c) a National Charter for Children in Care (Recommendations 164 and 165).

730. Apart from funding for research, including the work of the National Child Protection Clearing House which has been operated by the Australian Institute of Family Studies, these recommendations were given no attention at the Federal level in the reporting period. On 26 May 2008 the current Australian Government announced a proposal to develop a national framework for the protection of Australia's children.<sup>738</sup> The framework is expected to be finalised by the end of 2008.

#### **T.10 Domestic Violence**

731. Up to one-quarter of young people in Australia have experienced or witnessed an incident of physical or domestic violence against their mother or stepmother.<sup>739</sup> The issue of domestic violence is discussed in further detail under [Article 3: Violence against Women](#).

732. While the federal and state and territory governments have prioritised addressing the issue of violence against women, there is no targeted approach which addresses the particular needs of children living in situations of domestic violence. This is particularly concerning given that witnessing parental domestic violence has emerged as the strongest predictor of perpetration of violence in young people's own intimate relationships.<sup>740</sup>

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<sup>737</sup> *Seen and Heard Report*, above n 660, '428.

<sup>738</sup> See Department of Families, Housing, Community Services and Indigenous Affairs, *Australia's Children: Safe and Well* (May 2008), available at [http://www.facsia.gov.au/internet/facsinternet.nsf/family/parenting-child\\_protection\\_discussion\\_page.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/parenting-child_protection_discussion_page.htm).

<sup>739</sup> These findings come from a survey of 5,000 Australians aged between 12 and 20 from all States and Territories in Australia: David Indermur, 'Young Australians and Domestic Violence' (Trends and Issues in Crime and Criminal Justice No.19, 2001).

<sup>740</sup> *Ibid* 5.

### **Case Study**

James tried to get a violence restraining order from a court due to the ongoing abuse of his stepfather. He had left the home due to the fact that his mother refused to do anything about the abuse against James. The Magistrate refused to grant a restraining order on the basis that no complaints had been made to police prior to this application, they had never been called to the house and therefore the only evidence that the court had was the testimony of James.<sup>741</sup>

### **PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 24)**

- Please provide information regarding the steps, if any, that the Australian Government is taking to review, update and implement the recommendations of the joint report by the Australian Law Reform Commission and HREOC, *Seen and Heard: Priority for Children in the Legal Process*.
- Please provide to the Human Rights Committee any further information on what plans the Australian Government has to develop an integrated early childhood education and care program across Australia.
- Please provide details of the share of public expenditure on primary education and secondary education (disaggregated according to public and private schools).
- Please provide information regarding the proportion of Indigenous children attending secondary education and details of the adequacy and effectiveness of supports for Indigenous children to participate fully in and complete secondary education.
- Please provide information regarding the proportion of children with disabilities attending secondary education and details of the adequacy and effectiveness of supports for children with disabilities to participate fully in and complete secondary education.
- Please provide further information on whether the Australian Government intends to proceed with the draft *Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006*.
- Please provide further details regarding the recent proposal to develop a national framework for the protection of Australia's children.

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<sup>741</sup> Case study provided by SCALES Community Legal Centre, Western Australia.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 24)**

THAT the Australian Government take immediate steps to review, update and implement the recommendations of the joint report by the Australian Law Reform Commission and HREOC, *Seen and Heard: Priority for Children in the Legal Process*.

THAT Australia review all mandatory sentencing legislation and take all necessary steps and measures to ensure that such legislation does not adversely impact on disadvantaged groups, particularly young people and Indigenous people, in a manner that is disproportionate or discriminatory.

THAT Australia undertake a comprehensive review and reform of counter-terrorism laws, including to ensure that such laws are compatible with the rights of children.

THAT Australia legislate comprehensively to ensure that no child may be held in an immigration detention centre.

THAT Australia commit to a specific timeframe for all Australian state and territory governments to provide a minimum age for paid employment and/or a maximum number of allowable work hours for children subject to compulsory schooling.

THAT Australia ensure all states and territories abolish junior or youth rates of pay replacing them with equal rates of pay for equal work, with payments based on responsibilities and skills required in the job, not age.

THAT Australia ratify *ILO Convention 138 Concerning the Minimum Age for Admission to Employment* and *ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.

THAT Australia invest progressively using the maximum available resources in public education and reduce the funding inequity between public government schools and private schools.

THAT Australia implement and adequately resource programs to address the issues of bullying, truancy and exclusion from schools, particularly in respect of Indigenous children.

THAT Australia take appropriate steps and measures, including budgetary measures, to ensure that tertiary education is equally available to all persons on the basis of merit and capacity and that special measures be implemented to ensure equality of opportunity and access for students with disability, Indigenous students, low income students, and students from rural and remote areas.

THAT, as a matter of urgency, Australia take immediate steps to address the serious disadvantage in accessing all levels of education experienced by Indigenous Australians.

THAT Australia implement and adequately resource programs to enable children with disabilities to participate fully in and complete secondary education.

THAT Australia adopt legislation to prohibit the sterilisation of children, including children with disability.

## Article 25 — Rights of Political Participation

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**Article 25:**

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

- (a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*
  - (b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
  - (c) *To have access, on general terms of equality, to public service in his country.*
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### U. RIGHTS OF POLITICAL PARTICIPATION

733. Article 25 of the *ICCPR* enshrines the right of citizens to participate in public affairs, to vote, and to access the public service. Realisation of the right requires that special measures, including legislative, administrative and financial measures, be taken to ensure full participation for marginalised and disadvantaged groups, including people with disability and homeless people.

#### U.1 Political Representation

**(a) Women**

734. The significant under-representation of women in many aspects of political life raises concerns in relation to Article 25 of the *ICCPR*. This issue is discussed in further detail under [Article 3: Representation of Women](#).

**(b) Indigenous Australians**

735. The fact that there is currently no representative body for Indigenous people in Australia, compounded by the fact that there is currently not one Indigenous person holding a seat in the Australian Parliament, raises serious concerns in relation to Article 25 of the *ICCPR*. This issue is discussed in further detail under Article 1: Recognition of Self-Determination for Indigenous Australians.

**(c) People with Disability**

736. The political participation of people with disability is limited by the fact that currently, there are no members of Australian Parliament with a disability. Further, an Australian Social Inclusion Board has been established to be the main advisory body for the Australian Government on various aspects of social inclusion, including a disability and mental health employment strategy. It is comprised of leaders from the not-for-profit and business sectors, none of whom are people with disability.<sup>742</sup> The lack of representation of people with disability in such forums raises concerns in relation to Article 25 of the *ICCPR*.

**U.2 Right to Vote**

737. The right to vote is a norm of international law.<sup>743</sup> According to the Human Rights Committee, this right 'lies at the core of democratic government based on the consent of the people'.<sup>744</sup> Access to and effective exercise of the right to vote is a fundamental component of the framework necessary for the promotion, protection and fulfilment of other civil and political rights.

738. A general right to vote is not explicitly protected in the Australian Constitution or by any federal legislation. The *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**) requires that every Australian citizen (18 years or older) enrol and vote. People who are ineligible to enrol to vote include people under 18 years of age,<sup>745</sup> non-Australian citizens, people of unsound mind and people convicted of treason or treachery who have not been pardoned.<sup>746</sup> A person who is serving a sentence of imprisonment of three years or longer is not entitled to enrol or vote in federal elections.<sup>747</sup>

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<sup>742</sup> See Australian Social Inclusion Board, *Profiles of the Members*, at [http://www.socialinclusion.gov.au/aus\\_inclusion\\_board/member\\_profiles.htm](http://www.socialinclusion.gov.au/aus_inclusion_board/member_profiles.htm).

<sup>743</sup> See, eg, Human Rights Committee, *Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, [3], [11], UN Doc CCPR/C/21/Rev.1/Add.7 (1996).

<sup>744</sup> *Ibid* [1].

<sup>745</sup> 17 year olds may enrol provisionally but can not vote until they turn 18: *Electoral Act* s 100.

<sup>746</sup> *Electoral Act* s 93.

<sup>747</sup> *Roach v Electoral Commissioner* (2007) 239 ALR 1 declared as constitutionally invalid s 93(8AA) of the *Electoral Act*, and in Order 3A affirmed the continued existence section which it had purported to replace (which provided for disqualification on the basis of a term of imprisonment of three years or more). However, the decision did not have the effect of actually repealing s 93(8AA), which consequently remains in the *Electoral Act*.

739. In 2006, amendments were made to the *Electoral Act* by the former Australian Government which have the potential to impact on the right to vote for particular groups within Australia.<sup>748</sup> These amendments included:

- (a) earlier closure of the electoral roll,<sup>749</sup> which limited the time by which electors must enrol or change enrolment details prior to an election;
- (b) increased requirements for identification for enrolment or updating enrolment; and
- (c) limitations to prisoner voting entitlements.

740. These amendments raise concerns in relation to Article 25 of the *ICCPR*, particularly for young people, homeless people, Australians from non-English speaking backgrounds, Indigenous Australians and prisoners.

**(a) Young People**

741. Amendments to the *Electoral Act* reduced the close of roll period for new enrolments and re-enrolments to 8.00pm on the day that the election writs<sup>750</sup> are issued.<sup>751</sup> Previously, the electoral roll closed seven days after the election writs are issued.

742. The shorter close of roll period creates an impediment to many young people, as well as other disadvantaged groups, exercising the right to vote in federal elections. Prior to the 2004 federal election, 78,908 people enrolled for the first time in the seven-day period, with the majority being young people enrolling to vote for the first time.<sup>752</sup>

743. In addition to the early closure of the electoral roll, the 2006 amendments also introduced stricter proof of identity requirements for enrolment. The complexity and inconvenience caused by the stricter proof of identity requirements may impair the ability of young people to enrol to vote, or may deter them from enrolling.<sup>753</sup> The changes would particularly affect young people, people from disadvantaged backgrounds and people in remote communities.

**(b) Homeless People**

744. The United Nations Office of the High Commissioner for Human Rights has recognised the direct link between homelessness, poverty and the right to vote.<sup>754</sup> The proportion of poor and homeless people going to the polls is a key indicator of the extent to which a state is

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<sup>748</sup> See *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

<sup>749</sup> The electoral roll is a list of eligible persons who are registered to vote in Australian elections.

