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# **Making Rights Real: A National Human Rights Action Plan for Australia**

**Submission to the  
Attorney-General's Department on the development of a National  
Human Rights Action Plan**

**February 2011**

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**About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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## Part I: Introduction and Executive Summary

### 1. Introduction

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1. On 21 April 2010, the Federal Government launched 'Australia's Human Rights Framework' (the '**Framework**') setting out a number of measures the Government intends to take to protect and promote human rights in Australia. Included in the Framework is the commitment to develop a new National Human Rights Action Plan (the '**National Action Plan**') which is intended to "outline future action for the promotion and protection of human rights".<sup>1</sup>
2. On 16 December 2010, the Attorney-General released a Background Paper, *A new National Human Rights Action Plan for Australia*, ('**Background Paper**') which sets out the Government's proposed approach to developing the National Action Plan as well as a Baseline Study (a study to set out the status of human rights in Australia today).
3. The Human Rights Law Resource Centre ('**HRLRC**') welcomes the opportunity to contribute to the development of the National Action Plan and Baseline Study.
4. This submission sets out:
  - (a) a background to National Action Plans, drawing out the necessary aims and purposes;
  - (b) improvements that can be made to the process for developing the National Action Plan and Baseline Study; and
  - (c) a consideration of some of the substantive areas for inclusion in the National Action Plan and the steps to be taken towards better human rights protection in those areas.

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<sup>1</sup> See Commonwealth Government, Attorney-General's Department, *Australia's Human Rights Framework*, available at <http://www.ag.gov.au/humanrightsframework>.

## 2. Executive Summary

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5. Australia has played a leading role in the development of human rights action plans at an international level and was the first ever nation to develop a National Action Plan. While we should be proud of this legacy, the current proposed National Action Plan must improve on previous plans. Further, given that the National Action Plan is being proposed following a decision *not* to implement legal and enforceable human rights in a Human Rights Act, the plan must be particularly robust.
6. The Framework is the Federal Government's formal response to the recommendations of the National Human Rights Consultation Report, which itself was the culmination of the biggest public consultation in Australia's political history.<sup>2</sup> Its key recommendation was that Australia enact a federal Human Rights Act (indeed, of its 31 recommendations around half centred around a federal Human Rights Act). However, despite these recommendations (and the support of over 87% of respondents), the Federal Government has so far ruled out introducing any comprehensive legislative protection of fundamental rights.
7. Nonetheless, the National Action Plan provides the Government with an important opportunity to demonstrate its commitment to realising human rights in Australia.
8. The proposed National Action Plan and Baseline Study should, in accordance with the guidance set out in the *Handbook on National Human Rights Plans of Action* (the '**UN Handbook**')<sup>3</sup> and the Background Paper:
  - 'demonstrate Australia's on-going commitment to our international human rights obligations';<sup>4</sup>
  - seek to implement Australia's international human rights obligations, by reviewing commitments and proposing steps to ensure that they are effectively observed;<sup>5</sup>

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<sup>2</sup> In December 2008 the National Human Rights Consultation Committee was formed by the Federal Government to investigate the need for better human rights protection in Australia. Following the biggest public consultation in Australia's history (with over 35,000 written submissions received and 66 community roundtables held involving over 6000 members of the public), the Committee presented its findings to Government in late 2009.

<sup>3</sup> Office of the High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action*, UN Doc. HR/P/PT/10, 29 August 2002 ('**UN Handbook**').

<sup>4</sup> See Commonwealth Government, Attorney-General's Department, *A New National Human Rights Plan for Australia Background Paper* ('**Background Paper**'), p 2 available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~HRB+-+NHRAP+-+Background+Paper+-+Version+5.0+and+Final+-+December+2010.pdf/\\$file/HRB+-+NHRAP+-+Background+Paper+-+Version+5.0+and+Final+-+December+2010.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~HRB+-+NHRAP+-+Background+Paper+-+Version+5.0+and+Final+-+December+2010.pdf/$file/HRB+-+NHRAP+-+Background+Paper+-+Version+5.0+and+Final+-+December+2010.pdf); UN Handbook, part 3.2 states that 'A credible national action plan must be built on a commitment to universal human rights standards.'

<sup>5</sup> The UN Handbook, Part 3.3, states that national action plans should give practical effect to international obligations by reviewing commitments and proposing steps to ensure that they are effectively observed at the domestic level.

- aim to ‘improve the protection and promotion of human rights in Australia’;<sup>6</sup>
- give all human rights equal attention, with civil and political rights and economic, social and cultural rights being treated as interdependent and indivisible;<sup>7</sup>
- include, in the Baseline Study, a ‘comprehensive assessment of human rights needs in Australia which is then translated into specific goals and practical actions to ensure continued high level commitment to improving human rights across government’;<sup>8</sup>
- involve ‘a rigorous process of consultation and debate’ in developing the Action Plan, with meaningful and substantive participation from civil society;<sup>9</sup>
- be ‘action-oriented’ and not seek merely to justify existing policies. It should identify gaps in human rights protection, specify action to be taken and provide for effective monitoring and evaluation of progress;<sup>10</sup>
- build on, rather than duplicate, the work of the 2009 National Human Rights Consultation;<sup>11</sup>
- be a public document that is widely disseminated and easily attainable, with education about human rights and access (such as translations) provided where necessary.<sup>12</sup>
- be a truly national undertaking and involve all elements of society.<sup>13</sup> Governments will play a crucial role in the process, and so will other actors such as the Australian Human Rights Commission (‘AHRC’), NGOs and businesses. In Australia the involvement of government at all levels is also very important.

## 2.1 Procedural Improvements

9. The process for developing the National Action Plan and conducting the Baseline Study is controlled and staffed by Government with limited input from civil society, mainly in the form of comment and response during consultation. There must be more opportunities for participation across civil society and NGOs in the development of the National Action Plan and Baseline Study to ensure the Plan can create the necessary changes to better protect and promote human rights. The current process should be improved by:
  - (a) First, expanding the membership of the steering committee to include non-government representatives such as NGO peak bodies, other expert NGOs, representatives of vulnerable groups, trade unions, human rights educators and other community representatives;

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<sup>6</sup> Background Paper, above n 4, p 2.

<sup>7</sup> UN Handbook, above n 3, Part 3.4.

<sup>8</sup> Background Paper, above n 4, p 2.

<sup>9</sup> Background Paper, above n 4, p 3.

<sup>10</sup> UN Handbook, above n 3, Part 3.5.

<sup>11</sup> Background paper, above n 4, p 4.

<sup>12</sup> UN Handbook, above n 3, Part 3.6.

<sup>13</sup> UN Handbook, above n 3, Part 3.0.

- (b) Second, establishing other consultative and advisory mechanisms to ensure that the Government gains the benefit of broader involvement in developing particular areas of the Baseline Study and National Action Plan, for example the collection of data and monitoring of human rights (discussed in greater detail below at 4.3 and 4.4);
  - (c) Third, appointing the Attorney-General, who is currently overseeing the project, as chair of the steering committee, in order to give the high level commitment essential to the plan's success; and
  - (d) Fourth, ensuring public awareness of the National Action Plan process by the Attorney-General making strong public statements in support of the process and establishing an informative, interactive and easy to understand website.
10. A steering committee comprised of a broad range of actors and independent experts from across all relevant fields (as outlined above) and chaired by the Attorney-General should produce a comprehensive Baseline Study that examines the current status of human rights in Australia.
11. The Baseline Study should focus on human rights concerns that have been identified by the Human Rights Council in the recent Universal Periodic Review ('UPR') process and through the visits and reports of Special Procedures, UN treaty body reports on Australia and by relevant expert reports of the AHRC; parliamentary committees and civil society.
12. The National Action Plan and the Baseline Study should establish a system by which the enjoyment of human rights in Australia can be properly recorded and measured over time. The Baseline Study should include human rights indicators and provide for the collection of the necessary data to evaluate the human rights impact of current laws, policies and practices.

## **2.2 Substantive Matters**

13. It is imperative that the National Action Plan and the Baseline Study are comprehensive and address the most pressing issues affecting human rights in Australia. The National Action Plan must move Australia beyond the status quo and establish a framework that better protects human rights for everyone, in line with our international human rights obligations.
14. While we acknowledge that the National Action Plan must be politically viable and capable of being implemented by the executive, action taken pursuant to the plan must make real progress towards better enjoyment of human rights in Australia. The plan should not seek merely to justify the status quo.
15. At the very minimum, the National Action Plan should include concrete actions for improving human rights in the following areas:
- (a) constitutional and legislative framework for protecting human rights;
  - (b) immigration law, policy and practice;
  - (c) Aboriginal and Torres Strait Islander peoples:

- (d) torture and ill-treatment;
  - (e) counter-terrorism;
  - (f) mental health care;
  - (g) children's rights;
  - (h) housing and homelessness;
  - (i) police;
  - (j) equality and non-discrimination;
  - (k) women's rights;
  - (l) business and human rights;
  - (m) people with disabilities;
  - (n) sexual and gender identity;
  - (o) culturally and linguistically diverse communities;
  - (p) access to Justice;
  - (q) poverty;
  - (r) prisoners and prison conditions; and
  - (s) Australia's extra-territorial obligations.
16. The concrete steps to be taken in each of these areas should be guided by the recommendations in the UPR and those of relevant Special Procedures, United Nations treaty body reviews of Australia and the National Human Rights Consultation.
17. Where the Australian Government is committed to implementing these recommendations, the National Action Plan should clearly identify the persons and entities responsible for implementation and a timeframe and milestones for doing so.
18. Where the Australian Government is unwilling or unable to implement these recommendations in full the, consistent with principles of good governance, the Nation Action Plan should commit the Government to fully, transparently and accountably set out the reasons for their partial implementation or rejection.
19. For each of the broad areas in paragraph 15 above, this submission sets out:
- (a) the issue or problem;
  - (b) the recommendations of the UPR, treaty bodies and other relevant reviews; and
  - (c) priorities for action to be included in the National Action Plan.
- (Part III of this submission sets out the policy areas that the National Action Plan must cover and the human rights standards that the Plan should move towards in each of those areas.);

## Part II: Human Rights Action Plans and Best Practice

### 3. Background: Human Rights Action Plans

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#### 3.1 Australia's Leadership Role in National Action Plans

20. Australia can be justly proud of its involvement in the development of international thinking on national human rights action plans. It was Australia's proposal in 1993 at the Vienna World Conference on Human Rights that all nations be encouraged to pursue better human rights, which led to a recommendation that all countries consider drawing up national action plans. Australia was also the first country to develop a national human rights action plan in 1994 and today a number of other countries have now adopted their own action plans.

#### 3.2 The Limitations of Previous Action Plans – Need for 'Action'

21. There is a danger that action plans can end up being merely rhetoric about the importance of rights without any substantive commitment to human rights. To be effective, an action plan must set out specific targets and actions to implement, together with mechanisms for monitoring and review.
22. Australia's human rights action plan was last updated in 2004. While the 2004 action plan emphasised Australia's commitment to human rights and international law, and listed a number of issues in which human rights were engaged, it failed to include any active measures that would lead to a greater realisation of rights. Instead the 2004 action plan sought to justify many laws and policies that violated human rights, such as the indefinite detention of stateless persons, the denial of access to the Australian legal system for certain asylum seekers and the indefinite detention without charge of terrorist suspects.<sup>14</sup> At no point did the 2004 action plan set out any proposals for change. An action plan of this nature serves merely to serve as a cover for human rights failures and undermines the very purpose and aim of an action plan that is conceived and executed in good faith.
23. We therefore welcome the Government's announcement that it is prepared to reflect on the strengths and weaknesses of other action plans.<sup>15</sup> For the current proposed National Action Plan to be successful it must do more than vaguely reference issues of concern or justify problematic laws and policies. Instead, the National Action Plan must be based on independent studies on how human rights in Australia are currently protected, analyse what measures need to be taken to remedy or improve the situation and set out specific actions to

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<sup>14</sup> See Commonwealth Government, Attorney-General's Department, *Australia's National Framework for Human Rights – National Action Plan, 2005*, available at: [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~18+NAP+17+FEB.pdf/\\$file/18+NAP+17+FEB.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~18+NAP+17+FEB.pdf/$file/18+NAP+17+FEB.pdf).

be taken. In short, the National Action Plan must promote the active realisation of human rights.

### 3.3 The Aims and Purpose of National Action Plans

24. Generally, national action plans are focused on encouraging and mobilising change in government.<sup>16</sup> The HRLRC believes the National Action Plan and Baseline Study should, in accordance with the guidance set out in the UN Handbook and the Background Paper:

- ‘demonstrate Australia’s on-going commitment to our international human rights obligations’;<sup>17</sup>
- seek to implement Australia’s international human rights obligations, by reviewing commitments and proposing steps to ensure that they are effectively observed;<sup>18</sup>
- aim to ‘improve the protection and promotion of human rights in Australia’;<sup>19</sup>
- give all human rights equal attention, with civil and political rights and economic, social and cultural rights being treated as interdependent and indivisible;<sup>20</sup>
- include, in the Baseline Study, a ‘comprehensive assessment of human rights needs in Australia which is then translated into specific goals and practical actions to ensure continued high level commitment to improving human rights across government’;<sup>21</sup>
- involve ‘a rigorous process of consultation and debate’ in developing the National Action Plan, with meaningful participation from civil society;<sup>22</sup>
- be ‘action-oriented’ and not seek merely to justify existing policies. It should identify gaps in human rights protection, specify action to be taken and provide for effective monitoring and evaluation of progress;<sup>23</sup>
- build on, rather than duplicate, the work of the 2009 National Human Rights Consultation;<sup>24</sup>

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<sup>15</sup> Background Paper, above n 4, p 4.

<sup>16</sup> UN Handbook, above n 3, p 12.

<sup>17</sup> Background Paper, above n 2, p 2; UN Handbook, above n 3, Part 3.2 states that ‘A credible national action plan must be built on a commitment to universal human rights standards.’