<sup>750</sup> An election writ is a legal document that is issued by the Governor-General which 'commands' an electoral officer to hold an election.

<sup>751</sup> *Commonwealth Electoral Act 1918* (Cth) s 155.

<sup>752</sup> Evidence to Senate Finance and Public Administration Legislation Committee, Parliament of Australia, Canberra, 7 March 2006, 3 (Mr Ian Campbell, Electoral Commissioner, Australian Electoral Commission).

<sup>753</sup> See, eg, Submission to Senate Finance and Public Administration Legislation Committee, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005, Parliament of Australia, 9 (Human Rights and Equal Opportunity Commission).

<sup>754</sup> UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 48.

implementing its fundamental obligations in relation to the right to vote.<sup>755</sup> Statistics relating to the enrolment and voting trends of homeless people suggest that:

- (a) at the 2004 Federal Election, up to 76 per cent of homeless people who were eligible to vote did not do so.<sup>756</sup>
- (b) at least 54 per cent of homeless people who are not enrolled would like to enrol to vote at federal elections;<sup>757</sup>
- (c) at the 2001 Federal Election, up to 80,000 homeless people were not enrolled or did not vote in that election.<sup>758</sup>

745. Recent amendments to the *Electoral Act* regarding proof of identity requirements and the closing of the electoral roll significantly impair the ability of people experiencing homelessness to participate in the electoral process. In particular:<sup>759</sup>

- (a) the earlier close of the electoral roll serves as a practical impediment to homeless people by removing or significantly reducing the opportunities for updating address details or registering as itinerant voters; and
- (b) the stringent proof of identity requirements for all applications for enrolment or transfers of enrolment are particularly problematic for homeless people, many of whom are unlikely to hold, or have in their possession, the requisite proof of identity documents.

746. Both of these proposals are likely to have a significant impact on exercise of the right to vote for people experiencing homelessness.

**(c) People with Disability**

747. People with disability must be able to freely express their political views through secret ballot and non-discriminatory voting mechanisms, which should be as freely available to people with disability as they are to their non-disabled peers. Universally accessible voting systems are required to enable people with disability to cast independent ballots. The following groups continue to be excluded in this way in Australia:<sup>760</sup>

- (a) people who are illiterate in any language, or illiterate in English, who make up an estimated 79 per cent of the print disabled population;

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<sup>755</sup> Ibid 51.

<sup>756</sup> Submission to the Joint Standing Committee on Electoral Matters' Inquiry into the Conduct of the 2004 Federal Election and the Matters related Thereto, Parliament of Australia, 30 March 2005, 38 (PILCH Homeless Persons' Legal Clinic), available at <http://www.aph.gov.au/house/committee/em/elect04/subs/sub131.pdf>.

<sup>757</sup> Ibid.

<sup>758</sup> Joint Standing Committee on Electoral Matters, Parliament of Australia, *The 2001 Federal Election: Report of the Inquiry into the conduct of the 2001 Federal Election, and Matters related Thereto* (2003) 84.

<sup>759</sup> PILCH Homeless Persons' Legal Clinic, above n 756, 38.

<sup>760</sup> Market Equity, *Secondary Research to Determine the Size of the National Print Disabled Audience* (2002).

- (b) people who have a physical impairment that prevents them holding or managing printed material, who make up an estimated 6 per cent of the print disabled population; and
  - (c) people who have a cognitive impairment that prevents them processing written information or an intellectual disability or acquired brain injury that makes comprehending complex information difficult, who make up an estimated 9 per cent of the print disabled population.
748. Barriers at state and federal levels to people with disability voting independently and confidentially include:<sup>761</sup>
- (a) no provision of information about electoral processes and arrangements in easy read, pictorial or similar formats to assist people with cognitive impairments;
  - (b) no provision of adjustments to voting instructions and ballot papers to assist people with cognitive impairments;
  - (c) no provision of Australian sign language (Auslan) interpreters at polling booths to assist people who are deaf;
  - (d) inadequate hearing augmentation at polling booths to assist people who are hearing impaired;
  - (e) no consistent provision of electronic voting to assist people who are blind, vision impaired or who have a physical impairment that limits hand function;
  - (f) few accessible polling booths, and those tagged as accessible do not comply with relevant Australian Standards; and
  - (g) inadequate training of electoral staff in interacting with and assisting people with disability.
749. The accessible electronic voting system trialled at the 2007 Federal Election was limited to people who are vision impaired, but excluded people who have multiple sensory impairments, such as people who are deafblind.

#### **Case Study**

In the 2007 Federal Election campaign, the major and minor political parties released policies on disability. All are available on-line only in portable document format (PDF), which is not compatible with screen-reading software used by people who are blind or vision impaired.<sup>762</sup>

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<sup>761</sup> Submission to the Joint Standing Committee on Electoral Matters Inquiry into Aspects of the Conduct of the 2004 Federal Election and Matters Related Thereto, Parliament of Australia, 7 March 2005, 1–2 (People with Disability Australia Inc), available at <http://www.aph.gov.au/House/committee/em/elect04/subs/sub050.pdf>.

<sup>762</sup> Case study provided by the Australian Federation of Disability Organisations.

**(d) Prisoners**

750. In June 2006, the former Australian Government passed legislation providing for the blanket disenfranchisement of *all* prisoners serving a term of imprisonment.<sup>763</sup> The legislation was subsequently successfully challenged in the High Court of Australia and found to be unconstitutional on the basis that it violated the concept of ‘representative democracy’ which is protected in the *Australian Constitution*.<sup>764</sup> The effect of the High Court’s decision is that there is now an implied right to vote in the *Australian Constitution* and that this right may only be limited by Parliament for a ‘substantial reason’ and in a way that is ‘appropriate and adapted’ or ‘proportionate’ to that aim.
751. The High Court upheld the validity, however, of the previous law which provides that prisoners serving a sentence of three years or longer are not entitled to vote. The general deprivation of the right to vote for convicted prisoners raises concerns with both Articles 25 and 10(3) of the *ICCPR*.

**U.3 Funding of Political Parties**

752. The Human Rights Committee has stated that fulfilment of the right of every citizen to participate in the conduct of public affairs and the right to vote requires that elections be conducted ‘without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector’s will’.<sup>765</sup> In particular, the Committee stated that:
- Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.<sup>766</sup>
753. The cost of running for public office should not be prohibitive, as this may infringe the right to participate in public affairs under Article 25. The Human Rights Committee has expressed concern ‘at the considerable financial costs that adversely affect the right of persons to be candidates at elections’ in the United States.<sup>767</sup>
754. Further, unrestricted and non-transparent private funding of political parties and election campaigns can compromise the autonomy of political parties.
755. The current regulation of political funding in Australia is inadequate to ensure that the democratic process is accessible and accountable to the degree required by Article 25. The size and source of private donations to political parties and the level of campaign expenditure

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<sup>763</sup> *Electoral Act* s 93(8AA), as amended by *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

<sup>764</sup> *Roach v Electoral Commissioner* (2007) 239 ALR 1.

<sup>765</sup> Human Rights Committee, *General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25)*, [19], UN Doc CCPR/C/21/Rev.1/Add.7 (1996).

<sup>766</sup> *Ibid.*

<sup>767</sup> Human Rights Committee, *Comments on United States of America*, [289], UN Doc CCPR/C/79/Add 50 (1995) [289].

is currently unrestricted.<sup>768</sup> Further, current annual disclosure requirements mean that there can be a significant lag time between the date of a donation and public disclosure of that donation, even in the lead up to an election.<sup>769</sup> There are also incumbency benefits for parliamentarians, who are not sufficiently restricted from using public resources at their disposal (such as staff and allowances) for campaigning.<sup>770</sup>

756. The current Australian Government has committed to reform and modernise the Australian electoral process. Specifically, it has committed to urgently implement the following five reforms:<sup>771</sup>

- (a) amend the campaign donation disclosure threshold level from \$10,000 to \$1,000;
- (b) ban donations from overseas or from non-Australian companies;
- (c) tie election funding to reported and verified electoral expenditure so as to prevent a candidate or party from profiting from the electoral public funding system;
- (d) ensure that separate divisions of a political party are not treated as separate entities; and
- (e) require donation disclosure to occur at six monthly intervals, rather than annually.

757. The current Australian Government has also committed to produce an electoral reform 'Green Paper', which will consider disclosure, funding and expenditure issues.<sup>772</sup> If implemented, the amendments outlined above will go some way towards improving integrity of Australia's electoral system. However, more stringent amendments and additional changes are required to ensure transparency and equity in political financing in accordance with the requirements of Article 25 of the *ICCPR*.

#### **PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 25)**

- Please provide information as to targeted programs or measures to ensure full and practical realisation of the right to vote for marginalised and vulnerable groups, including young people, homeless people, prisoners, people with disability and Indigenous Australians.
- Does the Australian Government consider the disenfranchisement of prisoners to be for a legitimate purpose or purposes and, if so, what are those purposes?

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<sup>768</sup> Except for the Tasmanian Legislative Council: see Marian Sawer, *Democratic Values: Political Equality?* (Discussion Paper 9/07, Democratic Audit of Australia, May 2007) 3–4, available at [http://democratic.audit.anu.edu.au/papers/20070525\\_sawerdemvals.pdf](http://democratic.audit.anu.edu.au/papers/20070525_sawerdemvals.pdf).

<sup>769</sup> Ibid. Sawer notes that due to the current disclosure rules a donation of 1 million dollars from Lord Ashcroft, an overseas donor, to the Liberal Party's 2004 Federal election campaign was not made public for 16 months: at 4.

<sup>770</sup> Ibid.

<sup>771</sup> Senator John Faulkner, *Transcript Electoral Reform, Parliament House, Canberra* (28 March 2008), available at [http://www.smos.gov.au/transcripts/2008/tr\\_20080328\\_electoral\\_reform.html](http://www.smos.gov.au/transcripts/2008/tr_20080328_electoral_reform.html).

<sup>772</sup> Ibid.

- Please provide information and evidence as to how the current disenfranchisement of prisoners is appropriate, adapted and proportionate.
- Please advise the Human Rights Committee as to how the current process of electoral reform will give full effect to Article 25 of the *ICCPR*.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 25)**

THAT Australia take immediate and targeted steps, including legislative, administrative and budgetary steps, to ensure practical realisation of the right to vote for all Australians, including particularly young people, homeless people, people with disability and prisoners.