<sup>18</sup> UN Handbook, above n 3, Part 3.3, states that national action plans should give practical effect to international obligations by reviewing commitments and proposing steps to ensure that they are effectively observed at the domestic level.

<sup>19</sup> Background Paper, above n 4, p 2.

<sup>20</sup> UN Handbook, above n 3, Part 3.4.

<sup>21</sup> Background Paper, above n 4, p 2.

<sup>22</sup> Background Paper, above n 4, p 3.

<sup>23</sup> UN Handbook, above n 4, Part 3.5.

<sup>24</sup> Background paper, above n 4, p 4.

- be a public document that is widely disseminated and easily attainable, with education about human rights and access (such as translations) provided where necessary;<sup>25</sup> and
  - be a truly national undertaking and involve all elements of society.<sup>26</sup> Governments will play a crucial role in the process, and so will other actors such as the AHRC, NGOs and business. In Australia the involvement of governments at all levels is also very important.
25. It is also important to acknowledge, as the Background Paper sets out, that the National Action Plan must be capable of being implemented by the Government, and therefore Australia's plan must set 'achievable targets and propose realistic activities' rather than making vague promises.<sup>27</sup>

#### **4. Procedural Issues**

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26. The Background Paper sets out a process for preparing the National Action Plan and the Baseline Study. The secretariat for the process will sit within the Commonwealth Attorney-General's Department and the steering committee for the process will consist of senior officials from across government departments.
27. There are a number of ways that the process could be improved, which in turn would better reflect the principles and processes set out in the UN Handbook. Whilst the UN Handbook does not provide a specific process that must be used, it provides useful guidance on these issues.

##### **4.1 Consultation and Meaningful Participation with Civil Society**

28. It is appropriate that Government play a central role in developing the National Action Plan. However, in order to adopt a truly national approach to the plan, the National Action Plan and Baseline Study should be prepared in consultation with civil society and other non-state actors. Currently, the process foreshadows consultation with NGOs and other groups by way of comments provided in response to the Background Paper, participation in an NGO Forum with the Attorney-General and Minister for Foreign Affairs and further comments on the draft National Action Plan and Baseline Study.<sup>28</sup>

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<sup>25</sup> UN Handbook, above n 3, Part 3.6.

<sup>26</sup> UN Handbook, above n 3, Part 3.0.

<sup>27</sup> Background Paper, above n 4, p 4.

<sup>28</sup> The Background Paper states that the National Action Plan is a feature of the 'engagement' principle of the Framework, and it will be developed in consultation with States and Territories and NGOs: Background Paper, above n 4, p 2.

29. The UN Handbook suggests that civil society actors such as peak NGOs, representatives of vulnerable groups, trade unions, human rights educators and other community representatives should be involved in a national coordinating committee that has, amongst other things, a role in conducting the Baseline Study, liaising with government and the community and developing the National Action Plan.<sup>29</sup> Currently, the role of NGOs in developing the National Action Plan is limited to providing comment and response to drafts, but comes nowhere near to the level of involvement suggested in the UN Handbook.
30. The HRLRC believes that in order for this to be a properly effective process the Government should:
- (a) expand the membership of the steering committee to include non-government representatives such as NGO peak bodies, NGOs with subject-matter expertise, academics, representatives of vulnerable groups, trade unions, human rights educators and other community representatives; and
  - (b) establish other consultative and advisory mechanisms to ensure that it gains the benefit of broader involvement in developing particular areas of the Baseline Study and National Action Plan, for example the collection of data and monitoring (discussed in greater detail below at 4.3 and 4.4).
31. This broad participation from across sectors will give the process greater credibility and will also allow for the provision of expertise and experience in relevant areas. It is important, for example, that human rights expertise and perspectives is part of the steering committee's process. The involvement of academics and civil society with expertise in indicators and monitoring is essential in developing a Baseline Study that is comprehensive and useful.
32. The Government should also encourage widespread participation in the National Action Plan process, by making public statements that support the process.

***Recommendation 1:***

The HRLRC recommends that the membership of the steering committee should be expanded to improve its expertise and credibility, and that the members represent some or all of the following groups:

- (a) the vulnerable groups identified in the National Human Rights Consultation report, namely Aboriginal and Torres Strait Islander peoples, homeless people, people with mental illness, people from rural and remote areas, the ageing, children, asylum seekers;
- (b) civil society including NGOs, trade unions and human rights educators;
- (c) academics and civil society experts in indicators and monitoring; and
- (d) other sectors of society as might be necessary or desirable.

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<sup>29</sup> UN Handbook, above n 3, Part 5.6.

**Recommendation 2:**

The Government should establish other consultative and advisory mechanisms to ensure that the process includes broader of civil society in developing particular areas of the Baseline Study and National Action Plan, for example the collection of data and monitoring. The Government should also encourage widespread participation in the National Action Plan process, by making public statements that support the process.

**4.2 Chair of the Steering Committee**

33. The steering committee is currently comprised of senior Government officials. The Background Paper states that the process will be geared to ensuring high-level commitment to improving human rights across Government.<sup>30</sup> This high level commitment is essential to the success of the National Action Plan. We support the recommendation made by Mr Bill Barker in his submission on the National Action Plan that the Attorney-General, who is currently charged with overseeing the project, also be the chairperson of the steering committee. As Mr Barker states, this would emphasise the seriousness of the project, provide political guidance and promote public and media interest.<sup>31</sup>

**Recommendation 3:**

The Steering Committee should be chaired by the Attorney-General.

**4.3 Baseline Study**

34. The HRLRC welcomes the announcement that a Baseline Study – a report on the status of human rights in Australia – will be developed alongside the National Action Plan. However, the HRLRC submits that the process for the Baseline Study can be improved in three ways:
35. First, the study should be developed and overseen by a diverse and representative steering committee with appropriate expertise as described above. This will mean that the steering committee will have the expertise needed to identify the major human rights issues in Australia. This broad-based approach will also ensure the Baseline Study is not overly influenced by political considerations and will ensure that the study provides a solid basis on which to measure human rights over time.

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<sup>30</sup> Background Paper, above n 4, p 2.

<sup>31</sup> Bill Barker, A new National Human Rights Action Plan for Australia: Comments on the Attorney-General's Department Background Paper, p 2.

36. Secondly, the Baseline Study must include, at a minimum, consideration of all the recent reports by international human rights bodies. Australia's commitment to, and observance of, rights set out in numerous international treaties are the subject of numerous United Nations mechanism reports and recommendations. Particular attention should be paid to recent recommendations of:
- the Human Rights Committee in respect of Australia's obligations under the International Covenant on Civil and Political Rights ('**ICCPR**');<sup>32</sup>
  - the Committee on Economic, Social and Cultural Rights in respect of Australia's obligations under the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**');<sup>33</sup>
  - the Committee Against Torture in respect of Australia's obligations under the United Nations Convention Against Torture ('**CAT**');<sup>34</sup>
  - the Committee on the Elimination of Racial Discrimination in respect of Australia's obligations under the Convention on Elimination of all forms of Racial Discrimination ('**CERD**');<sup>35</sup>
  - the Committee on the Elimination of Discrimination against Women in respect of Australia's obligations under the Convention on the Elimination of all forms of Discrimination against Women ('**CEDAW**');<sup>36</sup>
  - the recommendations coming out of the UPR of Australia by the United Nations Human Rights Council,<sup>37</sup> and
  - the recommendations made in respect of Australia by the Special Rapporteur on the Right to Health, the Independent Expert on Foreign Debt and Human Rights, the Special Rapporteur on the Rights of Indigenous Peoples, and the Special Rapporteur on the Right to Adequate Housing.

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<sup>32</sup> See *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Australia*, 95<sup>th</sup> session, 7 May 2009, CCPR/C/AUS/CO/5 ('**HRC**').

<sup>33</sup> See *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia*, 42<sup>nd</sup> session, 22 May 2009, E/C.12/AUS/CO/4 ('**CESCR**').

<sup>34</sup> See *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Concluding Observations of the Committee Against Torture, Australia*, 40<sup>th</sup> session, 15 May 2008, CAT/C/AUS/CO/1 ('**CAT Committee**'). See also *List of issues prior to the submission of the fifth periodic report of Australia*, Committee Against Torture, 45<sup>th</sup> session, 1-19 November 2010, CAT/C/AUS/4.

<sup>35</sup> See *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia*, 77<sup>th</sup> session, 27 August 2010, CERD/C/AUS/CO/15-17 ('**CERD Committee**').

<sup>36</sup> See *Concluding Observations of the Committee on the Elimination of Discrimination Against Women, Australia*, 46<sup>th</sup> session, 30 July 2010, CEDAW/C/AUS/CO/7 ('**CEDAW Committee**').

<sup>37</sup> Human Rights Council, Working group on the universal periodic review, Tenth session, *Draft report of the Working Group on the Universal Periodic Review, Australia*, A/HRC/WG.6/10/L.8, 31 January 2011, ('**UPR**'), available at <http://www.hrlrc.org.au/files/Draft-report-on-UPR-of-Australia.doc>.

37. In addition to reports by international bodies on Australia's human rights record, regard must also be had to expert subject-specific reports by the Australian Human Rights Commission, parliamentary committees and Senate inquiries, and of course, the National Human Rights Consultation Committee. In addition, regard should be had to recent relevant submissions on Australia's human rights record by civil society and academia.
38. Thirdly, in order to properly assess the status of the human rights in Australia and to measure the change in those rights over time, the Baseline Study should seek to develop a comprehensive list of indicators for each issue of concern. The indicators should set out:
- (a) the structures that are already in place, or should be put in place, to protect rights, such as laws and policies;
  - (b) process indicators, such as the extent to which people actually use laws or agreements already available to defend their human rights; and
  - (c) outcome indicators that show the impact of laws or gaps in laws, such as the numbers of people whose human rights are either being respected or denied.<sup>38</sup>
39. Once such a systematic and comprehensive review of the major human rights issues currently facing Australia has been completed, the National Action Plan should then be developed, setting out steps that will be taken to work towards better protecting and promoting human rights for all. Such a plan must also include a timeframe by which action points should be met or developed, including mechanisms for ongoing monitoring and review.

**Recommendation 4:**

A steering committee with broad-based membership should guide the progress of a comprehensive Baseline Study that examines the current status of human rights in Australia.

The Baseline Study should focus on human rights concerns that have been identified by the Human Rights Council and Special Procedures, United Nations treaty body reports on Australia and by relevant expert reports of the Australian Human Rights Commission; parliamentary committees and civil society. It should also include indicators that provide data as to current law and policies and the numbers of persons whose rights are affected.

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<sup>38</sup> See, for example, structural, process and outcome indicators as explored by the Office of the United Nations High Commissioner for Human Rights in its *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, 6 June 2008, HRI/MC/2008/3, available at: [http://www2.ohchr.org/english/issues/indicators/docs/HRI.MC.2008.3\\_en.pdf](http://www2.ohchr.org/english/issues/indicators/docs/HRI.MC.2008.3_en.pdf)

#### **4.4 Monitoring the Enjoyment of Human Rights**

40. As stated above, the Baseline Study should establish a set of indicators that maps out the extent to which human rights are being realised in Australia. This will also be a starting point from which to measure and monitor human rights over time. In relation to some indicators it is likely that there is currently insufficient data available, in which case the Baseline Study or the National Action Plan should include a mechanism to identify the gaps in relevant data and take steps to collect and publish the relevant missing data. Establishing these indicators and collecting such data will provide an important and necessary structure to properly review the Framework in 2014, which is a key commitment of the Framework itself.

***Recommendation 5:***

The Baseline Study should establish a set of human rights indicators, identify the gaps in data and establish a system for collecting the necessary data and monitoring human rights over time.

#### **4.5 Transparency and Accountability in the Implementation or Rejection of Human Rights Recommendations**

41. As discussed above, the National Action Plan should incorporate and reflect the recommendations made to Australia in the UPR and those of relevant Special Procedures, United Nations treaty body reviews, the Australian Human Rights Commission and the National Human Rights Consultation Committee.
42. Where the Australian Government is committed to implementing these recommendations, the National Action Plan should clearly identify the persons and entities responsible for implementation and a timeframe and milestones for doing so.
43. Where the Australian Government is unwilling or unable to implement these recommendations in full the, consistent with principles of good governance, the Nation Action Plan should commit the Government to fully, transparently and accountably set out the reasons for their partial implementation or rejection.

***Recommendation 6:***

In relation to recommendations from the UPR, Special Procedures, treaty bodies, the Australian Human Rights Commission and the National Human Rights Consultation Committee, the National Action Plan should explicitly identify those recommendations which the Government:

1. is committed to implementing and the persons and entities responsible for implementation and a timeframe and milestones for doing so; and
2. is unwilling or unable to implement in full and set out thorough and transparent reasons for their partial implementation or rejection.

## Part III: Substantive Matters: Priorities for Inclusion in Action Plan

### 5. Minimum Content of National Action Plan

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44. The final National Action Plan must comprehensively address the main and most pressing issues affecting the realisation of human rights in Australia with specific goals and practical steps to address these problems.<sup>39</sup> The National Action Plan should be heavily informed by recent recommendations made by international human rights bodies as well as recent domestic reviews, submissions and reports.
45. The areas set out below are those that have recently been raised by the Human Rights Council during the UPR, Special Procedures of the Council, United Nations treaty bodies and the HRLRC as areas in which human rights are not currently being fully protected or promoted in Australia. This submission also sets out the concrete steps recommended by those bodies for progress towards better human rights protection, which is intended to be a guide for priorities to be included in the National Action Plan. Whilst some of these recommendations will not accord with the current policy of the current government, they should be considerations and aspirations taken into account when developing a plan for making real human rights progress.
46. The following sections are not intended to be comprehensive of all areas that should be included in the National Action Plan. The National Action Plan must address, at a minimum, all of these broad areas and incorporate the recommended priorities for inclusion.