THAT the Australian Government ensure that the current process of electoral reform be directed, *inter alia*, toward the full realisation of Article 25 of the *ICCPR*.

## Article 27 — Minority Rights

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**Article 27:**

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

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### V. MINORITY RIGHTS

758. Article 27 of the *ICCPR* recognises the protection, in addition to the rights that all individuals have under the Covenant, that must be afforded to individuals belonging to minority groups. The fundamental components of minority identity which must be protected are its cultural, religious and linguistic manifestations.<sup>773</sup>

#### V.1 Indigenous Australians

759. A significant gap exists between Indigenous and non-Indigenous Australians relating to, among other things, standards of living and health, political participation, the right of self-determination, the administration of justice, land rights, and access to adequate housing and education. The effect of many of these inequalities is a significant and detrimental impact of the ability of Indigenous Australians to preserve and develop their culture, religion and language, which raises serious concerns with Article 27 of the *ICCPR*.

760. The following issues are discussed in further detail throughout this submission:

- (a) the failure to recognise the self-determination of Indigenous Australians and to ensure adequate political representation (see [Article 1: Recognition of Self-Determination for Indigenous Australians](#))
- (b) the failure to provide compensation for those affected by the ‘Stolen Generations’ (see [Article 1: The Stolen Generations](#));

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<sup>773</sup> See, generally, Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994) .

- (c) the ‘emergency response intervention’ into Indigenous communities in the Northern Territory (see [Article 1: Intervention into Northern Territory Indigenous Communities](#));
- (d) the protection of the titles and interests of Indigenous Australians in their native lands (see [Article 1: Native Title](#)); and
- (e) the state of Indigenous health, including life expectancy, infant mortality rates and susceptibility to diseases (see [Article 6: Indigenous Health](#)).

761. Each of these issues impinge on the ability of Indigenous Australians to enjoy their Article 27 rights.

## V.2 Arab and Muslim Communities

762. As discussed under [Article 2: Religion](#), there is no prohibition of discrimination or vilification on the ground of religion at a federal level. The *Ismaξ — Listen* report outlined a number of areas that require attention, such as improving legal protection, promoting public awareness through education, addressing stereotypes and misinformation in public debate, ensuring community safety through law enforcement, empowering communities and fostering public support and solidarity with Arab and Muslim Australians.<sup>774</sup> The report also made ten recommendations for action.<sup>775</sup> The first one calls for the introduction of a federal law making discrimination and vilification on the grounds of religion or belief unlawful.

763. As a consequence of anti-Muslim and anti-Arab prejudice, fear is isolating many Muslim and Arab Australians from the wider community<sup>776</sup> Where non-Muslim Australians have reported generalised fears of such things as travelling in planes, Muslim Australians have reported specific fears for their personal safety in public places and a mistrust of society.<sup>777</sup> Compounding these fears is the fact that there are significant gaps in the anti-discrimination legislation at the federal and state levels to protect people from this discrimination, largely because being a Muslim is not classified as a ‘race’ which is a protected attribute under Australian law. Religion is not classified as a protected attribute under federal law.

764. The effect of this prejudice is a fear on the part of Muslim and Arab Australians to openly enjoy their own culture or practise their own religion. This raises serious issues under Article 27 of the *ICCPR*. Measures must be taken by the Australian Government towards preserving and defending the cultural, religious and social identity of Arab and Muslim Australians.

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<sup>774</sup> *Ismaξ — Listen report*, above n 105.

<sup>775</sup> *Ibid* 4–14.

<sup>776</sup> Edith Cowan University, *National Fear Survey* (August 2007).

<sup>777</sup> *Ibid*.

### V.3 African Communities

765. African communities, particularly the Sudanese community, are some of the fastest growing ethnic communities in Australia.<sup>778</sup> There is a lack of resources and information available to those who provide services to recently arrived African communities. As a consequence, there is a lack of understanding and sensitivity to the needs of African communities. Presently, most Sudanese in Australia are struggling to deal with the effects of their trauma and the nuances of their experience are not widely appreciated.<sup>779</sup> Similarly, many Sudanese have come from rural areas or refugee camps and are unfamiliar with urban environments and some of the facilities and amenities available to them.
766. In 2007, the former Australian Government made a number of statements about the Sudanese community and its inability to integrate into mainstream Australian society.<sup>780</sup> The former Minister for Immigration, Kevin Andrews, alleged just prior to the election in November 2007 that African refugees were involved in gangs, nightclub fights and drinking alcohol in parks at night.<sup>781</sup> He did not substantiate these claims. This was preceded by a statement in August 2007 when the former Australian Government announced that it intended to cut African immigration from 70 per cent of the 13,000 humanitarian quota in 2005 to 30 per cent in 2007, and freeze all Sudanese admissions until the middle of 2008.<sup>782</sup>
767. The lack of adequate funding for programs and services to recently arrived African communities, as well as the development of public attitudes fuelled by unhelpful political comments, raises concerns for many African communities to freely enjoy their own culture and practise their religion.

#### PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 27)

- Please provide further information as to the steps and measures being taken, or proposed, to protect and respect the rights of vulnerable minorities, including particularly Indigenous Australians, Arab and Muslim Australians, and African migrants.

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<sup>778</sup> Refugee Council of Australia, *Australia's Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions* (2008), available at [http://www.refugeecouncil.org.au/docs/resources/submissions/2008-09\\_intakesub.pdf](http://www.refugeecouncil.org.au/docs/resources/submissions/2008-09_intakesub.pdf).

<sup>779</sup> See Rebecca Atwell, 'The Educational Background of Sudanese Refugees: A Quick Guide for Australian Teachers' (2005), available at [http://www.akm.net.au/sora/research.php?subaction=showfull&id=1124062517&archive=&start\\_from=&ucat=38&](http://www.akm.net.au/sora/research.php?subaction=showfull&id=1124062517&archive=&start_from=&ucat=38&).

<sup>780</sup> Alison Caldwell, 'Bligh rebuts Minister's 'Racist' Comments on Sudanese' *ABC News*, 5 October 2007, available at <http://www.abc.net.au/news/stories/2007/10/05/2052475.htm>.

<sup>781</sup> Jewel Topsfield, David Rood and Daniella Miletic, 'Minister's African Dossier Renews Racial Tensions' *The Age* (Melbourne), 5 October 2007, available at <http://www.theage.com.au/articles/2007/10/04/1191091281217.html>.

<sup>782</sup> Connie Levett, 'Andrews Tempers Integration Remarks, Sudanese Group Says', *The Sydney Morning Herald* (Sydney), 31 October 2007, available at <http://www.smh.com.au/news/federalection2007/news/andrews-tempers-integration-remarks-sudanese-group-says/2007/10/30/1193618883984.html>.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 27)**

THAT Australia take all necessary steps, including legislative, administrative and budgetary steps, to enable and maintain Indigenous culture, language and customs.

THAT the Australian Government enact legislation to prohibit religious discrimination and vilification.

## Article 50 – Federalism

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**Article 50:**

*The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.*

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**W. Applicability of the covenant in federal states**

768. Article 50 states that the *ICCPR*'s protections extend to all parts of federal States without limitation or exception, thus requiring the Australian Government to guarantee that the states and territories of Australia comply with the Covenant.
769. Violations of the *ICCPR* can still be established and recognised where the actions or laws in questions are those of a state or province.<sup>783</sup> In such cases, the violation in question is attributed to the State party (being the treaty party). While some countries may face constitutional difficulties in overriding the laws of states or provinces, Australia's Federal Government has power to legislate to give effect to Australia's obligations under international treaties and conventions.<sup>784</sup> To the extent of any inconsistency, federal law prevails over state and territory laws.<sup>785</sup> Australia's Federal Government has previously relied on this protection to give effect to certain international obligations.<sup>786</sup>
770. Accordingly, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at federal and state and territory level, must respect, protect and fulfil the human rights afforded by the *ICCPR*.<sup>787</sup>

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<sup>783</sup> See, eg, the communication to the HRC in *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

<sup>784</sup> *Australian Constitution* s 51(xxix).

<sup>785</sup> *Australian Constitution* s 109.

<sup>786</sup> See *Commonwealth v Tasmania* (1983) 158 CLR. Further, the *Human Rights (Sexual Conduct) Act 1994* (Cth) was introduced to override sections of the Tasmanian *Criminal Code* following the Human Rights Committee's decision in *Toonen v Australia*.

<sup>787</sup> Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004). Article 27 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)

**(a) Australia's Historical Position on the Application of Article 50**

771. Subsequent to withdrawing the reservations lodged by the Australian Government upon ratification of the *ICCPR* on 13 August 1980, Australia lodged the following declaration:

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.<sup>788</sup>

772. In its previous Concluding Observations, the Human Rights Committee noted:

the explanation by the [Australian] delegation that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights... [but stressed]... that such negotiations cannot relieve the State party of its obligation to respect and ensure Covenant rights in all parts of its territory without any limitations or exceptions (art. 50).<sup>789</sup>

773. The Human Rights Committee further stated that any arrangements between the Commonwealth and a state or territory could not condone restrictions on Covenant rights which are not permissible under the Covenant.<sup>790</sup>

**(b) Protection of Covenant Rights in the States and Territories**

774. The Common Core Document identifies the small number of guarantees of rights or immunities which the High Court has found in the Constitution, and the particular legislation at a federal and state level said to implement aspects of Covenant rights.<sup>791</sup> However, the Common Core Document does not expressly identify the fact that the relevant legislation, taken as a whole, does not encompass all *ICCPR* rights, and that inconsistencies exist as to the levels or scopes of protection afforded between the states and territories in respect of those rights.

775. While the Commonwealth Attorney-General has committed to undertaking a national consultation process regarding the need for a federal charter of rights,<sup>792</sup> the reality, as reported in the Common Core Document, is that Australia has failed to achieve uniform legislative protection of Covenant rights in all parts of Australia. Even in the Australian Capital Territory and Victoria, whose parliaments have enacted legislation to give effect to rights broadly similar to those contained in the *ICCPR*, the question of complementarity between the

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provides that a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

<sup>788</sup> *Declaration concerning the Federal Constitutional System: Australia*, 1379 UNTS 319 (1984).