### 6. Constitutional and Legislative Framework

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#### 6.1 A National Human Rights Act

47. There is no overarching and comprehensive protection of human rights in Australian law. Australia does not have any federal law that comprehensively protects human rights; there is no overarching human rights legislation and limited protection of human rights in the Australian Constitution and the common law.
48. In 2009, a national consultation was held on the protection and promotion of human rights in Australia (the **National Human Rights Consultation**). The Consultation Committee received a record 35,000 submissions and ultimately recommended that Australia adopt a Human

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<sup>39</sup> Background Paper, above n 4, p 2.

- Rights Act; a key recommendation supported by over 87% of submissions that addressed the issue.<sup>40</sup>
49. The National Human Rights Consultation found that Australia's legal and institutional protection of human rights is inadequate, particularly for individuals and communities that are marginalised or disadvantaged.<sup>41</sup> Despite widespread public support for the introduction of a Human Rights Act,<sup>42</sup> the Australian Government has said it will not consider the issue of comprehensive legal rights protection until at least 2014.
50. While Australia's domestic law contains a number of pieces of legislation that protect certain human rights, particularly the right to non-discrimination, the protection they provide is patchy and limited. Most rights contained in the *ICCPR* and *ICESCR* are not justiciable or enforceable in Australian courts or tribunals. Where some protection exists, such as the *Racial Discrimination Act 1975 (Cth)* ('**RDA**') which partly implements *CERD*, the protections are merely Acts of Parliament and can be overridden by subsequent law. Indeed, the Australian Government can, and has, enacted laws which override or suspend aspects of existing rights protections, and which pose a significant challenge to its compliance with international human rights law.
51. Instead, in response to the National Human Rights Consultation, the Government announced a new framework for the protection of human rights in Australia, which contains some significant commitments regarding the promotion and protection of human rights in Australia, including:<sup>43</sup>
- (a) establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations;
  - (b) requiring that each new bill introduced into Federal Parliament be accompanied by a statement that explains the bill's compatibility with Australia's international human rights obligations, including *CERD*;
  - (c) reviewing legislation, policies and practice for compliance with the seven core international human rights treaties to which Australia is party;
  - (d) investing more than \$12 million over four years in various education initiatives to promote a greater understanding of human rights across the community;

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<sup>40</sup> See *Report of the National Human Rights Consultation* (2009), p 264 and Recommendation 18.

<sup>41</sup> A copy of the National Human Rights Consultation Committee's report on the protection and promotion of human rights in Australia is available at <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>.

<sup>42</sup> The national human rights consultation received over 28,000 public submissions in support of a Human Rights Act.

<sup>43</sup> See [Background Paper](#), above n 4.

- (e) developing a new National Action Plan on Human Rights to 'outline future action for the promotion and protection of human rights';
  - (f) consolidating and harmonising federal anti-discrimination laws into a single Act; and
  - (g) creating a 'Human Rights Forum' to enable whole-of-government engagement with NGOs on an annual basis.
52. Australia has repeatedly been criticised for the gaps in legal human rights protection and has been encouraged by a range of United Nations treaty bodies and most recently the Human Rights Council through the UPR.<sup>44</sup> Australia has been consistently asked and encouraged to strengthen its legislative framework for protection of human rights by adopting national human rights legislation.<sup>45</sup>

**Priorities for inclusion in the National Action Plan**

That the Australian Government work towards fully incorporating its international human rights obligations into domestic law by introducing a comprehensive, judicially enforceable Human Rights Act.

## **6.2 Australian Human Rights Commission**

53. Although Australia does have an independent national human rights institution in accord with the Paris Principles, the authority of the AHRC is limited to inquiry and complaints. The Commission cannot make enforceable determinations and there is no requirement that the Australian Government implement or even respond to its recommendations. There is also insufficient funding for the Commission to properly conduct its functions and activities.
54. Australia has been called upon by treaty bodies to amend the functions and powers of the AHRC. The CAT Committee has questioned Australia as to whether the AHRC should be given statutory powers to effectively monitor international treaty obligations.<sup>46</sup> The CESCR has called on the Australian Government to strengthen the mandate of the AHRC to cover all economic, social and cultural rights, and provide it with adequate human and financial resources.<sup>47</sup>

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<sup>44</sup> See HRC, above n 32, [8]; CEDAW Committee, above n 36, [25] and CAT, above n 34, [2].

<sup>45</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.17, 86.18, 86.19, 86.20, 86.21 and 86.22.

<sup>46</sup> See CAT Committee, above n 34, [5].

<sup>47</sup> CESCR, above n 33, [13].

**Priorities for inclusion in the National Action Plan**

1. Ensure that the determinations and recommendations of the AHRC are given greater weight and that it is sufficiently funded to independently and effectively fulfil its mandate.
2. The mandate of the AHRC be expanded to cover economic, social and cultural rights, and provide it with adequate human and financial resources. Implementation of recommendations of UN human rights mechanisms.

**6.3 Implementation of Recommendations of UN Human Rights Mechanisms**

55. Australia lacks any comprehensive institutional mechanism for the systematic domestic consideration and implementation of views and recommendations made by UN human rights mechanisms. Australia has a poor record of taking action in response to treaty body recommendations, which it does not recognise as legally authoritative, and has rejected the adverse findings and recommendations of the UN Human Rights Committee on a significant number of occasions.<sup>48</sup>
56. Australia's response to UN human rights mechanisms in various contexts received attention during the UPR, where several countries made recommendations that Australia implement, or follow-up on the recommendations of human rights mechanisms.<sup>49</sup>

**Priorities for inclusion in the National Action Plan**

That the Australian Government extend the mandate of the proposed Joint Parliamentary Committee on Human Rights to include the consideration, follow up and oversight of implementation of recommendations and views of UN human rights mechanisms.

**6.4 Ratification of All Core International Human Rights Treaties and Protocols and Withdrawal of Reservations**

57. While Australia has ratified most of the core international human rights instruments, the National Action Plan should include a commitment to ratify all core international human rights and their protocols, and to withdraw all reservations to human rights treaties.

**Priorities for inclusion in the National Action Plan**

That the Australian Government commit to and expedite ratification and implementation of:

1. the Optional Protocol to the Convention against Torture;
2. the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;

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<sup>48</sup> The views of the Human Rights Committee and the Australian Government's response can be found at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Human\\_rights\\_and\\_anti-discriminationCommunications](http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationCommunications).

<sup>49</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.34, 86.35, 86.36, 86.37, and 86.38.

3. the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;
4. the International Convention for the Protection of All Persons from Enforced Disappearances; and
5. ILO Convention 169 Concerning Indigenous and Tribal Peoples.

Further, that the Australian Government commit to and expedite the withdrawal of all reservations from international human rights treaties.

## 7. Immigration

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58. Any National Human Rights Action Plan which seeks to demonstrate Australia's commitment to promoting and protecting human rights must seriously address the issue of refugees and asylum seekers. The Australian Government's approach towards refugees and asylum seekers has, for many years, breached fundamental human rights. Australia's treatment of asylum seekers often breaches the right to liberty; the prohibition on inhuman and degrading treatment; the right to a fair trial; the right to equality; the right to a private and family life; and the rights to freedom of expression and freedom of movement, among others.
59. Unlike some other areas of concern that require systemic cultural and social change, remedying breaches of human rights in this area requires legislative reform and changes to current policies and practices. In many instances, this could be accomplished by treating asylum seekers arriving by boat in the same way as those arriving by air. While we appreciate the political sensitivities in this area, if the Baseline Study and National Action Plan fail to address these issues it will be unable to lay any legitimate claim to "improve both the promotion and protection of human rights in Australia".<sup>50</sup>

### 7.1 Mandatory Immigration Detention

60. Since 1992 Australia has had in place a policy of indefinite mandatory detention of every person arriving in Australia without a valid visa. In practice this means that those who arrive on a boat seeking our protection are locked up (sometimes for years) while their claims are determined, while those who arrive on a plane, clear customs and then apply for asylum, are allowed to live in the community while their claims are processed. There is no limit on the period of time for which a person can be detained. Indeed, under the *Migration Act 1958* (Cth) ('**Migration Act**') a person can be detained for administrative reasons for the rest of their life if it is not possible to deport them to another country (often the case in respect of stateless persons).<sup>51</sup>

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<sup>50</sup> Background Paper, above n 4, p 2.

<sup>51</sup> See *Al-Kateb v Commonwealth* (2004) 219 CLR 562.

61. The conditions in immigration detention have been described as similar to those in prisons.<sup>52</sup> Detention facilities are often overcrowded, families are separated and there is often a lack of access to legal advice, interpreters, information and communication facilities, together with limited access to appropriate physical and mental health services, social, cultural and religious support and educational and recreational opportunities. In particular, indefinite and prolonged detention can have a severe impact on a person's mental health, particularly those who have fled persecution and torture before seeking Australia's protection. These problems are especially acute for those detained in offshore or remote facilities, where the isolation of those detained renders the delivery of appropriate services particularly difficult. The reopening of the Curtin Detention Centre (located in the remote and hot West Kimberly region of Western Australia) in early 2010 is particularly concerning given these difficulties. The facility was previously closed in 2002 following a series of riots and marked deterioration in the mental health of detainees.
62. In addition, while the Migration Act has been amended to state that children should only be detained as a measure of last resort, over 1000 children continue to be held in various forms of immigration detention.<sup>53</sup> While these children are generally no longer held within the actual detention centres, many are held in detention-like facilities. In fact, in some cases children are held under guard in motels where there is nowhere for the children to go outside and play, and those allowed to go to school do so under guard. By far the greatest use of detention for children is known as 'alternative temporary detention in the community',<sup>54</sup> yet children detained under this are often detained in this form of 'temporary' accommodation for months. A leading child psychiatrist, Monash University Professor of Psychiatry Dr Louise Newman, has said that in this temporary accommodation – where children are not free to leave, are under guard and are housed in facilities that are often worse than detention facilities – are in many cases more detrimental to children than detention in detention facilities themselves:
- Children on Christmas Island, for example, have been held in some of the worst accommodation on Christmas Island. The actual detention facility would have been of a higher standard than some of the rather dilapidated accommodations that children were in.<sup>55</sup>
63. Australia's system of mandatory immigration detention is out of step with almost every other comparable country. It has been criticised on innumerable occasions. Most recently, the

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<sup>52</sup> See Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Visit to Australia* (24 October 2002), UN Doc. E/CN.4/2003/8/Add.2, [14].

<sup>53</sup> As at 21 January 2011, 1017 children were in immigration detention in Australia, with 330 of them on Christmas Island. See *Immigration Detention Statistics Summary* at: <http://www.immi.gov.au/managing-australias-borders/detention/pdf/immigration-detention-statistics-20110121.pdf>.

<sup>54</sup> *Ibid.* 842 of 982 children were detained under 'Alternative Temporary Detention in the Community' and only 175 under 'Immigration Residential Housing'.

<sup>55</sup> See AM, September 18 2010, at: <http://www.abc.net.au/am/content/2010/s3015469.htm>.

HRC,<sup>56</sup> the CAT Committee,<sup>57</sup> the CERD Committee<sup>58</sup> and the CESCR<sup>59</sup> have called on the Government to consider abolishing mandatory immigration detention. Calls have also been made by international bodies<sup>60</sup> to implement the AHRC's 2008 recommendations on immigration detention facilities.<sup>61</sup> The HRLRC submits that these high-level recommendations, in addition to the numerous calls from domestic bodies and organisations, must be included in the National Action Plan.

64. During the Universal Periodic Review of Australia, strong recommendations were made about how Australia could improve its immigration detention regime. These included abolishing mandatory detention, resorting to detention only when strictly necessary and for the shortest time possible and addressing the conditions of immigration detention.<sup>62</sup>

**Priorities for inclusion in the National Action Plan**

1. Abolish mandatory immigration detention and ensure that immigration detention occurs only exceptionally and not simply for administrative convenience..

**Alternatively**

If mandatory detention is not abolished, at a minimum:

1. Ensure frequent independent reviews of the ongoing need to detain individuals.
2. Make greater use of community detention, particularly in relation to families, children and other vulnerable groups.
3. Legislate to ensure children are not held in detention or detention-like facilities and implement the outstanding recommendations from the Australian Human Rights Commission's 2004 report *A Last Resort? National Inquiry into Children in Immigration Detention*.
4. Legislate to ensure strict time limits on detention.
5. Ensure detainees have access to adequate and independent health care, particularly mental health care, as well as appropriate recreational activities such as external excursions, access to reading materials and educational opportunities.

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<sup>56</sup> See HRC, above n 32, at [23].

<sup>57</sup> See CAT Committee, above n 34, at [11].

<sup>58</sup> See CERD Committee, above n 35, at [24].

<sup>59</sup> See CESCR, above n 33, at [25].

<sup>60</sup> See CESCR, above n 33, at [25] and HRC, above at 32, at [23].

<sup>61</sup> See Australian Human Rights Commission, *2008 Immigration Detention Report – Summary of Observations following visits to Australian immigration detention facilities*, December 2008, available at: [http://www.hreoc.gov.au/human\\_rights/immigration/idc2008.pdf](http://www.hreoc.gov.au/human_rights/immigration/idc2008.pdf).

<sup>62</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.121, 86.122, 86.123, 86.126, 86.127, 86.130, 86.131, 86.132.

6. Policies regarding the use of restraint on detainees must be reviewed to ensure restraint can only be used when absolutely necessary and following appropriate risk assessments.
7. Immigration officials must ensure all detainees are frequently updated on the status of their claim and any action being considered in relation to the detainee and must inform detainees about what options are available to them.
8. Ensure interpreters are available where necessary (and for female detainees ensure female interpreters are available on request), and ensure all detainees are made aware of how to access interpreters.

## 7.2 Offshore Processing

65. In 2001, amendments were made to the Migration Act to 'excise' parts of Australian territory (including Christmas Island, Ashmore and Cartier Islands and the Cocos Islands) from the migration zone. As the law currently stands anyone who first enters Australia this way and who does not have a visa, cannot make an application for asylum under the normal rules. They can only apply if the Minister for Immigration personally intervenes in their case. Under the Migration Act there is no way to force the Minister to intervene or review his or her decision not to intervene. In addition, asylum seekers in offshore places are barred from the normal refugee determination systems that apply on the Australian mainland. Instead, non-legally binding guidelines apply and there is no access to properly transparent and independent merits review of the original decision. In November 2010, the High Court of Australia<sup>63</sup> unanimously ruled that despite there being no provision in the Migration Act for asylum seekers to access Australian courts, access to the courts for judicial review of a decision on an application was required under the Australian Constitution.
66. In response, on 7 January 2011 the Federal Government announced that the rules would be changed.<sup>64</sup> Instead of taking the opportunity to rid itself of the unfair and cumbersome system applying a different protection regime to a person simply on the basis of how they arrived in the country, the Government has announced it will take away the right of asylum seekers in offshore places to have any merits review. Access to judicial review is essential to a fair trial, but judicial review in itself is limited as it cannot consider the merits of an application. In addition, given those in offshore places will remain in detention on Christmas Island, access to legal advice and appropriate services remains extremely difficult, even more so for those now wishing to launch judicial review claims.

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<sup>63</sup> *Plaintiff M61/2010E; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41.

<sup>64</sup> Announcement by the Minister for Immigration and Citizenship, Mr Chris Bowens MP, 'Government announces faster, fairer refugee assessment process', 7 January 2011, available at: <http://www.minister.immi.gov.au/media/cb/2011/cb157059.htm>

67. The HRC, the CESCR and the CAT Committee, have all called for an end the use of 'excised' offshore locations like Christmas Island to ensure all those seeking asylum have an equal right to protection.<sup>65</sup> This comes on top of constant calls for an end to this practice by non-government organisations and the AHRC.<sup>66</sup> With the High Court's recent decision it is clear the basis for this unequal system is fast unravelling and the ill-judged excision of Australian territory from the usual laws and procedures should now be repealed.
68. Offshore processing was a topic that was discussed during the recent Universal Periodic Review of Australia and recommendations were made about giving all asylum seekers and refugees access to Australian laws and courts<sup>67</sup>

**Priorities for inclusion in the National Action Plan**

1. Close down detention facilities on Christmas Island, abolish off-shore processing and ensure equality in applications for asylum, regardless of a person's mode of arrival in Australia; and
2. If the excision of offshore places is not abolished, ensure that all asylum seekers are provided with adequate legal assistance and have the same decision-making process applied to them with full access to merits review and Australian courts.

### **7.3 Family Reunion and Health Requirements Exemption**

69. For those who are recognised as in need of Australia's protection there is often a pressing desire for them to be reunited with family members who had to be left behind. It is an important right for every person to have a private and family life. This means not only that the Government itself not cause family separation but also that it takes steps to reunite separated family members.<sup>68</sup> Yet, under current immigration law and policy the right to respect to a private and family life is often not respected. Families are often separated by the deportation of family members and by a refusal to grant a visa to family members of those already in Australia. In order to properly meet our obligations to respect the private and family lives of those in Australia, as well as to ensure new arrivals to Australia can properly commit to a new life in Australia, action must be taken to allow for family reunification. Taking such steps is also likely to lead to a reduction in the number of people seeking to arrive in Australia by boat in dangerous attempts to be reunited with family members.

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<sup>65</sup> See HRC, above n 32, at [23]; CESCR, above n 33, at [25]; and CAT Committee, above n 34, at [12].

<sup>66</sup> See Australian Human Rights Commission, *2009 Immigration Detention and Offshore Processing on Christmas Island*, available at: [http://www.hreoc.gov.au/human\\_rights/immigration/idc2009\\_xmas\\_island.pdf](http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.pdf)

<sup>67</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.120, 86.121, 86.122 and 86.133.

<sup>68</sup> See Geneva Expert Roundtable, UN High Commissioner for Refugees, *Summary Conclusions on Family Unity*, [5], UN Doc UNHCR/IOM/08/2002 Annex 8 (2001).

70. Under the Migration Act migrants to Australia must meet certain health requirements in order to be considered eligible for a visa. Certain groups are exempt from needing to meet these health requirements, including asylum seekers in Australian territory to whom Australia owes protection obligations. However, those who are offshore (usually in a refugee camp elsewhere in the world) who apply for settlement under the Refugee and Special Humanitarian Program do have to meet the stringent health checks. Given that the reason a person will be granted settlement under this program is that they have been found to face a genuine risk of persecution in their home country or are subject to substantial persecution and/or discrimination amounting to a gross violation of their human rights in their home country, requiring the person to be of good health before offering them protection rather seems to undermine the purpose of the protection program.

**Priorities for inclusion in the National Action Plan**

1. Make it a priority to resettle family members of refugee and humanitarian permanent residents.
2. Ensure all applicants for offshore refugee and humanitarian settlement are exempt from the operation of the health requirement.

**7.4 Stateless Persons**

71. As mentioned above, any non-citizen in Australia that arrives without a valid visa is mandatorily detained. In addition, any non-citizen in Australia whose visa is cancelled is subject to mandatory detention before deportation. Under section 196 of the Migration Act a person can be indefinitely detained until they have either been removed or deported from Australia or granted a visa. However, if a visa has been refused but the person cannot be removed or deported because no other country will allow their entry, under the law as it currently stands that person can be legitimately kept in detention for the rest of their life. Stateless persons in particular have no country to which they can be removed or deported, and there are others where questions over their right to re-enter certain countries means they are not able to be deported or removed. The absurdity of this was demonstrated in the High Court case of *Al-Kateb*.<sup>69</sup> In this case Mr Al-Kateb, a stateless person whose asylum application had been refused, requested to be deported. However, for over two years, the Government could find no country that would accept him – and in the meantime Mr Al-Kateb remained locked up in immigration detention. The High Court ruled that under the Migration Act, Mr Al-Kateb could be detained for as long as it took to find a country to which he could be removed. If that never happened he could be detained for the rest of his life.
72. Following on from this decision in May 2005 the Government introduced a new visa type – a Removal Pending Bridging Visa, to allow such persons to live in the community pending

removal. However, this visa relies on the grant of Ministerial discretion. For those whose visas have been cancelled on character grounds and for whom deportation is difficult or not possible, an application for the Minister to grant such a temporary visa is generally refused. The CAT Committee has said it is “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*’”. It recommended that urgent measures be taken to avoid the indefinite detention of stateless persons.<sup>70</sup>

**Priorities for inclusion in the National Action Plan**

1. Urgently amend the Migration Act to ensure stateless persons and persons who cannot be deported or removed to their country of origin are not indefinitely detained.

## **7.5 Deportation of Long-term Residents**

73. Under the Migration Act, a person who is not a citizen of Australia can have their right to stay in Australia removed if the Minister for Immigration and Citizenship believes the person is not of ‘good character’. The definition of ‘good character’ is extremely broad. Not only will a person not pass the test if sentenced to 12 months or more imprisonment, but people may also have visas cancelled if they have once had an ‘association’ with someone else suspected of involved in criminal conduct, or because the Minister considers, based on their general past conduct, they are not of good character; or that there’s a significant risk of future bad behaviour.<sup>71</sup> While such broad criteria may arguably be appropriate in determining who can receive a tourist visa for a short-term visit to Australia, the application of this to those who have set up a life in Australia can be hugely damaging.
74. Long-term permanent residents in Australia have established a life in Australia, often having children and a family life here. In many cases where this power has been used those who are to be deported came to Australia as children. In March 2010 the AHRC noted that:

...of 25 people in immigration detention as of May 2008 whose visas had been cancelled under section 501, all but one of them had lived in Australia for more than 11 years. Seventeen of them had lived in Australia for more than 20 years. The majority of them were 15 years old or younger when they first arrived in Australia.<sup>72</sup>

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<sup>69</sup> See *Al-Kateb v Commonwealth* (2004) 219 CLR 562.

<sup>70</sup> See CAT Committee, above n 34, at [11].

<sup>71</sup> See section 501 of the *Migration Act 1958* (Cth).

<sup>72</sup> Australian Human Rights Commission, *Background Paper: immigration Detention and Visa Cancellation under Section 501 of the Migration Act*, p 2, March 2010 at [http://www.humanrights.gov.au/human\\_rights/immigration/501\\_migration\\_2010.pdf](http://www.humanrights.gov.au/human_rights/immigration/501_migration_2010.pdf) citing Question 423, Senate Hansard (17 June 2008) pp 2625-2626 at: <http://www.aph.gov.au/HANSARD/senate/dailys/ds170608.pdf>

75. Long-term permanent residents who have lived in Australia since they were children are essentially Australian. To deport them to their country of birth regardless of whether they have any connections with that country or even speak the language of that country, is disproportionate and double punishment. Such deportations also fail to take into account the importance of the right to a private and family life, often separating children from their parents – affecting not just the person being deported but their entire family group. In the absence of any domestic legislation protecting the importance of the right to a family and private life, the National Action Plan should ensure that all laws and policies should place emphasis on this right. We believe that section 501 of the Migration Act needs to be amended to ensure it is far more tightly confined as to when a visa can be cancelled, and there should be a presumption that long-term permanent residents of Australia should not have their visa cancelled.

**Priorities for inclusion in the National Action Plan**

1. Amend section 501 of the Migration Act (allowing for a visa to be cancelled if a person is found not to be of 'good character') to ensure that the visa's of permanent residents can only be cancelled in tightly defined circumstances.
2. Review the operation of section 501 of the Migration Act to ensure long-term permanent residents are not deported and ensure proper regard is had to the right to respect for a private, family and home life.

## **8. Aboriginal and Torres Strait Islander Peoples**

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76. Another pressing human rights problem facing Australia today is the inequality suffered by many Aboriginal and Torres Strait Islander peoples. It is essential that the Baseline Study and the National Action Plan address these issues and set out tangible action points to address this disadvantage. In this submission we set out some of the main areas which need to be addressed. However, this is not intended to be an exhaustive list given the levels of inequality and disadvantage suffered by Indigenous Australians. We hope that the National Action Plan will devote a substantial part of it to addressing this fundamental human rights issue.

### **8.1 Genuine Consultation**

77. It is trite to say that before developing and implementing proposals that will affect Aboriginal and Torres Strait Islander communities the Government should genuinely consult with those communities and use their expertise and experience to develop workable policies. Indeed, this has been the recommendation of numerous international bodies over many years.<sup>73</sup> However, in practice all too often this approach is not taken – inevitably leading to problems

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<sup>73</sup> See HRC, above n 32, at [13]; CESCR, above n 33, at [15]; CERD Committee at [15]-[18].

with implementation in the longer term. The most recent obvious example of this is in relation to the Northern Territory Intervention (discussed below). Compounding the problem of lack of consultation with affected communities was the abolition in 2004 of the only Aboriginal representative body, the Aboriginal and Torres Strait Islander Commission. This directly affected the rights of Indigenous people to fully participate in policy formulation and public debate and to be consulted properly. We are pleased that the National Congress of Australia's First Peoples has now been developed. The Congress is of great importance in ensuring Aboriginal peoples can exercise meaningful control over their affairs. In order for the Congress to be able to work effectively it must receive adequate and ongoing funding and be fully supported by existing Government structures.<sup>74</sup> To this end the National Action Plan should consider recommending the integration of the Congress into meetings of the Council of Australian Governments ('COAG') to ensure the states and territories fully take into account the views of Aboriginal and Torres Strait Islander peoples in developing policies that will affect them.

78. During the UPR process, a number of recommendations were made regarding the need for the Australian Government to consult with Aboriginal and Torres Strait Islanders. Specifically, these recommendations recommended consultation before any decision to suspend the RDA, to develop a framework to implement and raise awareness about the *UN Declaration on the Rights of Indigenous Peoples* in consultation with Indigenous peoples and more broadly, to ensure Indigenous people are consulted in relation to all action affecting their people.<sup>75</sup>

**Priorities for inclusion in the National Action Plan**

1. Ensure there is genuine consultation, engagement and partnership with Aboriginal and Torres Strait Islander people in decisions that affect their lives and resources;
2. Continue the support of the National Congress of Australia's First Peoples and ensure it receive autonomous, recurrent and sustainable funding.
3. Involve the National Congress of Australia's First Peoples in the meetings of the Council of Australian Governments for the purpose of coordinating policies and strategies relating to Aboriginal and Torres Strait Islander peoples.

**8.2 Reconciliation: Constitutional Change, Stolen Generations and Stolen Wages**

79. The need to achieve reconciliation between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians has only been recognised relatively recently. At the time the Commonwealth Constitution was drafted there was no acknowledgment of the rights of

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<sup>74</sup> See CERD Committee, above n 35, at [15].

<sup>75</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.26, 86.106, 86.110, 86.111, 86.112, 86.13 and 86.118.

Aboriginal and Torres Strait Islander peoples as the first peoples of Australia. However, it is high time that our highest legal document recognises the importance of Aboriginal and Torres Strait Islander peoples as the first people in Australia. We are pleased that the Federal Government has announced its intention to hold a referendum on including recognition in the Commonwealth Constitution. Given the notorious difficulty in achieving successful outcomes in referendums, we believe the National Action Plan should set out the steps that should be taken by the Government to educate the general population about the importance of recognition as another step towards reconciliation.