<sup>789</sup> *Concluding Observations of the Human Rights Committee: Australia*, [498]–[528], UN Doc A/55/40 (2000).

<sup>790</sup> *Ibid.*

<sup>791</sup> Core Common Document, above n 4, [52]–[55], [68].

<sup>792</sup> Discussed in [Article 2: Federal Charter of Human Rights](#).

legislative instruments and the Covenant (in terms of the rights and protections afforded) remains.<sup>793</sup>

**(1) ACT Human Rights Act**

776. The Australian Capital Territory (**ACT**) was the first Australian jurisdiction to introduce comprehensive human rights legislation protecting Covenant rights, with the introduction of the *Human Rights Act 2004* (**ACT**) (**Human Rights Act**) in 2004. The Act establishes a ‘dialogue model’, which essentially seeks to ensure that Covenant rights are taken into account and discussed by the different arms of government when developing and interpreting ACT law. The model adopted by the ACT included the following key features:

- (a) statements of compatibility prepared by the Attorney-General, in which proposed Government bills are assessed for consistency with the *Human Rights Act* prior to introduction into the Legislative Assembly;<sup>794</sup>
- (b) pre-enactment scrutiny of proposed legislation by the Legislative Assembly Standing Committee on Legal Affairs, reporting on human rights issues raised by all bills;<sup>795</sup>
- (c) the interpretive provision, in which courts, tribunals and decision makers must adopt, where possible, a human rights consistent interpretation of ACT laws;<sup>796</sup> and
- (d) the Supreme Court’s power to issue a declaration of incompatibility, where such an interpretation cannot be adopted.<sup>797</sup>

777. Significantly, the *Human Rights Act* was amended in March this year. The most significant change, which will come into force on 1 January 2009, is that public authorities will be bound to act and make decisions consistently with the human rights protected under the Act.<sup>798</sup>

778. A direct right of action will also be available to persons affected by an act or decision of a public authority which is made inconsistently with human rights. Such affected persons will be able to initiate proceedings in the ACT Supreme Court to challenge acts and decisions of public authorities. Under this mechanism, which is based on section 42 of the United Kingdom’s *Human Rights Act 1998*, the ACT Supreme Court will have discretion to grant any appropriate relief (other than financial compensation, unless that remedy is independently available) .

**(2) Victorian Charter of Human Rights and Responsibilities**

779. Following the introduction of the ACT’s *Human Rights Act* in 2004, the Victorian Government commenced a consultation process in April 2005, culminating in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (**Victorian Charter**) being passed by the Victorian Parliament in July 2006, and becoming fully operational on 1 January 2008.

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<sup>793</sup> *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>794</sup> *Human Rights Act* s 37.

<sup>795</sup> *Human Rights Act* s 38.

<sup>796</sup> *Human Rights Act* s 30.

<sup>797</sup> *Human Rights Act* s 32.

<sup>798</sup> See *Human Rights Amendment Act 2008* (ACT) s 7, inserting a new Part 5A into the *Human Rights Act*.

780. Like the ACT's *Human Rights Act*, the *Victorian Charter* is an act of Parliament, which seeks to protect and promote a set of civil and political rights broadly consistent and predominantly drawn from those contained in the Covenant, through a dialogue model.<sup>799</sup> The *Victorian Charter* adopts the following key mechanisms:

- (a) any new bills to be introduced into Parliament must be assessed for their consistency with the rights contained in the *Victorian Charter*, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament;<sup>800</sup>
- (b) the Scrutiny of Acts and Regulations Committee is to consider whether any proposed legislation is incompatible with human rights;<sup>801</sup>
- (c) public authorities must act consistently with human rights and give proper consideration to human rights in any decision-making process;<sup>802</sup>
- (d) courts are required to interpret legislation consistently with the human rights contained in the *Victorian Charter* (so far as possible);<sup>803</sup> and
- (e) the Supreme Court of Victoria has the power to issue a Declaration of Inconsistent Interpretation if a law cannot be interpreted and applied consistently with the rights in the *Victorian Charter*.<sup>804</sup>

781. The *Victorian Charter* does not establish a free-standing cause of action and a breach of the *Charter* does not result in an award of damages. The focus of the legislation introduced in both Victoria and the ACT is on seeking to enhance transparency and accountability in government, by requiring the legislature to take into account and explicitly address human rights considerations when making new laws (at the earliest stage of development), rather than affording individual rights by way of granting causes of action (save for the amendment to the ACT's *Human Rights Act* discussed above).

**(c) Developments in other States and Territories**

782. Both the Tasmanian and Western Australian governments have conducted consultations on the need for specific human rights legislation in those states, which both recommended that human rights legislation should be enacted in order to protect both *ICCPR* and *ICESCR* rights.<sup>805</sup> To date, however, neither the Tasmanian nor Western Australian governments have implemented this recommendation.

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<sup>799</sup> Noting a significant modification to the right to life (compare *Victorian Charter* s 9 and *ICCPR* art 6) and the exclusion of the right to self-determination (*ICCPR* art 27), although cultural rights are incorporated in s 19 of the *Victorian Charter*.

<sup>800</sup> *Victorian Charter* s 28.

<sup>801</sup> *Victorian Charter* s 30.

<sup>802</sup> *Victorian Charter* s 38.

<sup>803</sup> *Victorian Charter* s 32.

<sup>804</sup> *Victorian Charter* s 36.

<sup>805</sup> Tasmanian Law Reform Institute, above n 51; Consultation Committee for a Proposed WA Human Rights Act, above n 51.

783. In Tasmania, the Attorney-General has foreshadowed discussing the matter with his Commonwealth counterpart, without providing any further commitment to progress the matter within Cabinet.<sup>806</sup> The Western Australian Attorney-General has gone a step further, announcing that consideration of the issue at the state level will be put on hold until after the Australian Government's consultation period.<sup>807</sup>
784. Other states and territories are a lot further behind the developments in the ACT and Victoria. In New South Wales, the idea of a charter of rights was earlier this year branded as 'absurd' by the then Attorney-General.<sup>808</sup> The issue is yet to receive a significant degree of either political or media attention in Queensland, South Australia or the Northern Territory.

#### **PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 50)**

- Please advise the Human Rights Committee as to what measures, including legislative or constitutional measures, Australia is taking to ensure that the *ICCPR* is applied across all branches of government (legislative, executive and judicial) at federal and state and territory level.
- Please provide information as to the nature, timing, scope and parameters of the proposed national public consultation regarding the legal recognition and protection of human rights, including particularly the steps and measures that will be taken to ensure participation by marginalised and disadvantaged individuals and groups.
- What steps will the Australia Government take if its consultation process recommends introducing legislative protection for Covenant rights?
- What steps will the Australian Government take to ensure that all state and territory governments implement legislative protection of human rights?
- Please update the Human Rights Committee as to the status of the implementation of the recommendations of the Consultative Committees regarding the enactment of human rights legislation in Tasmania and Western Australia.

#### **PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 50)**

THAT Australia enact comprehensive legislative protection of the rights contained in the *ICCPR* and ensure that the rights are applied across all levels and arms of government.

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<sup>806</sup> Maria Rae, 'Rights Charter Stalled', *The Mercury* (Hobart), 12 March 2008.

<sup>807</sup> Jim McGinty, Western Australian Attorney-General, 'Human Rights Report Completed' (Press Release, 20 December 2007), available at [http://acthra.anu.edu.au/articles/McGinty%20media\\_release\\_report.pdf](http://acthra.anu.edu.au/articles/McGinty%20media_release_report.pdf).

<sup>808</sup> See James Eyers, 'NSW Barristers Back Charter of Rights', *The Australian Financial Review* (Sydney) 14 March 2008.

THAT Australia take steps to ensure that all state and territory governments enact legislation to comprehensively recognise and protect human rights.

THAT Australia develop ongoing dialogue at a federal and state level to ensure that lessons learnt in relation to the methods of legislative protection of human rights are shared between both levels of government.

## Appendix 1 — Proposed Questions for List of Issues

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### **Article 1 — Right of Self-Determination**

- Please provide information on the steps that the Australian Government is taking to promote the right of Indigenous Australians of self-determination.
- Please provide details of any policies and measures being developed by the Australian Government to establish a representative Indigenous body to ensure that Indigenous persons are able to meaningfully participate in and contribute to relevant policy and decision-making processes.
- Please advise as to the Australian Government's response to the *National Indigenous Representative Body* Issues Paper prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner.
- Please provide information on the steps that the Australian Government is taking to improve consultation with affected communities and to support the development of better Indigenous governance structures, particularly in light of the abolition of the Aboriginal and Torres Strait Islander Commission and particularly in relation to the Northern Territory Intervention.
- Does the Australian Government propose to implement the remaining recommendations contained in the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report that are not already implemented? In particular, what measures are being taken to provide an effective remedy to the Stolen Generations through reparations?
- Please provide information on the steps the Australian Government is taking to implement the recommendations of the Human Rights and Equal Opportunity Commission to ensure that the Northern Territory Intervention is compatible with domestic and international human rights standards, including by fully reinstating the *Racial Discrimination Act 1975* (Cth).
- Please update the Human Rights Committee as to the Australian Government's position on the Declaration on the Rights of Indigenous Peoples.
- Please provide details as to the steps and measures being taken to make the native title system more fair, effective and efficient following the July 2008 announcement of an 'overhaul' of the system.

### **Articles 2 and 26 — Treaty Entrenchment and Non-Discrimination**

- Please provide information as to how the *ICCPR* is incorporated into Australian domestic law, including its enforceability and justiciability before domestic courts and tribunals.
- Please provide information as to the nature, timing, scope and parameters of the proposed national public consultation regarding the legal recognition and protection of human rights, including particularly the steps and measures that will be taken to ensure participation by marginalised and disadvantaged individuals and groups.