80. As part of achieving reconciliation it is vital to acknowledge and compensate for past injustices. It is now well-known that Indigenous children were forcibly taken from their parents as part of official Government policy between 1909 and 1969. Those taken from their parents and placed in care were often psychologically, physically and sexually abused. As a result it is common for members of the 'Stolen Generations' to suffer from depression, anxiety and post-traumatic stress. Yet, despite the Australian Government finally making a formal apology in 2008, those who still suffer from the effects of this racist and damaging policy have received no compensation.
81. In addition, from 1900 right up until the 1980s, many Australian state and territory governments withheld wages and other payments from Aboriginal and Torres Strait Islander peoples under their care and protection. By law the states and territories were able to determine the employers from whom Indigenous peoples could work and control the conditions of their employment. In many cases Indigenous peoples received sub-standard wages or no wages at all. In 2006 the Senate Legal and Constitutional Affairs Committee found that Indigenous peoples were subject to the practice of 'stolen wages' in every Australian jurisdiction, and its report *Unfinished Business: Indigenous Stolen Wages* recommended steps to redress this injustice, including a national compensation plan. However, while there have been schemes set up in some states and territories, the rules on accessing the funds and the level of evidence required to prove a claim are in many cases prohibitively high. In order to properly compensate those who suffered from this form of slavery, there should be a national compensation scheme made available. Both the HRC and the CERD Committee have recommended that, in order to nationally address past racially discriminatory practices, adequate compensation must be paid.<sup>76</sup>
82. During the UPR, a number of recommendations were made regarding these issues. These recommendations included the establishment of a National Compensation Tribunal for the Stolen Generations, instituting a formal reconciliation process leading to an agreement with

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<sup>76</sup> See HRC, above n 32, [15] and CERD Committee, above n 35, at [26].

Aboriginal and Torres Strait Islander people, and to pursue constitutional reform that recognises Indigenous Australians.<sup>77</sup>

**Priorities for inclusion in the National Action Plan**

1. Ensure appropriate funding is provided to ensure the general public is properly informed about the reasons for a referendum to recognise Aboriginal and Torres Strait Islander people as the first peoples of Australia in the Commonwealth Constitution.
2. Establish a national compensation fund for members of the 'Stolen Generation'.
3. Review and implement the recommendations in the Senate Legal and Constitutional Affairs Unit report *Unfinished Business: Indigenous Stolen Wages*.

**8.3 Economic, Social and Cultural Rights**

83. The inequality faced by Aboriginal and Torres Strait Islander peoples in all aspects of life in Australia is staggering. The life expectancy for Indigenous Australians is around 10 years less than for all other Australians.<sup>78</sup> In addition, the infant mortality rate for Indigenous infants in 1999–2003 was 2.5 times that of non-Indigenous infants.<sup>79</sup> 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>80</sup> The state of Indigenous health in Australia results from and represents serious human rights breaches. Many Aboriginal Australians do not have the benefit of equal access to primary health care and many Aboriginal communities lack basic determinants of the right to life, such as adequate housing, safe drinking water, electricity and effective sewerage systems.
84. Many Aboriginal and Torres Strait Islander peoples also face substantial disadvantage in accessing all levels of education, with continual under-spending on Indigenous peoples' education. Currently, Indigenous children have lower levels of access to education from pre-school through to tertiary levels. In 2006, school attendance and retention rates for Indigenous students were consistently lower across all age groups than other Australian

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<sup>77</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.97, 86.103, 86.104, 86.105, 86.106 and 86.107.

<sup>78</sup> Australian Government, Closing the Gap: Prime Minister's Report (2010) page 13, available at: <http://www.fahcsia.gov.au/sa/indigenous/pubs/general/Documents/ClosingtheGap2010/closingthegap2010.pdf>. Note also that life expectancy for Aboriginal peoples is between eight and 15 years less than that of indigenous populations in Canada, the United States of America and New Zealand: AUSTRALIAN HUMAN RIGHTS COMMISSION, *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>79</sup> *Ibid.*, at 183.

<sup>80</sup> *Ibid.*, 132–3, 139, 193–4.

children of the same age. The disparity was particularly pronounced for 17-year-old children, with 35% of Indigenous 17-year-old children attending secondary school, compared with 66% of other Australian children of the same age.<sup>81</sup> In 2006, 19% of Aboriginal peoples reported Year 12 as their highest level of school completed, compared to 45% of the other Australian population.<sup>82</sup> The failure to provide adequate education to Indigenous children is further compounded by the fact that 24% of Aboriginal communities are in remote Australia.<sup>83</sup> Indigenous children in rural or remote areas have, on average, much lower rates of school attendance and retention than Indigenous children living in urban areas.<sup>84</sup> According to the AHRC, it is estimated that 2,000 Indigenous school-age children have no access to school.<sup>85</sup> Yet, it is estimated that if the participation rate of Indigenous school students in the Northern Territory was 100%, at least another 660 teachers would be needed.<sup>86</sup> Further, students who speak Aboriginal languages at home but attend schools that teach only in English are more likely to fail or drop out than those taught by a bilingual or trilingual teacher.<sup>87</sup> Despite this, in 2009 the Northern Territory Government implemented a new policy requiring the first four hours of education in all Northern Territory schools be conducted in English.<sup>88</sup>

85. Indigenous peoples also experience significant barriers to accessing appropriate and adequate housing and are over-represented in the homeless population. Factors which contribute to the crisis in Indigenous peoples' housing include lack of affordable and culturally appropriate housing, lack of appropriate support services, significant levels of poverty and underlying discrimination and lack of funding in the provision of housing services.<sup>89</sup> Indeed,

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<sup>81</sup> Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* (2006), available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4713.0Main+Features12006?OpenDocument>.

<sup>82</sup> S Dogra, *Australian Indigenous people – A Statistical Snapshot Based on the Australian Bureau of Statistics* (2006); Aboriginal Legal Rights Movement Inc, 'Your Legal Rights' 19 (2009) Quarterly Newsletter Magazine of Aboriginal Legal Rights Movement Inc 17.

<sup>83</sup> Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians* (2006), available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4705.0Main+Features12006?OpenDocument>.

<sup>84</sup> Productivity Commission, Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2007* (2007), section 6.

<sup>85</sup> Australian Human Rights Commission, Indigenous Peoples' Organisations Network of Australia, *Submission to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Australian Mission* (August 2009), at [95].

<sup>86</sup> M Kronemann, Australian Education Union, *Education is the Key: An Education Future for Indigenous Communities in the Northern Territory* (2007).

<sup>87</sup> *Ibid.*, p 20.

<sup>88</sup> Northern Territory Government, 'Education Restructure Includes Greater Emphasis on English' (Press Release, 14 October 2008) available at <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=4599&d=5>.

<sup>89</sup> M Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Addendum – Mission to Australia* (31 July to 15 August 2006), UN Doc A/HRC/4/18/Add.2 (2007) para [80]. See also, D O'Sullivan, *Indigenous Housing Crisis*, News.com.au (Sydney),

the situation of Indigenous housing in Australia was described by the UN Special Rapporteur on Adequate Housing as a 'humanitarian tragedy'.<sup>90</sup> Aboriginal peoples are half as likely as other Australians to own their home.<sup>91</sup> Aboriginal peoples are more likely to live in social housing than non-Indigenous households<sup>92</sup> and are five times more likely to live in dwellings with structural problems.<sup>93</sup> In 2006, 27% of Indigenous peoples were reported to be living in overcrowded conditions and 51 permanent dwellings had no organised sewerage supply.<sup>94</sup> Further, Indigenous peoples are significantly over-represented in the homeless population. Overall, 2.4% of people identified as Aboriginal at the 2006 Census whereas 9% of the homeless population were Aboriginal peoples.<sup>95</sup> A 2005 study found that the rate for Aboriginal peoples' homelessness was 18 per 1,000, which is 3.5 times higher than the rate of homelessness in the general population.<sup>96</sup>

86. In addition, Indigenous peoples experience significant disadvantages in their right to work which is reflected in the following statistics:
- (a) in 2006, the unemployment rate for Aboriginal peoples was 20%, approximately three times higher than the rate for other Australians;<sup>97</sup>
  - (b) in 2006, the median weekly income for Aboriginal peoples was \$278, compared with \$471 for other Australians;<sup>98</sup>

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2 June 2010: "Aboriginal housing service providers have reported an increase in demand for housing from clients in crisis, which has not been supported by additional funding from Government."

<sup>90</sup> *Ibid.*

<sup>91</sup> Australian Government, *Indigenous Home Ownership Issues Paper* (24 May 2010) page 9, available at [http://www.fahcsia.gov.au/sa/indigenous/pubs/housing/indig\\_home\\_ownership/Documents/Indigenous\\_Home\\_Ownership\\_Issues\\_Paper.pdf](http://www.fahcsia.gov.au/sa/indigenous/pubs/housing/indig_home_ownership/Documents/Indigenous_Home_Ownership_Issues_Paper.pdf).

<sup>92</sup> Dogra, above n 17, p 17.

<sup>93</sup> Australian Human Rights Commission, *Social Justice Report 2008* (2009) pp 283-312, available at [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sireport08/app2.html](http://www.humanrights.gov.au/social_justice/sj_report/sireport08/app2.html). 35% of Aboriginal and Torres Strait Islander households live in dwellings that have structural problems, and 55% of Aboriginal and Torres Strait Islander households renting mainstream or community housing reported that their dwellings had structural problems.

<sup>94</sup> Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008* (2009) p 39, cited in Anand Grover, *United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Addendum: Mission to Australia*, UN Doc A/HRC/14/20/ADD.4 (3 June 2010), [38].

<sup>95</sup> Overall, 2.4% of people identified as Indigenous at the 2006 Census, but 9% of the homeless were Indigenous: Australian Bureau of Statistics, *Counting the Homeless, 2001*, ABS Catalogue No 2050.0 (2003) page ix.

<sup>96</sup> Australian Institute of Health and Welfare, *Indigenous Housing Needs 2005: A Multi-Measure Needs Model* (2005), p 44.

<sup>97</sup> Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2006* (2006) p 66.

<sup>98</sup> Australian Bureau of Statistics, *2006 Census of Population and Housing, Community Profile Series, Indigenous Profile* (2007) p 104.

- (c) Aboriginal women are more likely to be working in low income jobs, with over 60% of Aboriginal women on a gross weekly income of \$399 or less (including 41.6% receiving less than \$250 gross each week) compared with the median weekly income of \$471 for other Australians, generally;<sup>99</sup> and
- (d) it has been found that Aboriginal peoples must submit 35% more applications for entry-level positions to obtain the same number of interviews as an Anglo-Saxon person.<sup>100</sup>
87. It is clear there is a crisis of inequality and a failure to meet the economic, social and cultural rights of many of Australia's first peoples. Yet, it is a crisis that has been ongoing for decades. We hope that the National Action Plan can put in place some concrete recommendations and action points to seek to close some of the most egregious breaches of human rights.
88. In July 2009, COAG agreed to implement the *National Integrated Strategy for Closing the Gap in Indigenous Disadvantage*, bringing together a number of National Partnership Agreements. This committed the federal, state and territory governments to meet targets to close the gap between Aboriginal and Torres Strait Islander peoples and other Australians in respect of life expectancy, education and employment opportunities. These aims are to be applauded, yet the targets have not yet been integrated into policies and the approach taken is not one that adopts first principles of basic human rights.
89. The National Action Plan should approach the issue of Indigenous disadvantage and discrimination from a human rights perspective and include priorities for action that ensure all existing policies take a human rights based and consultative approach to implementation. In addition to the Closing the Gap strategy, in formulating the National Action Plan regard should be had to the specific recommendations in relation to Aboriginal and Torres Strait Islander peoples made by bodies such as CESCR and the CERD Committee.<sup>101</sup>
90. During the UPR, a number of recommendations were made about how the Australian Government could better fulfil the economic, social and cultural rights of Aboriginal and Torres Strait Islander peoples. These included enhancing the awareness of law enforcement officers about the cultural specificities of Indigenous cultures and communities, improving the provision of health and education services especially in remote communities and improving the socio-

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<sup>99</sup> Australian Bureau of Statistics, *2006 Census of Population and Housing, Selected Person Characteristics by Indigenous Status by Sex* (2006, revised 14 November 2007).

<sup>100</sup> A Booth, A Leigh and E Varganova, *Does Racial and Ethnic Discrimination Vary Across Minority Groups? Evidence From a Field Experiment* (2009), p 9.

<sup>101</sup> See CESCR, above n 33, at [33], CERD Committee at [15]-[16], [21]-[22].

economic inequalities experienced by Aboriginal and Torres Strait Islander peoples more generally.<sup>102</sup>

**Priorities for inclusion in the National Action Plan**

1. Implement the *National Integrated Strategy for Closing the Gap in Indigenous Disadvantage* by each relevant federal, state and territory government forming partnerships with relevant Aboriginal organisations, engage and consult effectively with affected communities, take a human rights-based approach to implementation and allocate sufficient funding to meet the targets.
2. Strengthen the preservation of Indigenous languages and culture, including by promoting bilingual education at schools. Allocate adequate resources for a national approach towards preserving Indigenous languages and hold a national inquiry into the issue of bilingual education for Aboriginal and Torres Strait Islander peoples.
3. Ensure all public service providers who have contact with Aboriginal and Torres Strait Islander peoples are required to undergo relevant cultural training and all relevant policies are reviewed to ensure culturally appropriate public service delivery to address Indigenous socio-economic disadvantage.
4. Genuinely and effectively consult with Aboriginal and Torres Strait Islander communities to identify culturally specific housing needs of each community to ensure practical respect for the right to housing.

#### **8.4 Northern Territory Intervention**

91. In 2007, the former Australian Government passed a package of legislation, known as the 'Northern Territory Intervention' or the 'Northern Territory Emergency Response' (the **Northern Territory Intervention**).<sup>103</sup> The Northern Territory Intervention was justified by the former Australian Government as being necessary to prevent child sex abuse in Indigenous communities, purportedly in response to the *Little Children Are Sacred* report.<sup>104</sup> The report made 97 recommendations to the Northern Territory Government about how best to support

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<sup>102</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.95, 86.96, 86. 101, 86.102, 86.108, 86.15, 86.16 and 86.17.

<sup>103</sup> *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Service and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

<sup>104</sup> In June 2007, the Northern Territory Government had released a report on the protection of children from sexual abuse in Aboriginal communities, entitled *Little Children Are Sacred: Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Little Children Are Sacred* (2007).

- and empower communities to prevent child sexual abuse now and in the future. Yet, there was very little relationship between the recommendations in the *Little Children Are Sacred* report and the measures adopted in the Northern Territory Intervention.<sup>105</sup>
92. The Northern Territory Intervention was targeted directly at Indigenous peoples, but was passed without consultation with Indigenous representatives and affected communities. The Northern Territory Intervention suspended the operation of the RDA (as well as Northern Territory and Queensland anti-discrimination laws) in respect of all acts or omissions done under or for the purposes of the Intervention.<sup>106</sup> The key aspects of the Intervention:
- (e) enabled the compulsory acquisition and control of specified Indigenous land and community living areas through renewable five-year leases, without compensation<sup>107</sup> and Government control of designated town camps;<sup>108</sup>
  - (f) introduced a compulsory income management regime which included quarantining 50% of welfare payments and 100% of lump sum payments for food and other essentials, and linked welfare payments to children's school attendance;
  - (g) powers given to the Australian Government to take over representative community councils.<sup>109</sup>
  - (h) Alcohol and pornographic materials were banned in prescribed areas, with fines and terms of imprisonment imposed for failure to abide by the restrictions;
  - (i) Community Development Employment Projects, which employed Indigenous people in a wide variety of jobs directed towards meeting local community needs were abolished (and subsequently partially reinstated);
  - (j) consideration of Indigenous customary law and cultural practices for an offender in criminal proceedings for all offences in bail and sentencing hearings was limited.<sup>110</sup>
93. From June to August 2009, the Federal Department of Families, Housing, Community Services and Indigenous Affairs undertook a series of consultations with Aboriginal peoples in the Northern Territory with the purpose of looking to reform the Northern Territory

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<sup>105</sup> See, for example, Parliament of Australia Parliamentary Library, Briefing Book for the 42nd 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).

<sup>106</sup> See, for example, *Northern Territory National Emergency Response Act 2007* (Cth) ss 132 and 133; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ss 4 and 5.

<sup>107</sup> *Northern Territory National Emergency Response Act 2007* (Cth) s 31.

<sup>108</sup> *Northern Territory National Emergency Response Act 2007* (Cth) s 47.

<sup>109</sup> *Northern Territory National Emergency Response Act 2007* (Cth) part 5.

<sup>110</sup> *Northern Territory National Emergency Response Act 2007* (Cth) part 6.

- Intervention.<sup>111</sup> However, serious concerns have been raised regarding significant procedural and substantive failures of the consultation process, including a lack of independence; a lack of notice to communities about the consultations and the absence of interpreters and inadequate explanations of the Northern Territory Intervention measures and complex legal concepts. In addition, these consultations were on matters which the Government had already implemented and determined would continue, such as compulsory income management and there was inadequate recording and reporting of consultations.<sup>112</sup>
94. In June 2010 the Government amended the legislation to reinstate the operation of the RDA, effective from 31 December 2010.<sup>113</sup> However, the amendments were limited to the description of the 'objects' of each of the Northern Territory Intervention measures, but did not substantively redesign the measures themselves. The quarantining of welfare payments has continued, but in order to ensure it is not (on the face of it) racially discriminatory, the new legislation has expanded compulsory income quarantining to apply to all 'disengaged youths', 'long-term welfare recipients' and people being assessed as 'vulnerable'. However, this measure will first be trialled to welfare recipients only in the Northern Territory (where the majority of the Aboriginal population lives). Aside from a move away from blanket alcohol bans towards community restrictions to be tailored on a case-by-case basis, the amendments did not substantively change the nature of the Northern Territory Intervention. Additionally, the change to say the 'object' of the measures are intended to be 'special measures' for the purposes of the RDA potentially limits any legal challenge to the racial discriminatory aspects of the legislation.
95. One aspect of the Intervention includes an income management regime which involves quarantining welfare payments to exclude the purchase of tobacco, alcohol, gambling and pornography. Income managed funds can be expended via Centrelink, allocated direct to third parties, through cheque, voucher or credit card payments, or via a 'Basics Card'. As the Basics Card can only be used for the purchase of 'priority needs' this has meant Aboriginal peoples subject to it can only shop in particular stores. In fact, some Basics Card outlets, such as roadhouses, are only licensed to sell limited products to Basics Card customers, even though they stock other 'priority items'. This has led to humiliation and embarrassment when

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<sup>111</sup> Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, Policy Statement: *Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (November 2009), p 5.

<sup>112</sup> Nicholson, Behrendt, Vivian, Watson and Harris, *Will they be Heard? — A Response to the NTER Consultations June to August 2009* (November 2009). See also, *Cultural & Indigenous Research Centre Australia, Report on the NTER Redesign Engagement Strategy and Implementation Final Report* (September 2009).

<sup>113</sup> See the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2009* (Cth) and the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Act 2009* (Cth)

Basics Card customers have been refused service when they have sought to buy 'priority items', unaware of these restrictions.<sup>114</sup> There are also a limited range of designated Basics Card retailers which means that individuals often have to travel over some distance to access a Basics Card retailer, often incurring significant transport costs and inconvenience.<sup>115</sup> In addition, the balance on a Basics Card cannot be checked easily, resulting in almost one fifth of all Basics Cards transactions being unsuccessful due to insufficient funds. Affected individuals have reported experiencing shame and humiliation when using their Basics Card.<sup>116</sup> The Government's has proposed to provide dedicated kiosks in public to allow people to check the balance of their Basics Card, yet the public nature of this only adds to feelings of stigmatisation and breach of personal privacy.

96. In October 2008, the Government's own Review Board found that the introduction of income management resulted in feelings of anger, resentment, widespread disillusionment, confusion, anxiety, shame, embarrassment and humiliation, severe frustration and overt racism within Indigenous communities.<sup>117</sup> The Review Board recommended that income management be voluntary and subject to independent review – a recommendation that has, to date, been rejected by the Australian Government.
97. The Northern Territory Intervention also provides for the compulsory acquisition of leases by the Australian Government over townships on Aboriginal land held by Aboriginal Land Trusts or Land Councils, 'Aboriginal community living areas' held by Aboriginal associations and other specified areas.<sup>118</sup> The five year leases give the Australian Government 'exclusive possession and quiet enjoyment of the land'.<sup>119</sup> The terms and conditions of the compulsory five year leases are able to be determined by the Australian Government, which includes the ability for the Government to vary or terminate the lease without consultation with the Aboriginal landholders – yet Aboriginal peoples are denied the power to unilaterally terminate or vary their lease.<sup>120</sup> The compulsory acquisition of Aboriginal townships vests all decision-making power about the use of the land in the Australian Government and deprives the

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<sup>114</sup> Australian Council of Social Service, *Submission to the Senate Community Affairs Committee Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and Related Bills* (February 2010), p 18.

<sup>115</sup> *Ibid.*, p 17.

<sup>116</sup> Australian Government, *Closing the Gap on Indigenous Disadvantage: The Challenge for Australia* (February 2009) page 5. See also, *ibid* and Northern Territory Emergency Response Review Board, Australian Government, *Report of the Northern Territory Emergency Response Review Board* (October 2008).

<sup>117</sup> Report of the NTER Board, *Ibid.*, p 20.

<sup>118</sup> *Northern Territory National Emergency Response Act 2007* (Cth) s 31(1). 'Aboriginal land' is land granted to Aboriginal Land Trusts in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Aboriginal community living areas are created by grant to associations in fee simple under the *Land Acquisitions Act 1978* (NT).

<sup>119</sup> *Northern Territory National Emergency Response Act 2007* (Cth) s 35(1).

traditional owners of the right to make decisions about the use of the land. This has led to reports of these powers being used to take over culturally sensitive areas, including a ceremonial area and cemetery.<sup>121</sup>

98. In 2010, the CERD Committee urged Australia to fully reinstate the RDA, including to ensure the RDA can be used effectively to challenge aspects of the Intervention. It particularly stated that Australia should implement the 2009 Northern Territory Emergency Response Review Board recommendations to strengthen consultation with affected communities, and that in taking action that affects Aboriginal communities the Government must respect human rights, particularly the principle of non-discrimination.<sup>122</sup> These calls were also echoed by the HRC<sup>123</sup> and the CESCR,<sup>124</sup> as well as recently by the Human Rights Council during the UPR.<sup>125</sup> Given the widespread abuses of human rights as a result of the Northern Territory Intervention – particularly in relation to the fundamental principle of non-discrimination, and the right to privacy – the National Action Plan should include priorities for action to seek to urgently remedy these abuses.
99. One of the Human Rights Council's recommendations during the UPR was to reinstate the Racial Discrimination Act into the Northern Territory Emergency Response.<sup>126</sup>

**Priorities for inclusion in the National Action Plan**

1. The full reinstatement of the *Racial Discrimination Act 1975* in respect of the Northern Territory Intervention, including to ensure the Act can be effectively used to challenge and provide remedies for racially discriminatory Northern Territory Intervention measures.
2. Amendments must be made to the relevant legislative provisions of the Northern Territory Intervention legislation to remove compulsory income management in favour of a voluntary, opt-in system of management.
3. Immediate steps must be taken to improve the Basics Card scheme to expand the stores at which the card can be used, improve the Basics Card infrastructure to ensure there does not need to be separate lines for users, and provide a means of checking the balance of a Basics Card in a private and non-stigmatising way.

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<sup>120</sup> *Northern Territory National Emergency Response Act 2007* (Cth) s 35(5), (6), (7) and (8).

<sup>121</sup> L 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>122</sup> CERD Committee, above n 35, at [16].

<sup>123</sup> See HRC, above n 32, at [14].

<sup>124</sup> See CESCR, above n 33, at [15].

<sup>125</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.24, 86.25 and 86.26.

<sup>126</sup> See Human Rights Council, UPR, above n 37, recommendation at 86.25.

4. Take steps to amend the compulsory 5 year lease scheme under the Northern Territory Intervention to ensure affected persons and communities are fairly compensated and can vary or terminate leases.

## 8.5 Native Title

100. Access to native title is an incredibly important in helping to realise many of the rights owed to Aboriginal and Torres Strait Islander peoples. The *Native Title Act 1993* (Cth) ('**Native Title Act**') was an innovative and important part of this process. However, the standards of proof required to prove a traditional and ongoing connection by a people to their land is onerously high. The Native Title Act requires claimants to demonstrate a continuing connection, under traditional laws and customs, with the land and/or waters and to demonstrate that native title has not been extinguished by an inconsistent government act (i.e. sale of the land etc). This means that where Government policies themselves (such as forcible removal) directly led to a significant break in an Indigenous group's connection to the land, native title cannot be established.<sup>127</sup>
101. Establishing a traditional and an ongoing connection to the land requires proof of something that is spiritual, cultural, and often intensely personal. Requiring people to testify in court, and be subject to cross-examination, about their religion can be a deeply confronting and traumatic experience. Instead of placing such high burdens of proof regarding continual connection to the land on traditional owners, consideration should be given to legislating for a presumption in favour of native title for groups that can establish traditional ownership of the land in question. The current general failure of the native title system to provide robust land interests providing security of title to Aboriginal peoples undermines the opportunity for full and free economic participation. The National Action Plan should adopt the recommendations made by numerous international and domestic bodies and improve the current operation of the native title system.<sup>128</sup>
102. During the UPR, a recommendation was made that the Native Title Act be reformed to amend the strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life.<sup>129</sup>

### Priorities for inclusion in the National Action Plan

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<sup>127</sup> As occurred in the case of *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

<sup>128</sup> See, e.g., HRC, above n 32, at [16]; CESCR, above n 33, at [32] and CERD Committee, above n 35, at [18]

<sup>129</sup> See Human Rights Council, UPR, above n 37, recommendation at 86.102.

That the Australian Government review and reform, in consultation with Aboriginal and Torres Strait Islander peoples, the Native Title Act to remove the onerously high standard of proof required to demonstrate ongoing connection with the land.

## 8.6 Policing and the Criminal Justice System

### (a) *Overrepresentation in Prisons*

103. Indigenous peoples in Australia are heavily overrepresented in the criminal justice system.

Recent figures reveal that:

- (k) Aboriginal peoples were 13 times more likely as other Australians to be imprisoned in 2008;<sup>130</sup>
- (l) the imprisonment rate increased by 46% for Aboriginal women and by 27% for Aboriginal men between 2000 and 2008;<sup>131</sup>
- (m) in the Northern Territory, Aboriginal peoples constitute 83% of the prison population, despite only making up 30% of the Territory's total population;<sup>132</sup>
- (n) Aboriginal juveniles are 28 times as likely to be detained as other Australian juveniles and between 2001 and 2007 the rate of Aboriginal juvenile detention rose by 27%.<sup>133</sup>

104. Given this overrepresentation, the conditions in Australian prisons, which are too often overcrowded with substandard health care, disproportionately impact on Aboriginal peoples.<sup>134</sup> In Western Australia, the situation is acute,<sup>135</sup> and the Aboriginal Legal Service of Western Australia has reported that prisoners are forced to 'double bunk' in prisons and sometimes sleep on mattresses on the floor, with temperatures regularly exceeding 40 degrees.<sup>136</sup> Prisons in South Australia, Victoria and New South Wales have also reported over-crowding

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<sup>130</sup> Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2008-08*, cited in Aboriginal and Torres Strait Islander Legal Services, *Joint Submission to the Human Rights Consultation* (June 2009), [5.8].

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009); and Australian Bureau of Statistics, 'Prisoners in Australia', *Population Distribution, Aboriginal and Torres Strait Islander Australians* (2007).

<sup>134</sup> See also Anand Grover, United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Addendum: Mission to Australia*, UN Doc A/HRC/14/20/ADD.4 (3 June 2010), [66]

<sup>135</sup> See Ombudsman Western Australia, *Report on Deaths in Prisons* (2000).