- Please update the Human Rights Committee as to the status of the implementation of the recommendations of the Consultative Committees regarding the enactment of human rights legislation in Tasmania and Western Australia.
- Does the Australian Government consider the Views of the Human Rights Committee under the First Optional Protocol to the *ICCPR* to be binding? What measures and mechanisms, including legislative, administrative and parliamentary measures, are in place to ensure domestic implementation of, and compliance with, Human Rights Committee's Views?
- Does the Australian Government propose to maintain all of the existing reservations to the *ICCPR*? Please update the Human Rights Committee as to the reasons for, and status of, these reservations.
- Please provide information as to the steps being taken to develop a national action plan on human rights education and to ensure that human rights are a formal component of the curriculum at a primary or secondary level in every Australian state and territory.
- What steps, including legislative measures, is the Australian Government taking to address issues of substantive inequality, direct discrimination and systemic discrimination against vulnerable communities and groups, including Indigenous Australians, women, people with disability, people from non-English speaking backgrounds and all religions, homeless people, gay, lesbian, bisexual, transgender and intersex people, children and young people, and older persons?
- Please explain how exemptions to Australian anti-discrimination law which permit discrimination on grounds including race and nationality in the field of employment are compatible with the prohibition against discrimination under the *ICCPR*.
- The current Australian Government has recently recognised that homelessness is a major issue in Australian society. What additional measures, both legislative and educative, have or will the Australian Government introduce to address discrimination based on socio-economic and housing status?

**Article 3 — Equal Rights of Men and Women**

- What concrete steps, including legislative, budgetary and administrative steps, is Australia taking to address the significant disadvantage of women compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation?
- Please outline the steps and measures that Australia is taking to ensure that women and children who are victims of domestic violence are able to remain in the family home and do not become homeless.
- Please indicate whether the resources allocated to both prevention of violence and assistance for women and children who experience violence, including through the 'Women's Safety Agenda' initiative, are anticipated to meet the demand for services.
- How will the Australian Government support a structure for Indigenous women to have input into deciding on appropriate services and solutions to violence in their own communities?

**Article 4 — Permissible Derogations in Times of Public Emergency**

- Does the Australian Government consider the ‘emergency’ in Northern Territory Indigenous communities to constitute an ‘emergency which threatens the life of the nation’ and, if so, what steps has Australia taken to permissibly derogate from provisions of the *ICCPR* under Article 4 with respect to the Northern Territory Intervention?
- Does the Australian Government consider the ‘War on Terror’ to constitute an ‘emergency which threatens the life of the nation’ and, if so, what steps has Australia taken to permissibly derogate from provisions of the *ICCPR* under Article 4 with respect to counter-terrorism laws and measures?

**Article 6 — Right to Life**

- Please details the steps being taken to review, update and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and substantially reduce the incidence of Indigenous deaths in prison.
- Please provide information regarding the measures, including particularly legislative measures, in place to ensure that Australia in no way cooperates or assists with the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed or which may result in a person being subject to cruel, inhuman or degrading treatment or punishment.
- Please provide information as to how Australia’s law, policy and practice on climate change promotes and protects human rights, including the right to life, particularly with respect to climate affected refugees.
- Please provide information as to how Australia’s law, policy and practice in response to homelessness ensures full realisation of the right to life, including the right to live with dignity.

**Articles 7 and 10 — Freedom from Torture and Other Cruel Treatment**

- Please advise as to the steps and measures taken to implement the recent recommendations of the Committee against Torture.
- Please detail the steps being taken to ensure that all counter-terrorism laws and practices are compatible with human rights, including particularly the absolute prohibition against torture and other forms of cruel treatment.
- Please provide information regarding the investigation of serious allegations as to the torture and rendition of Australian citizens, including Mamdouh Habib and David Hicks.
- Please provide details as to the legislative amendments proposed to end the policy of mandatory immigration detention.
- Please provide information as to whether and how asylum seekers who have been detained are provided with adequate physical and mental health care, including routine assessments.
- Please provide information regarding drug harm prevention and minimisation programs in prisons, including condom and needle and syringe exchange programs.

- Please update the Human Rights Committee as to the steps and measures, including legislative, budgetary and programmatic measures, that Australia is taking to review and implement the recommendations of the Senate Select Committee on Mental Health in *A National Approach to Mental Health – from Crisis to Community*.
- Please provide details as to the use of ‘Tasers’, and other weapons that cause severe pain, by police and correctional authorities.

**Article 8 — Freedom from Slavery, Servitude and Forced Labour**

- Please update the Human Rights Committee as to implementation of the 2006 recommendation of the Committee on the Elimination of Discrimination against Women that Australia formulate a comprehensive strategy to combat the trafficking of women and exploitation resulting from prostitution.
- What steps is Australia taking to ensure that adequate compensation is paid to Indigenous Australians for ‘Stolen Wages’?

**Article 9 — Freedom from Arbitrary Detention**

- Please provide information as to the legislative steps being taken to abolish mandatory immigration detention and to enable substantive judicial review of the lawfulness of detention.
- Please advise the Human Rights Committee as to the steps, including legislative steps, being taken by Australia to address the decision of the High Court in *Al-Kateb v Godwin* which permits the indefinite detention of a stateless person, potentially for life.
- Please update the Human Rights Committee as to the steps and measures, including legislative steps, that Australia is taking to review and implement the recommendations of the Senate Select Committee on Mental Health in *A National Approach to Mental Health – from Crisis to Community* with respect to Advance Directives.
- Please explain whether and how Australia considers that the processes and legislative timelines for external review of involuntary mental health treatment are consistent with the requirements of the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* which provide that initial involuntary admission shall be for a ‘short period’ pending external review and that the review shall take place ‘as soon as possible’.

**Article 12 — Freedom of Movement**

- Please provide information as to what steps are being taken to adopt and strengthen standards, including legislative standards, pertaining to access to premises and to transportation for people with disability.

**Article 13 — Procedural Rights against Expulsion**

- Please explain how the current interpretation and application of section 501 of the *Migration Act 1958* (Cth) is consistent with the ICCPR, including particularly Articles 12, 13, 14, 17, 23 and 24.

**Article 14 — Right to a Fair Trial**

- Please provide information as to measures, including budgetary measures, to increase and enhance access to legal advice and representation for marginalised and disadvantaged groups, including by legal aid commissions and community legal centres.
- Please advise of any proposals to either tighten or expand legal aid funding arrangements and eligibility criteria.
- Please inform the Human Rights Committee as to steps, including legislative amendments, being taken or proposed to ensure that all aspects of Australia's counter-terrorism measures are compatible with the right to a fair hearing.
- Please advise as to what steps, if any, the Australian Government is taking to establish an independent body to investigate, correct and compensate wrongful arrest, conviction and detention.
- Please provide information as to the legal advice, representation and resources available to prisoners and in relation to the availability of judicial review for conditions of detention.
- Please provide information as to the resources available to self-represented litigants to assist them to conform to court procedures and details as to how court procedures are modified or sufficiently flexible to accommodate self-represented individuals requiring assistance.

**Article 15 — Prohibition of Retroactive Criminal Laws**

- Please explain how the following legislation is compatible with Article 15 of the *ICCPR*:
  - (a) legislation in a number of Australian jurisdictions which provides for the continued detention and supervision of certain prisoners beyond their sentence, including in circumstances where the legislation was not in force at the time of the conviction; and
  - (b) legislation in New South Wales which has resulted in the retrospective application of effective life sentence for certain offenders who were sentenced when they were juveniles.

**Article 17 — Right to Privacy**

- Please provide details of any proposal to introduce or adopt a national access (or 'identity') card system.
- Please provide information as to proposed national, state and territory reforms, if any, regarding CCTV and video surveillance in public places.
- Please advise the Human Rights Committee as to the Government's response, including legislative response, to the recent Australian Law Reform Commission report on privacy.
- Please explain how legislation, such as section 17 of the *Justice Legislation Amendment Act 2007* (Vic), which enables interception and censorship of prisoner correspondence, is consistent with the Human Rights Committee's jurisprudence that prisoner correspondence should be delivered to the addressee without interception and without otherwise being read.

**Article 18 — Freedom of Thought, Conscience and Religion**

- Please advise the Human Rights Committee as to the steps, including legislative steps, that the Australian Government is taking to implement the recommendations of HREOC's *Ismael — Listen* report, to address the issue of discrimination against and vilification of Arab and Muslim Australians.

**Articles 19 and 20 — Freedom of Expression**

- Please provide information as to the steps and measures, including legislative steps, that the Australian Government is taking to remove restrictions imposed by public funding arrangements and taxation laws with respect to NGOs engaging in lobbying and advocacy to promote human rights.
- Please explain whether and how the Australian Government considers the law relating to sedition to be proportionate and the minimal impairment necessary with human rights, particularly the right to freedom of expression.
- What steps, including legislative and budgetary steps, does the Australian Government propose to take to ensure that, consistently with Articles 19 and 20 of the *ICCPR* and Article 13 of the *Convention on the Rights on Persons with Disabilities*, people with disability in Australia enjoy the freedom to seek, receive and impart information and ideas on an equal basis with others?

**Articles 21 and 22 — Freedom of Assembly and Association**

- Please explain how the right to strike is protected by Australian law and how restrictions on the right under domestic law are compatible with the *ICCPR*.
- Please explain how legislation passed in association with a number of major events, such as the Asia-Pacific Economic Cooperation Economic Leaders meeting in Sydney in September 2007 and World Youth Day in Sydney in July 2008, is consistent with the right to freedom of peaceful assembly and association.

**Article 23 — Protection of the Family**

- Please provide details of the steps the Australian Government is taking to ensure children and their families are safe following relationship breakdown, particularly in light of the recent changes to family law.
- Please provide details of the outcomes of Productivity Commission inquiry into the establishment of a paid parental leave scheme.
- What steps is the Australian Government taking, together with state and territory governments, to develop a nationally consistent approach to relationship recognition, in particular one that includes both same-sex and mixed-sex couples on terms of equality?

**Article 24 — Protection of Children**

- Please provide information regarding the steps, if any, that the Australian Government is taking to review, update and implement the recommendations of the joint report by the

Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*.

- Please provide to the Human Rights Committee any further information on what plans the Australian Government has to develop an integrated early childhood education and care program across Australia.
- Please provide details of the share of public expenditure on primary education and secondary education (disaggregated according to public and private schools).
- Please provide information regarding the proportion of Indigenous children attending secondary education and details of the adequacy and effectiveness of supports for Indigenous children to participate fully in and complete secondary education.
- Please provide information regarding the proportion of children with disabilities attending secondary education and details of the adequacy and effectiveness of supports for children with disabilities to participate fully in and complete secondary education.
- Please provide further information on whether the Australian Government intends to proceed with the draft *Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006*.
- Please provide further details regarding the recent proposal to develop a national framework for the protection of Australia's children.