<sup>136</sup> Aboriginal Legal Service of Western Australia, *Submission to the Community Development and Justice Standing Committee Legislative Assembly Parliament of Western Australia — 'Making our Prisons Work: Inquiry into the Efficiency and Effectiveness of Prisoner Education, Training and Employment Strategies* (April 2010), available at [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/9A75B79A334556C848257713002472E6/\\$file/MOP+Sub18\\_ALSWA+\(vA254460\).pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/9A75B79A334556C848257713002472E6/$file/MOP+Sub18_ALSWA+(vA254460).pdf) at 23 May 2010

which has led to inappropriate placement of prisoners and conditions that have been described as 'inhumane'.<sup>137</sup> In 2008, the CAT Committee recommended that the Australian Government undertake measures to reduce overcrowding in prisons.<sup>138</sup>

**(b) Health of Prisoners**

105. Additionally, reports have recently emerged in the Northern Territory about the growing number of people with intellectual disabilities and mental illnesses who remain incarcerated in harsh prison conditions, even after having served their sentences, due to a lack of appropriate care facilities.<sup>139</sup> The Special Rapporteur on the Right to Health has noted that despite the fact that Aboriginal peoples are overrepresented in the Australian prison system, and that this has a damaging impact on their mental health, "forensic mental health services [in prisons] nevertheless systematically fail to meet [the needs of Aboriginal peoples]."<sup>140</sup>
106. The Special Rapporteur has also observed that while Aboriginal peoples are overrepresented in the prison population, they are vastly under-represented in prison staff numbers, and recommended that the Australian Government implement programs to promote the recruitment of Aboriginal health and prison workers and to ensure culturally appropriate service delivery to prisoners.<sup>141</sup>

**(c) Policing**

107. The factors contributing to high levels of imprisonment for Aboriginal peoples are varied and complex.<sup>142</sup> Part of the reason for over-representation is the way in which Aboriginal peoples are policed, which suggests institutional discrimination against Aboriginal peoples. One survey showed that 23.4% of Aboriginal people reported experiencing race-based discrimination by police, compared with 6.1% of people from Anglo-Celtic and non-

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<sup>137</sup> '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>; 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.htm>; '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>; AUSTRALIAN HUMAN RIGHTS COMMISSION, *Submission to the Special Rapporteur*, above n 86, [47].

<sup>138</sup> CAT Committee, above n 34, [23]. See also, *ABC News*, *Fears prison overcrowding to remain*, (4 March 2010), available at <http://www.abc.net.au/news/stories/2010/03/04/2836553.htm>.

<sup>139</sup> N Robinson, *Jailing of Mentally ill 'appalling' says NT Chief Justice*, *The Australian* (Sydney), 21 September 2009, available at <http://www.theaustralian.com.au/news/nation/jailing-of-mentally-ill-appalling-says-nt-chief-justice/story-e6frg6nf-1225777245772>. See also, Anand Grover, United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Preliminary Observations and Recommendations* (4 December 2009).

<sup>140</sup> Grover, *Addendum: Mission to Australia*, [77].

<sup>141</sup> *Ibid.*, [81].

<sup>142</sup> See Australian Human Rights Commission, *Social Justice Report 2009*, [2.3] – [2.4] available at [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport09/chap2.html#s2\\_4](http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/chap2.html#s2_4).

Anglo/Celtic background.<sup>143</sup> The lack of appropriate non-custodial sentencing options in rural and remote areas, particularly in the Northern Territory,<sup>144</sup> coupled with the disproportionate impact of certain criminal laws to Aboriginal peoples have further compounded the high rates of Aboriginal peoples' incarceration.

108. Aboriginal women prisoners are the fastest growing demographic amongst the prison population.<sup>145</sup> In the decade to 2005, the percentage Aboriginal women in prison increased by 420%.<sup>146</sup> Since the 1991 Royal Commission into Aboriginal deaths in custody, the number of Aboriginal women in prison has increased threefold.<sup>147</sup> More than half of the women in jail have been diagnosed with a mental illness and over 89% of women prisoners are survivors of sexual assault.<sup>148</sup> 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>149</sup>

**(d) Deaths in Custody**

109. The death of Aboriginal peoples in custody continues to be of serious concern despite recommendations of the Royal Commission into Aboriginal Deaths in Custody 20 years ago.<sup>150</sup> The Royal Commission made 339 recommendations relating to improvements in the criminal justice system and reducing the number of Aboriginal peoples in the Australian prison system. Its principal thrust was directed towards the elimination of disadvantage and the empowerment of Aboriginal peoples. However, many of the recommendations have never

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<sup>143</sup> See discussion of Gallaher Survey, in Vic Health, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (December 2009) page 31, available at <http://www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources.aspx>

<sup>144</sup> See Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2008-2009* (2009) page 4, available at <http://www.nt.gov.au/justice/policycoord/researchstats/index.shtml>; Evidence to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, 6 May 2010 (Magistrate Oliver), available at <http://www.aph.gov.au/hansard/reps/commtee/R12981.pdf>

<sup>145</sup> Australian Human Rights Commission, *Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2006), at chapter 9(b), available at [http://www.hreoc.gov.au/social\\_justice/statistics/index.html](http://www.hreoc.gov.au/social_justice/statistics/index.html).

<sup>146</sup> This compares with an increase over the same decade of 110% in the male Indigenous prison population, and of 45% in the general male prison population. In March 2004, the incarceration rates of Indigenous women nationally were 20.8 times that of non-Indigenous women: *ibid.*

<sup>147</sup> National Indigenous Drug and Alcohol Committee, *Bridges and Barriers: Addressing Indigenous Incarceration and Health* (2009), available at [http://www.nidac.org.au/publications/pdf/nidac\\_bridges\\_and\\_barriers.pdf](http://www.nidac.org.au/publications/pdf/nidac_bridges_and_barriers.pdf).

<sup>148</sup> Women's Report Card Project, Women's Rights Action Network Australia, *Our Rights, Our Voices: The National Community Report on Women's Human Rights In Australia* (2004), p 25, available at <http://www.wrana.org.au/WRC%20Project/Final%20National%20report.pdf>.

<sup>149</sup> *Ibid.*, p 25.

<sup>150</sup> Commonwealth of Australia, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991) vol 1-5.

- been implemented and in 2006, 54 people were reported to have died in custody or in custody-related operations, with 11 of those individuals being Aboriginal peoples.<sup>151</sup>
110. In Western Australia, where the vast majority of prisoners transported, especially in regional and remote areas, are Aboriginal peoples.<sup>152</sup> A number of people have died or suffered serious injury as a result of being transported as prisoners “thousands of kilometres in unsafe and uncomfortable vehicles, often for minor offences”.<sup>153</sup> The shocking ramifications of these practices are illustrated in the case of Mr Ward, who dies of heatstroke in 2008.
111. On 27 January 2008, Mr Ward, a respected Ngaanyatjarra Aboriginal elder, was placed in the back of a prison transport van for up to four and half hours while temperatures outside exceeded 40 degrees Celsius. Mr Ward was being transferred from Laverton to Kalgoorlie in remote Western Australia to face a charge of driving under the influence. Mr Ward was found unconscious in the back of the van, having suffered heat stroke. He subsequently died in hospital. The van’s air-conditioning system was faulty.<sup>154</sup> A coronial inquest into Mr. Ward’s death revealed systemic failings which contributed to the death. These included over policing, denial of bail, inhumane prisoner transport, lack of training of justices of the peace, police and private contractor staff, lack of governmental supervision of contractual duties and inadequate funding. In June 2009, the coroner found that Articles 7 (prohibition against torture and inhuman treatment) and 10 (right to be treated with dignity and humanity when deprived of liberty) of the ICCPR had been breached.<sup>155</sup> However, despite these findings, the Director of Public Prosecutions in Western Australia has confirmed that no charges will be laid as a result of Mr Ward’s death.

**(e) Mandatory Sentencing**

112. Mandatory sentencing continues to operate in Western Australia and the Northern Territory, having a disproportionate impact on Aboriginal peoples, particularly Aboriginal children.<sup>156</sup> Mandatory sentencing laws limit judicial discretion in sentencing and prevent courts from

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<sup>151</sup> J Joudo and J Curnow, ‘Deaths in Custody in Australia: National Deaths in Custody Program Annual Report 2006, *Australian Institute of Criminology, Technical and Background Paper No 85* (2006) p xii, cited in Australian Human Rights Commission *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2008), available at [http://www.hreoc.gov.au/social\\_justice/statistics/index.html#fn142](http://www.hreoc.gov.au/social_justice/statistics/index.html#fn142).

<sup>152</sup> Office of the Inspector of Custodial Services (WA), *Thematic Review of Custodial Transport Services in Western Australia* (Report No 43, May 2007) page 1, cited in Aboriginal and Torres Strait Islander Legal Services, above n 30, [5.3].

<sup>153</sup> Aboriginal and Torres Strait Islander Legal Services, *Joint Submission to the Human Rights Consultation*, (June 2009), para [5.3].

<sup>154</sup> Paige Taylor, ‘Drink Driver Dies in Custody’, *The Australian* (Sydney), 28 January 2008.

<sup>155</sup> See [http://www.safetyandquality.health.wa.gov.au/docs/mortality\\_review/inquest\\_finding/Ward\\_finding.pdf](http://www.safetyandquality.health.wa.gov.au/docs/mortality_review/inquest_finding/Ward_finding.pdf).

<sup>156</sup> Australian Bureau of Statistics, *Prisoners in Australia*, 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).

- taking account of the cultural background and responsibilities of offenders, and the economic and social difficulties that they face. The CAT Committee has recommended that mandatory sentencing be abolished “due to its disproportionate and discriminatory impact on the indigenous population”.<sup>157</sup>
113. Further, in the Northern Territory, the Legal Aid Commission has reported that securing safe transport to court for remote communities is a significant issue, where failure to appear in court generally results in the issue of a warrant for an offender’s arrest, compounding the original offence. The Legal Aid Commission has also observed that in the absence of reliable transport to court appearances, due in part to the lack of public transport, individuals often have no alternative but to commit further offences by driving an unregistered and/or unroadworthy vehicle, unlicensed, in order to make an appearance at court.
114. It seems clear that there is an ongoing crisis in the policing and criminal justice system in its application to Aboriginal and Torres Strait Islander peoples. It is essential that the National Action Plan address this and propose a series of quantifiable measures to help address this. Although criminal justice matters are largely a matter for State and Territory governments, we believe there is a role for a national and co-ordinated approach to this pressing issue. The CERD just last year made a number of recommendations in this regard, including recommending the dedication of “sufficient resources to address the social and economic factors underpinning Indigenous contact with the criminal justice system”.<sup>158</sup> We believe that a significant part of the National Action Plan must be devoted to practical measures that will help to address the substantial disadvantage of Indigenous Australians in the criminal justice system.
115. During the UPR, a number of recommendations were made about the interaction between Aboriginal and Torres Strait Islander peoples, the police and the criminal justice system. These recommendations included addressing the overrepresentation of of Aboriginal and Torres Strait Islanders communities in the prison population, increasing the availability of non-custodial sentences and improving the human rights training of law enforcement personnel.<sup>159</sup>

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<sup>157</sup> CAT Committee, above n 34, [23].

<sup>158</sup> CERD Committee, above n 35, [20].

<sup>159</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.93, 86.94 and 86.96.

**Priorities for inclusion in the National Action Plan**

1. That the Federal Government convene meetings of all States and Territory Governments to agree on adopting legislation and policies to reduce discrimination against Aboriginal and Torres Strait Islander peoples in policing and the criminal justice system. In particular, all governments should:
  - a) require all police officers to regularly undergo training on their legal duties under anti-discrimination legislation and regularly undertake appropriate cross-cultural and anti-racism training;
  - b) develop standards across all police forces to ensure any racist behaviour or failure to properly investigate cases involving ethnic minorities is a high-level disciplinary matter;
  - c) ensure all police cells, interview rooms and police vehicles in Australia contain recording equipment;
  - d) legislate to establish a properly independent and accountable body to investigate any allegations of police misconduct and police use of force;
  - e) review sentencing legislation (particularly the use of mandatory sentencing) and ensure legislation does not discriminate against or disproportionately impact on the rights of Aboriginal and Torres Strait Islander peoples;
  - f) introduce or continue and increase the use of courts and conciliation mechanisms, diversionary, prevention programs and restorative justice that specifically focuses on the needs of Aboriginal and Torres Strait Islander peoples;
  - g) incorporate customary law into the criminal justice system where appropriate, including by allowing for community dispute mechanisms where appropriate;
  - h) in partnership with Aboriginal and Torres Strait Islander communities, implement programs to promote the recruitment of Aboriginal health and prison workers and ensure culturally appropriate service delivery to prisoners;
  - i) investigate transport options for those in remote Indigenous communities to appear at court.
2. Provide adequate resources for the establishment and ongoing delivery of a national Aboriginal and Torres Strait Islander interpreter service.
3. Review the recommendations of the Royal Commission into Aboriginal Deaths in Custody and in consultation with Aboriginal and Torres Strait Islander communities identify the relevant recommendations and commence a program of implementation.