#### **Article 25 — Rights of Political Participation**

- Please provide information as to targeted programs or measures to ensure full and practical realisation of the right to vote for marginalised and vulnerable groups, including young people, homeless people, prisoners, people with disability and Indigenous Australians.
- Does the Australian Government consider the disenfranchisement of prisoners to be for a legitimate purpose or purposes and, if so, what are those purposes?
- Please provide information and evidence as to how the current disenfranchisement of prisoners is appropriate, adapted and proportionate.
- Please advise the Human Rights Committee as to how the current process of electoral reform will give full effect to Article 25 of the *ICCPR*.

#### **Article 27 — Minority Rights**

- Please provide further information as to the steps and measures being taken, or proposed, to protect and respect the rights of vulnerable minorities, including particularly Indigenous Australians, Arab and Muslim Australians, and African migrants.

#### **Article 50 – Federalism**

- Please advise the Human Rights Committee as to what measures, including legislative or constitutional measures, Australia is taking to ensure that the *ICCPR* is applied across all branches of government (legislative, executive and judicial) at federal and state and territory level.

- Please provide information as to the nature, timing, scope and parameters of the proposed national public consultation regarding the legal recognition and protection of human rights, including particularly the steps and measures that will be taken to ensure participation by marginalised and disadvantaged individuals and groups.
- What steps will the Australia Government take if its consultation process recommends introducing legislative protection for Covenant rights?
- What steps will the Australian Government take to ensure that all state and territory governments implement legislative protection of human rights?
- Please update the Human Rights Committee as to the status of the implementation of the recommendations of the Consultative Committees regarding the enactment of human rights legislation in Tasmania and Western Australia.

## **Appendix 2 — Proposed Recommendations for Concluding Observations**

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### **Article 1 — Right of Self-Determination**

THAT the recent formal apology to Indigenous Australians be congratulated.

THAT Australia continue its efforts in the process of reconciliation with Indigenous Australians and its efforts to improve their disadvantaged situation.

THAT the Australian Government provide resources for healing and counselling services for those affected by the Stolen Generations and for reparation options.

THAT all of the recommendations contained in the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report be implemented.

THAT, in light of the abolition of the Aboriginal and Torres Strait Islander Commission, the Australian Government establish an Indigenous body that consists of elected Indigenous representatives who can contribute to policy-making in domestic Indigenous affairs.

THAT the Australian Government repeal those aspects of the Northern Territory Intervention legislation that are incompatible with domestic and international human rights standards and fully reinstate the operation of the *Racial Discrimination Act 1975* (Cth).

THAT the Australian Government positively consider endorsing the Declaration on the Rights of Indigenous Peoples.

THAT the Australian Constitution be amended to enshrine the prohibition against racial discrimination and to provide that the 'Race Power' may only be used to the benefit, and not to the detriment, of persons of a particular race.

### **Articles 2 and 26 — Treaty Entrenchment and Non-Discrimination**

THAT Australia incorporate comprehensive legislative protection of the rights contained in the *ICCPR* and ensure that Covenant rights are applicable, enforceable and justiciable in domestic courts.

THAT the Australian Government establish effective domestic mechanisms to ensure and monitor implementation of and compliance with Views under the First Optional Protocol to the *ICCPR* and *Concluding Observations of the Human Rights Committee*.

THAT the Australian Government legislate to ensure that Australian corporations respect human rights, including in respect of their extraterritorial activities.

THAT all Australian jurisdictions enact legislation to prohibit vilification on the ground of disability or impairment.

THAT the Australian Government legislate to comprehensively prohibit discrimination on the grounds of sexual orientation and gender identity, and THAT Australia implement the recommendations of the Human Rights and Equal Opportunity Commission's *Same-Sex: Same Entitlements* report.

THAT the Australian Government legislate to provide for a legal right to equality, as required by Article 26 of the *ICCPR*.

THAT the Australian Government legislate to address issues of substantive inequality, direct discrimination and systemic discrimination against vulnerable communities and groups.

THAT the Australian Government legislate to ensure that any exemptions or exceptions permitted under domestic anti-discrimination law are compatible with the prohibition against discrimination under the *ICCPR*.

THAT Australia implement the recommendations of the Human Rights and Equal Opportunity Commission's *Ismaḡ — Listen* report, to address the issue of discrimination against and vilification of Arab and Muslim Australians.

THAT the Australian Government enact legislation to prohibit religious discrimination or vilification.

### **Article 3 — Equal Rights of Men and Women**

THAT Australia take concrete steps, including legislative, budgetary and administrative steps, to address the significant disadvantage of women compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation.

THAT, in addition to addressing the underlying causes of domestic violence, Australia increase funding to shelters and support services that are appropriate to women fleeing situations of domestic violence.

THAT Australia ensure that Indigenous women are properly consulted in relation to appropriate services and solutions to address violence in their communities.

THAT Australia take immediate steps to reduce the significant gender wage gap that exists in the Australian workforce.

### **Article 6 — Right to Life**

THAT Australia take immediate steps to ensure that Indigenous Australians have an equal opportunity to be as healthy as non-Indigenous Australians, including by ensuring that Indigenous Australians have equal access to primary health care and that the basic health needs of Indigenous communities are met through the provision of adequate housing, safe drinking water, electricity and effective sewerage systems.

THAT the Australian Government take immediate steps to review, update and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and substantially reduce the incidence of Indigenous deaths in prison.

THAT the Australian Government comprehensively legislate, at the national level, to prevent the introduction of the death penalty in any Australian state or territory, or for federal crimes.

THAT Australia desist from cooperating with or assisting with the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed or which may result in a person being subject to cruel, inhuman or degrading treatment or punishment.

THAT Australia's policy and practice in relation to climate change respond to the human rights issues and obligations associated with climate change, including particularly with respect to climate affected refugees.

THAT the Australian Government's policy and practice in response to homelessness ensure that people are able to live with dignity and realise all of their civil, political, economic, social and cultural rights.

**Articles 7 and 10 — Freedom from Torture and Other Cruel Treatment**

THAT Australia comprehensively review all counter-terrorism laws and practices and take all necessary steps and measures, including legislative measures, to ensure that such laws and practices are compatible with human rights, including particularly the absolute prohibition against torture and other forms of cruel treatment.

THAT Australia comprehensively legislate to absolutely prohibit the use of evidence that has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment other than for the purpose of establishing such treatment or punishment.

THAT Australia take all necessary steps and measures, including legislative measures, to ensure that allegations of torture and other forms of cruel, inhuman or degrading treatment or punishment, including by Australian agents abroad or in respect of Australian citizens abroad, be fully investigated and that appropriate reparations be made where such conduct is found to have occurred.

THAT Australia immediately repeal section 189 of the *Migration Act 1958* (Cth) and legislatively abolish its policy of mandatory immigration detention.

THAT, as a matter of priority, Australia ensure that all asylum-seekers who have been detained are provided with adequate physical and mental health care, including routine assessments.

THAT Australia amend both the *Migration Act 1958* (Cth) and the *Extradition Act 1988* (Cth) to comprehensively prohibit the refoulement, extradition or expulsion of a person from Australia in circumstances where they may be exposed to a risk of torture or other cruel, inhuman or degrading treatment or punishment.

THAT Australian law be amended to provide that, under no circumstances, will the Australian Government resort to diplomatic assurances as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.

THAT all persons involved in the management and administration of the immigration system receive human rights training and that all immigration laws, policies and practices be comprehensively reviewed to ensure that they are compatible with human rights.

THAT Australia enshrine in legislation and practice the principle that prisoners are not to be subject to any deprivations of rights or freedoms that are not a necessary consequence of the deprivation of liberty itself.

THAT Australia take further steps and measures to address overcrowding in prisons.

THAT Australia ensure that all prisoners have adequate access to health care, including mental health care, consistent with the human right to the highest attainable standard of physical and mental health.

THAT Australia develop and implement drug harm prevention and minimization programs in prison, including condom and needle and syringe exchange programs.

THAT Australia ensure that persons with mental illness are not subject to solitary confinement and are provided with access to appropriate treatment in a therapeutic environment.

THAT Australia take immediate steps to ensure that women in prison are not subject to any direct or systemic discrimination, or substantive inequality relative to male prisoners.

THAT all Australian jurisdictions establish independent, effective, publicly accountable and adequately resourced prison inspectorates.

THAT Australia continue its efforts to address the socio-economic disadvantage that, inter alia, leads to a disproportionate number of Indigenous Australians coming into contact with the criminal justice system.

THAT Australia review all mandatory sentencing legislation and take all necessary steps and measures to ensure that such legislation does not adversely impact on disadvantaged groups, particularly Indigenous people, in a manner that is disproportionate or discriminatory.

THAT Australia takes steps, including legislative, budgetary and programmatic measures, to review and implement the recommendations of the Senate Select Committee on Mental Health in *A National Approach to Mental Health – from Crisis to Community*.

THAT Australia relinquish the use of ‘Tasers’ and other weapons that cause severe pain, sometimes constituting a form of torture, and in some cases even death.

#### **Article 8 — Freedom from Slavery, Servitude and Forced Labour**

THAT Australia formulate a comprehensive strategy to combat the trafficking of women and exploitation resulting from prostitution.

THAT Australia implement the recommendations contained in the *Unfinished Business: Indigenous Stolen Wages* report, including the establishment of a national compensation plan.

THAT Australia implement laws to ensure that prisoners are:

- (a) fairly remunerated for their work;
- (b) not penalised through loss of other opportunities or privileges for refusing to undertake paid work;
- (c) provided with opportunities to acquire vocational skills to assist them to find post-release employment; and
- (d) equally protected in relation to workplace injury as other workers.

#### **Article 9 — Freedom from Arbitrary Detention**

THAT Australia immediately repeal section 189 of the *Migration Act 1958* (Cth) and legislatively abolish its policy of mandatory immigration detention.

THAT Australia legislate to require that every decision to keep a person in detention be periodically reviewed so that the grounds justifying the detention can be assessed and THAT full rights of judicial review be reinstated in the migration jurisdiction.

THAT Australia legislate to address the decision of the High Court in *Al-Kateb v Godwin*, which permits the indefinite detention of a stateless person, potentially for life.

THAT Australia comprehensively review all counter-terrorism laws and practices and take all necessary steps and measures, including legislative measures, to ensure that such laws and practices are compatible with human rights, including particularly the right to freedom from arbitrary detention.

THAT Australia review all mandatory sentencing legislation and take all necessary steps and measures to ensure that such legislation does not adversely impact on disadvantaged groups, particularly Indigenous people, in a manner that is disproportionate or discriminatory.

THAT Australia takes steps, including legislative measures, to review and implement the recommendations of the Senate Select Committee on Mental Health in *A National Approach to Mental Health – from Crisis to Community* with respect to Advance Directives.

THAT all Australian jurisdictions ensure that, consistently with the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, initial involuntary admission shall be for a 'short period' pending external review and that the review shall take place 'as soon as possible' and certainly within six weeks.

THAT all Australian jurisdictions review the current police complaints mechanisms to ensure that:

- (a) there are robust complaints mechanisms that require an independent body to properly investigate complaints involving police brutality and criminality; and
- (b) there is effective disciplining of police and enforcement of the findings of the independent bodies.

#### **Article 12 — Freedom of Movement**

THAT Australia legislate to provide that control orders and preventative detention orders may only be made by a court and must be subject to frequent and periodic substantive judicial review.

THAT the Australian Government adopt and strengthen standards pertaining to access to premises and to transportation for people with disability.

#### **Article 13 — Procedural Rights against Expulsion**

THAT section 501 of the *Migration Act* be amended and applied in a manner consistent with the *ICCPR*, including particularly Articles 12, 13, 14, 17, 23 and 24.

THAT Australia amend the *Migration Act 1958* (Cth) to provide that reasons for an adverse security assessment and visa cancellation under section 16 should be disclosed to the person the subject of the assessment, or his or her legal representative and THAT an independent merits review of adverse security assessments by ASIO be available to visa holders.

#### **Article 14 — Right to a Fair Trial**

THAT Australia take steps to ensure greater fairness and equality in access to justice, including by:

- (a) increasing funding to legal aid, community legal centres and impecunious and disadvantaged litigants, particularly for pre-litigation advice to prospective litigants;
- (b) increasing accessibility to courts by simplifying rules of procedure and reducing barriers such as costs and fees;

- (c) providing adequate services to assist individuals in accessing the justice system, including legal aid and free interpreters;
- (d) establishing a disbursements fund to aid pro bono, human rights and public interest matters; and
- (e) establishing model guidelines for government regarding costs in pro bono, human rights and public interest proceedings.

THAT Australia's counter-terrorism law, policy and practice, particularly with respect to control orders, preventative detention orders and questioning by ASIO, be reviewed and reformed to ensure compliance with the right to a fair hearing.

THAT all Australian jurisdictions reinstate the rule against double jeopardy.

THAT Australian law be amended to provide for a right to compensation for unlawful arrest, conviction or detention and THAT Australia establish an independent body to investigate, correct and compensate wrongful arrest, conviction and detention.

THAT Australia ensure that, consistent with the right to a fair hearing and equality before the law, prisoners have adequate access to legal advice and representation, legal resources, and judicial review of conditions of detention.

THAT Australia ensure that the free assistance of interpreters, including particularly Indigenous interpreters, is guaranteed in criminal proceedings and, where necessary for a fair hearing, in civil matters.

#### **Article 15 — Prohibition of Retroactive Criminal Laws**

THAT the *Sentencing Act* be amended to ensure that no person shall be subject to a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

#### **Article 17 — Right to Privacy**

THAT Australia develop legislation to ensure that the conduct and use of video and mass surveillance in public places is consistent with the right to privacy.

THAT Australia enact legislation requiring that police powers to stop and search persons are exercised consistently with human rights, including particularly the right to privacy.

THAT Australia enshrine in legislation and practice the principle that prisoners are not to be subject to any deprivations of rights or freedoms that are not a necessary consequence of the deprivation of liberty itself, including particularly with respect to the right to privacy.

THAT all Australian jurisdictions amend residential tenancy legislation to require that reasons be provided to a tenant for any proposed eviction.

THAT relevant public tenancy laws, policies and practices be amended to require that public authorities assist public tenants to find alternative suitable accommodation prior to any eviction from public housing AND that any such eviction be reasonable, necessary and proportionate.

**Article 18 — Freedom of Thought, Conscience and Religion**

THAT Australia implement the recommendations of HREOC's *Ismael — Listen* report, to address the issue of discrimination against and vilification of Arab and Muslim Australians.

THAT the Australian Government enact legislation to prohibit religious discrimination and vilification.

**Articles 19 and 20 — Freedom of Expression**

THAT Australia enact comprehensive constitutional or legislative protection of the right to freedom of expression.

THAT the Australian Government remove any restrictions on public funding to NGOs which may fetter freedom of expression, particularly with respect to the promotion and protection of human rights.

THAT the Australian Government amend the *Income Tax Assessment Act*, and other legislation as appropriate, to recognise 'the advancement of human rights' as a charitable purpose and to increase the ability of NGOs to engage in lobbying and advocacy to promote human rights.

THAT the Australian Government enact legislation to prohibit religious vilification.

THAT Australia undertake a comprehensive review and reform of counter-terrorism laws, including the law of sedition, to ensure that such laws are compatible with the right to freedom of expression.

THAT Australia take steps, including legislative and budgetary steps, to ensure that people with disability in Australia, including deaf and blind people and those with a vision or hearing impairment, enjoy the freedom to seek, receive and impart information and ideas on an equal basis with others.

THAT Australia review and implement the recommendations of the Australian Law Reform Commission report, *Fighting Words: A Review of Seditious Laws in Australia*.

**Articles 21 and 22 — Freedom of Assembly and Association**

THAT Australia undertake a comprehensive review and reform of counter-terrorism laws, including particularly the *Criminal Code*, to ensure that such laws are compatible with the right to freedom of assembly and association.

THAT Australia ensure that industrial relations laws and practices adequately reflect the principle of freedom of association embodied in Article 22.

THAT all Australian jurisdictions undertake a comprehensive review and reform of public space and assembly laws to ensure that such laws are compatible with the right to freedom of assembly and association.

**Article 23 — Protection of the Family**

THAT Australia ensure children and their families are safe following separation and throughout the family law process by reviewing the effect of family law on their safety, and by committing to implement and resource necessary changes to legislation and policy.

THAT Australia implement a comprehensive national paid parental leave scheme, including compulsory paid maternity leave, consistent with the internationally-recognised standard of 14 weeks.

THAT Australia make it a priority to resettle family members of individual refugee and humanitarian permanent residents.

THAT Australia commit to working with state and territory governments towards a nationally consistent approach to relationship recognition, in particular one that includes same-sex and mixed-sex couples, on terms of equality.

THAT Australia legislate to remove discrimination against same-sex couples and their families, including by implementing the recommendations contained in the Human Rights and Equal Opportunity Commission's report on *Same-Sex: Same Entitlements*.

THAT Australia take immediate steps to ensure minimum entitlements such as personal/carer's leave, compassionate leave and parental leave are afforded to all employees regardless of sexual orientation.

THAT Australia take steps to ensure that families can access housing, health and employment services following the release of a parent from prison.

THAT Australia ensure that all states and territories implement consistent policies addressing the needs of dependent children during the arrest and incarceration of their primary carer, in particular by considering alternative sentencing options such as the suitability of home detention, periodic detention or community-based orders.

#### **Article 24 — Protection of Children**

THAT the Australian Government take immediate steps to review, update and implement the recommendations of the joint report by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*.

THAT Australia review all mandatory sentencing legislation and take all necessary steps and measures to ensure that such legislation does not adversely impact on disadvantaged groups, particularly young people and Indigenous people, in a manner that is disproportionate or discriminatory.

THAT Australia undertake a comprehensive review and reform of counter-terrorism laws, including to ensure that such laws are compatible with the rights of children.

THAT Australia legislate comprehensively to ensure that no child may be held in an immigration detention centre.

THAT Australia commit to a specific timeframe for all Australian state and territory governments to provide a minimum age for paid employment and/or a maximum number of allowable work hours for children subject to compulsory schooling.

THAT Australia ensure all states and territories abolish junior or youth rates of pay replacing them with equal rates of pay for equal work, with payments based on responsibilities and skills required in the job, not age.

THAT Australia ratify *ILO Convention 138 Concerning the Minimum Age for Admission to Employment* and *ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.

THAT Australia invest progressively using the maximum available resources in public education and reduce the funding inequity between public government schools and private schools.

THAT Australia implement and adequately resource programs to address the issues of bullying, truancy and exclusion from schools, particularly in respect of Indigenous children.

THAT Australia take appropriate steps and measures, including budgetary measures, to ensure that tertiary education is equally available to all persons on the basis of merit and capacity and that special measures be implemented to ensure equality of opportunity and access for students with disability, Indigenous students, low income students, and students from rural and remote areas.

THAT, as a matter of urgency, Australia take immediate steps to address the serious disadvantage in accessing all levels of education experienced by Indigenous Australians.

THAT Australia implement and adequately resource programs to enable children with disabilities to participate fully in and complete secondary education.

THAT Australia adopt legislation to prohibit the sterilisation of children, including children with disability.

#### ***Article 25 — Rights of Political Participation***

THAT Australia take immediate and targeted steps, including legislative, administrative and budgetary steps, to ensure practical realisation of the right to vote for all Australians, including particularly young people, homeless people, people with disability and prisoners.

THAT the Australian Government ensure that the current process of electoral reform be directed, inter alia, toward the full realisation of Article 25 of the *ICCPR*.

#### ***Article 27 — Minority Rights***

THAT Australia take all necessary steps, including legislative, administrative and budgetary steps, to enable and maintain Indigenous culture, language and customs.

THAT the Australian Government enact legislation to prohibit religious discrimination and vilification.

#### ***Article 50 – Federalism***

THAT Australia enact comprehensive legislative protection of the rights contained in the *ICCPR* and ensure that the rights are applied across all levels and arms of government.

THAT Australia take steps to ensure that all state and territory governments enact legislation to comprehensively recognise and protect human rights.

THAT Australia develop ongoing dialogue at a federal and state level to ensure that lessons learnt in relation to the methods of legislative protection of human rights are shared between both levels of government.

## Appendix 3 — Recommendations of Treaty Bodies and Special Procedures

The following table addresses the extent to which the Common Core Document deals sufficiently with previous Concluding Observations of the Human Rights Committee.

An assessment has been made as to whether each recommendation is:

- not addressed at all;
- inadequately addressed; or
- adequately addressed.

Concluding observation	Common Core Document Reference	Assessment
<p>With respect to Article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term "self-determination", the Government of the State party prefers terms such as "self-management" and "self-empowerment" to express domestically the principle of indigenous peoples' exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.</p>	<p>K. Right of self-determination Paragraphs [201]–[202]</p>	<p>Inadequately addressed. The report reinforces the State party's view that it will not support an interpretation of "self-determination" that "has the potential to undermine Australia's territorial integrity or political sovereignty".</p>
<p>The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources.</p>	<p>G. Non-discrimination and equality Paragraphs [120]–[141] J. Participation in public life Paragraphs [181]–[191]</p>	<p>Inadequately addressed. The report outlines a number of structures in place for ensuring consultation with indigenous communities in relation to traditional land ownership, preservation and use, and to a lesser extent natural resources. However, the extent of those measures are largely consultative and do not invest sufficient decision-making power with indigenous Australians.</p>

Concluding observation	Common Core Document Reference	Assessment
<p>The Committee is concerned, despite positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (<u>Mabo</u>, 1992; <u>Wik</u>, 1996) and enactment of the <i>Native Title Act 1993</i> (Cth), as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.</p>	<p>G. Non-discrimination and equality Paragraphs [127]–[141]</p>	<p>Inadequately addressed. The report does not address ways in which amendments could be considered to limit the rights of some indigenous communities.</p>
<p>The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under Article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the <i>Native Title Act 1993</i> (Cth), taking into account these concerns.</p>	<p>G. Non-discrimination and equality</p>	<p>Inadequately addressed. While the report discusses, in general terms, some of the initiatives that governments have taken, it does not adequately address the specific remedies required to address the Committee's concerns.</p>

<b>Concluding observation</b>	<b>Common Core Document Reference</b>	<b>Assessment</b>
<p>The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under Article 27, are not always a major factor in determining land use.</p>	<p>G. Non-discrimination and equality Paragraphs [142]–[146]</p>	<p>Inadequately addressed. The report outlines various pieces of legislation that protect culturally or archaeologically significant sites but does not deal with the sustainability of traditional forms of economy.</p>
<p>The Committee recommends that in the finalization of the pending bill intended to replace the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), the State party should give sufficient weight to the values described above.</p>	<p>G. Non-discrimination and equality Paragraph [145]</p>	<p>Inadequately addressed. The report states that when reform of the Aboriginal and Torres Strait Islander Heritage Protection Act occurs it will consult with Indigenous groups. It does not make references to values described in the Committee's observations.</p>
<p>While noting the efforts by the State party to address the tragedies resulting from the previous policy of removing indigenous children from their families, the Committee remains concerned about the continuing effects of this policy.</p> <p>The Committee recommends that the State party intensify these efforts so that the victims themselves and their families will consider that they have been afforded a proper remedy.</p>	<p>R. Right to marry and found a family, protection of the family, mother and children Paragraphs [369]–[376]</p>	<p>Inadequately addressed. The report outlines a range indirect financial and institutional commitments made to those subject to the policy of removing indigenous children from their families. Significantly, the report fails to contemplate the establishment of any sort of direct compensation mechanism.</p>

<b>Concluding observation</b>	<b>Common Core Document Reference</b>	<b>Assessment</b>
<p>The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.</p>	<p>D. General legal framework within which human rights are protected at the national level Paragraphs [69]–[84]</p>	<p>Inadequately addressed.</p> <p>The report refers to the Human Rights and Equal Opportunity Commission and various pieces of legislation under which an individual may seek redress for the infringement of some rights, but does not deal specifically with the enforcement of Covenant rights.</p> <p>The report advocates the State party's position against introducing a national Bill of Rights.</p>
<p>The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy.</p>	<p>D. General legal framework within which human rights are protected at the national level Paragraph [64]</p>	<p>Not addressed at all.</p> <p>The report is silent on the issue of granting remedies to all persons whose Covenant rights and freedoms have been violated.</p> <p>Whilst the report acknowledges that a Royal Commission can inquire into human rights violations, this inadequately deals with this observation's concern as Royal Commissions are unable to grant remedies.</p>
<p>While noting the explanation by the delegation that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights, the Committee stresses that such negotiations cannot relieve the State party of its obligation to respect and ensure Covenant rights in all parts of its territory without any limitations or exceptions.</p>	<p>D. General legal framework within which human rights are protected at the national level Paragraphs [77]–[80]</p>	<p>Not addressed at all.</p> <p>The report does not assess whether the Commonwealth government can interfere with the state and territories human rights policy choices.</p> <p>Though the report acknowledges that the state and territory governments have their own human rights charters and own health and education initiatives, the report is silent on whether the Commonwealth can impose exceptions or limitations on these policies.</p>

<b>Concluding observation</b>	<b>Common Core Document Reference</b>	<b>Assessment</b>
<p>The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.</p>	<p>D. General legal framework within which human rights are protected at the national level Paragraphs [48]–[84]</p>	<p>Not addressed at all.</p> <p>The report describes various federal and state-based schemes that operate to protect certain rights however it fails to address how the federal and state schemes operate together. The report does not address the extent to which the Commonwealth Government can ensure that states and territories are not placing improper restrictions on Covenant rights.</p>
<p>The Committee is concerned by the government bill in which it would be stated, contrary to a judicial decision, that ratification of human rights treaties does not create legitimate expectations that government officials will use their discretion in a manner that is consistent with those treaties.</p> <p>The Committee considers that enactment of such a bill would be incompatible with the State party's obligations under Article 2 of the Covenant and it urges the Government to withdraw the bill.</p>	<p>D. General legal framework within which human rights are protected at the national level Paragraphs [65]–[66]</p>	<p>Inadequately addressed.</p> <p>The report deliberately refrains from making changes to the treaty ratification process.</p> <p>In fact, the report openly acknowledges that the executive act of entering into treaties does not itself give rise to legitimate expectations in administrative law. Rather than changing this policy, the report actually advocates this position explaining that this is a significant part of the Australian parliamentary process.</p>

<b>Concluding observation</b>	<b>Common Core Document Reference</b>	<b>Assessment</b>
<p>The Committee is concerned with the approach taken by the State party in relation to the Committee's Views in Communication No. 560/1993 (<u><a href="#">A. v. Australia</a></u>). Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.</p> <p>The Committee recommends that the State party reconsider its interpretation with a view to achieving full implementation of the Committee's Views.</p>	<p>Annex 2: Australia's Fifth Periodic Report under the Covenant Report on Communications arising under the Optional Protocol. Paragraphs [9]–[15]</p>	<p>Adequately addressed.</p> <p>The report states that while the Australian Government may disagree with the Committee, that does not in turn undermine their recognition or acceptance of the communications mechanism under the Optional Protocol.</p> <p>The report also indicated that careful consideration was given to the Committee's views in A v Australia. The State party was firmly of the view that they had the correct interpretation, and that their views were justified by compelling reasons of domestic policy.</p>
<p>The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.</p>	<p>I. Procedural guarantees Paragraphs [163]–[165]</p>	<p>Inadequately addressed.</p> <p>The report merely outlines the current operation of mandatory imprisonment legislation in Australia. The extent to which the relevant legislation has been either repealed or reviewed is limited.</p>

<b>Concluding observation</b>	<b>Common Core Document Reference</b>	<b>Assessment</b>
<p>The Committee notes the recent review within Parliament of the State party's refugee and humanitarian immigration policies and that the Minister for Immigration and Multicultural Affairs has issued guidelines for referral to him of cases in which questions regarding the State party's compliance with the Covenant may arise.</p> <p>The Committee is of the opinion that the duty to comply with covenant obligations should be secured in domestic law. It recommends that persons who claim that their rights have been violated should have an effective remedy under that law.</p>		<p>Not addressed at all.</p> <p>The report is silent on domestic causes of action available to persons who claim their rights under the Covenant have been violated.</p>

Concluding observation	Common Core Document Reference	Assessment
<p>The Committee considers that the mandatory detention under the <i>Migration Act 1958</i> (Cth) of "unlawful non-citizens", including asylum-seekers, raises questions of compliance with Article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right.</p> <p>The Committee urges the State party to reconsider its policy of mandatory detention of "unlawful non-citizens" with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel.</p>	<p>M. Right to liberty and security of the person</p> <p>Paragraphs [262]–[268]</p>	<p>Inadequately addressed.</p> <p>The report states that the policy of mandatory detention of "unlawful non-citizens" is necessary and lawful, however at no stage does the report address the possibility of reconsidering mandatory detention.</p> <p>The report outlines procedures in which detainees are informed that they are permitted to contact their legal representatives. It does not, however, address procedures where the State party informs detainees of their legal rights.</p>

# Freedom Respect Equality Dignity: Action

## NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights

Australia is not meeting its obligations under the International Covenant on Civil and Political Rights, a treaty that Australia ratified in 1980.

Fundamental human rights issues have been at the core of national political and social debate in Australia in the last decade. This report documents areas in which Australia is falling short of its obligations under the International Covenant on Civil and Political Rights. It focuses on areas that have been the subject of extensive NGO activity and research in Australia.

Subjects detailed in the report include:

- (a) the lack of constitutional or legislative recognition and protection of civil and political rights;
- (b) groups within society that remain vulnerable to discrimination, such as Indigenous peoples, women and children, people with disability, asylum seekers and gay and lesbian couples;
- (c) Australia's counter terrorism laws and measures;
- (d) Australia's immigration law, policy and practice; and
- (e) the treatment of people in detention, including prisoners and people in involuntary psychiatric detention.

The report includes specific recommendations of concrete steps that Australian authorities should take to bring Australia more fully into compliance with its obligations under the International Covenant on Civil and Political Rights; an Australia in which all persons can live with freedom, respect, equality and dignity.