## 8.7 Access to Justice

116. Many Aboriginal peoples confront serious obstacles to access the justice system which are compounded by the limited access Aboriginal peoples have to legal and interpretive services. Australian Government funding to the Legal Aid Indigenous Australians program decreased by 6% in the decade to 2008, and by 40% (in real terms) to Aboriginal and Torres Strait Islander legal services.<sup>160</sup> This is in contrast to a 120% increase to mainstream legal aid during the same time period.<sup>161</sup> Reductions in funding have occurred despite Australian parliamentary and governmental inquiries into this problem and recommendations by the AHRC and the HRC to increase funding to specialist Aboriginal services and to work collaboratively with service providers and Aboriginal communities to ensure that funding is appropriate and strategically directed.<sup>162</sup>
117. Under Australian law, the provision of an interpreter is a matter of judicial discretion. While in a criminal matter the right to a fair trial requires the accused to understand and hear the proceedings,<sup>163</sup> the provision of an interpreter is less certain in civil proceedings. A 2009 Federal Senate inquiry into access to justice acknowledged that language barriers inhibit Aboriginal and Torres Strait Islander peoples' access to justice and that access is neither adequately recognised nor properly resourced. The inquiry recommended that the Australian Government provide additional funding for court-based interpreters and undertake consultations to seek solutions to the difficulties associated with translating some Indigenous languages.<sup>164</sup>
118. The CERD Committee has encouraged the Australian Government to increase funding for Aboriginal legal aid in real terms to reflect "the essential role that professional and culturally appropriate Indigenous legal and interpretive services play within the criminal justice system".<sup>165</sup> The HRLRC believes the National Action Plan should consider this area of concern and make recommendations for steps to address these problems.

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<sup>160</sup> Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Access to Justice Inquiry Report* (2009), [8.5].

<sup>161</sup> *Ibid.* [8.27].

<sup>162</sup> See Australian Human Rights Commission, *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); HRC, *Concluding Observations: Australia*, above n 32; Attorney-General's Department, Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce*, (September 2009); Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), recommendations 27 and 26-27. Inadequate funding persisted despite Senate Inquiries in 2003-4 and 2009 recommending urgent increases in funding to specialist services. The Government has not implemented the recommendations set out in the Federal Attorney-General's *Strategic Framework for Access to Justice in the Federal Justice System*.

<sup>163</sup> *Re East; Ex parte Nguyen* (1998) 196 CLR 354.

<sup>164</sup> Senate Legal and Constitutional Affairs Committee, above n 162, [8.55] and [8.61].

<sup>165</sup> CERD Committee, above n 35, [19].

119. During the UPR, a recommendation was made that the provision of legal advice and translation services to Indigenous people, especially Indigenous women in remote communities, should be increased.<sup>166</sup>

**Priorities for inclusion in the National Action Plan**

1. Strengthen funding for Aboriginal legal aid and establish clear funding responsibilities between the federal, state and territory governments.
2. Improve access to culturally appropriate legal assistance services for family and civil law matters for Aboriginal and Torres Strait Islander peoples.
3. Through funding, working with Aboriginal and Torres Strait Islander legal assistance providers and the building of outreach services to connect existing services, improve the provision of access to justice information to Aboriginal and Torres Strait Islander peoples.

## **9. Torture**

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### **9.1 Deportation to Potential Torture or the Death Penalty**

120. The absolute prohibition on torture and inhuman or degrading treatment or punishment is one of the most fundamental of human rights. The prohibition not only prohibits a State from itself carrying out such deeds, it is also prohibited from deporting a person to another country where substantial grounds have been shown that he or she would face a real risk of being tortured or subjected to ill-treatment in that country. Yet, despite this, and despite numerous calls from the international community, non-government groups and Senate Committees, Australian law does not currently comprehensively prevent a person from being deported to a place where they face a substantial risk of torture or inhuman or degrading treatment. The only way a person can seek to avoid deportation in an immigration case on this basis by the Minister for Immigration and Citizenship exercising his or her discretion for the 'public interest'.<sup>167</sup> The Ministerial intervention process is wholly discretionary, non-reviewable, not transparent and is not subject to procedural fairness considerations. In addition, under section 501 of the Migration Act the Minister can cancel a person's visa on character grounds, regardless of whether the person may face the death penalty or torture or ill-treatment if deported.
121. Under extradition laws, the Minister retains an overriding discretion to extradite a person notwithstanding that this may expose them to a real risk of torture.<sup>168</sup> In addition, while the law

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<sup>166</sup> See Human Rights Council, UPR, above n 37, recommendation at 86.92.

<sup>167</sup> See section 417 of the *Migration Act 1958* (Cth).

<sup>168</sup> *Extradition Act 1988* (Cth) s 22(3)(f).

- provides that mutual assistance should be refused where the death penalty may be imposed, in providing assistance to other governments in criminal investigations, extradition can be granted if 'special circumstances' exist. There is no comprehensive prohibition where the mutual assistance may expose a person to torture or other cruel, inhuman or degrading treatment or punishment.
122. As a direct result of this gap in the law there have been numerous reports of persons being deported to countries where they subsequently faced torture or other cruel, inhuman or degrading treatment. In 1999 the CAT Committee found that Australia's decision to deport a failed asylum seeker to Somalia would breach Australia's obligations under the CAT.<sup>169</sup> The complainant in this case had to take his case to this international body as under Australian law there was no domestic remedy available to him.
123. In September 2009, the Government introduced the Migration Amendment (Complementary Protection) Bill to extend protection to people who are found not to be refugees but who face a real risk of torture or cruel, inhuman or degrading treatment or punishment if returned home, or who would be exposed to the death penalty or other arbitrary deprivation of life. This was an extremely welcome measure. Yet, the Bill lapsed before last year's General Election and has yet to be reintroduced.
124. We believe the National Action Plan must include action points to achieve a change in the law to ensure no one is deported, removed or extradited where they face the death penalty, torture or other cruel, inhuman or degrading treatment (a recommendation also recently made by the Human Rights Committee).<sup>170</sup> This should include a change to Australian laws and practices to ensure law enforcement assistance is not provided if there is a danger that in doing so a person may face such treatment or punishment.
125. During the UPR, several recommendations were made that Australia should adopt domestic laws that prohibits the extradition or refoulement of people, particularly asylum seekers to states where they would be in danger of torture or death.<sup>171</sup>

**Priorities for inclusion in the National Action Plan**

1. Amend the Migration Act to ensure no one can be deported or removed to a country where they face a substantial risk of being subject to torture or other cruel, inhuman or degrading treatment or punishment or flagrant human rights violation.

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<sup>169</sup> See *Elmi v Australia*, Committee Against Torture, Communication No 120/1998: Australia. 25/05/1999. CAT/C/22/D/120/1998.

<sup>170</sup> HRC, above n 32, [19]-[20].

<sup>171</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.34, 86.124 and 86.125.

2. Amend the *Extradition Act 1988* (Cth) to prohibit extradition in all circumstances where the person to be extradited faces a substantial risk of being subject to torture or other cruel, inhuman or degrading treatment or punishment, where the person will face the death penalty, or where the person may be subject to any other flagrant human rights violation.
3. Amend the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to prohibit the Australian Federal Police and others from providing assistance in evidence gathering or the provision of any other assistance where the person in question faces a substantial risk of torture or other cruel, inhuman or degrading treatment or other flagrant human rights violation.

## 9.2 Investigations into Torture Allegations

126. The Australian Government has so far refused to investigate serious allegations about the torture of Australian citizens during the so-called 'War on Terror'. In addition to failing to investigate, there have been allegations that Australian officials knew of, or indeed were present, when Australian citizens were being tortured and ill-treated by the officials of foreign governments. In particular, Mamdouh Habib, a dual Australian-Egyptian national, from October 2001 to 2005 was detained in Pakistan, Egypt and Guantanamo Bay. Mr Habib has made credible claims that he was tortured and ill-treated during his detention, particularly while in Egypt. Despite complaining to Australian law enforcement and intelligence officers in Pakistan and in Guantanamo Bay, Australia did not investigate these complaints. Most shockingly Mr Habib has claimed that Australian officials were actually present during some of his unlawful interrogations. In addition, David Hicks was detained in the custody of the US military in Afghanistan, on board US naval vessels and at Guantanamo Bay. 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 around 9 months and threatened with firearms and other weapons.<sup>172</sup> Despite these allegations Australian officials failed to investigate – preferring instead to leave any inquiry to the US.
127. In December 2010 the Australian Government announced it would pay compensation to Mr Habib, yet the details of the compensation remain secret.<sup>173</sup> Following this, in January 2011 the Government finally announced an inquiry into the allegations of torture.<sup>174</sup> Yet, while it is

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<sup>172</sup> Affidavit of David Hicks, 5 August 2004, available at: <http://www.smh.com.au/articles/2004/12/10/1102625527396.html>.

<sup>173</sup> See D Welch, 'Secret Sum Settles Habib Torture Compensation Case', *Sydney Morning Herald*, (Sydney), 8 January 2011, available at <http://www.smh.com.au/national/secret-sum-settles-habib-torture-compensation-case-20110107-19it1.html>.

<sup>174</sup> See S Neighbour, 'M Habib's Story is Backed by Evidence', *The Australian*, (Sydney) 15 January 2011, available at <http://www.theaustralian.com.au/news/features/mamdouh-habibs-story-is-backed-by-evidence/story-e6frg6z6-1225987997174>.

extremely welcome that these important allegations are properly investigated, this inquiry – to be undertaken by the Inspector-General of Intelligence and Security – will be held completely in secret. The terms of reference for the inquiry have not been made public and any report from the inquiry will be given “to the responsible minister who determines what is to be released publicly”.<sup>175</sup> What is needed is a full and public inquiry into all allegations of knowledge or complicity in torture by Australian officials.

128. The Human Rights Council, through the UPR has recently recommended that all allegations of torture in the context of counter-terrorism measures should be investigated, and that this should “give publicity to the findings, bring perpetrators to justice and provide reparation to the victims”.<sup>176</sup> Given the fundamental and absolute nature of the prohibition on torture and degrading treatment (and the corresponding positive duty to investigate) the National Action Plan must set out the measures to be taken to investigate these allegations to ensure Australia does not, and is not seen to, condone torture.

**Priorities for inclusion in the National Action Plan**

1. Establish a wide-ranging public and independent review into all allegations of torture against Australian citizens or residents and into whether Australian officials engaged in, were complicit in or knew of the torture or other cruel, inhuman or degrading treatment or punishment of suspects during the so-called ‘War on Terror’.
2. Ensure the review has the power to award reparations to affected individuals if such conduct or knowledge is established and to recommend prosecution of persons involved or implicated in the torture or ill-treatment.

**9.3 Use of Torture Evidence**

129. The absolute prohibition on torture and inhuman or degrading treatment or punishment also includes an absolute prohibition on using information obtained through torture as evidence in court. As the UN Special Rapporteur on Torture has explained it, the rationale behind this is twofold:

Firstly, confessions or other information extracted by torture is usually not reliable enough to be used as a source of evidence in any legal proceeding. Secondly, prohibiting the use of such evidence in legal proceedings removes an important incentive for the use of torture and, therefore, shall contribute to the prevention of the practice.<sup>177</sup>

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<sup>175</sup> See Website of Inspector General of Intelligence and Security, at <http://www.igis.gov.au/inquiries/index.cfm> . See also the *Inspector-General of Intelligence and Security Act 1986*.

<sup>176</sup> See Human Rights Council, UPR, above n 37, recommendation at 86.136.

<sup>177</sup> M Nowak, Special Rapporteur on Torture, *Interim Report to General Assembly, A/61/259*, 1 August 2006, at [45].

130. The common law has long recognised the importance of not admitting such ‘evidence’ in court.<sup>178</sup> Yet despite the clear and absolute prohibition under international law, and the centuries of common law opposing it, Australian law currently allows for evidence obtained in this way to be used in legal proceedings. In particular, section 138 of the *Evidence Act 1995* (Cth) provides that evidence obtained improperly or in contravention of Australian law may still be admitted in court if the trial judge considers that admitting the evidence is more desirable than excluding it. In addition, the *Foreign Evidence Act 1994* (Cth) provides that evidence obtained from a foreign country can be used in Australian courts, even if the ‘evidence’ was obtained through torture. The only qualification for this is that in general cases, a court can exclude evidence if it is satisfied that justice would be better served not to admit the evidence (section 25). Yet, in criminal cases involving terrorism or national security the threshold for exclusion of evidence is even higher – evidence must not be excluded unless the court is satisfied that admitting the evidence would have a substantial adverse effect on the right of the accused to a fair hearing (section 25A).
131. The CAT Committee has expressed its concern about the lack of uniform legislation excluding the admission of evidence obtained through torture and about the use of confessional evidence obtained under ill-treatment in other countries in criminal proceedings in Australia. It has recommended that Australia, in order to comply with its obligations under the CAT, apply “uniform and precise legislation in all states and territories excluding the admission of statements as evidence if made as a result of torture”.<sup>179</sup> While legislation was recently passed which, for the first time, specifically criminalised torture, this did not prohibit the admission of torture evidence.<sup>180</sup> We believe it is essential that the National Action Plan address this very important issue and provide specific action points to be taken by all governments to address this problem.

**Priorities for inclusion in the National Action Plan**

Enact legislation to absolutely prohibit the use of evidence that has been obtained as a result or torture or other cruel, inhuman or degrading treatment or punishment (except in proceedings establishing that such treatment or punishment took place).

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<sup>178</sup> As Lord Bingham said in the House of Lords in 2005: “It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law... In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice.” *A and others v Secretary of State for the Home Department* (No. 2) [2005] UKHL 71 at [11].

<sup>179</sup> CAT Committee, above n 34, [30].

<sup>180</sup> See the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth).

## 10. Counter-Terrorism

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132. Governments have a duty to protect the rights, lives and safety of people within their territory and perpetrators of violent or terrorist acts should be brought to justice. However, the measures put in place to bolster national security, protect lives and prevent terrorist attacks should not unduly infringe on people's human rights. Too often, debate on counter-terrorism laws and measures presupposes that national security and human rights are inherently in tension or even mutually exclusive. Fundamentally, however, human rights, human security and national security are closely associated and intertwined. The realisation of human rights creates the conditions necessary for human and national security, while national security is a necessary precondition to the realisation of human rights.
133. Under international law, Australia has committed to respect, protect and fulfil the fundamental human rights of all persons within its jurisdiction. A human rights law framework recognises and reflects the need for the State to protect national security and, in some circumstances, allows for limitations of human rights for the purpose of protecting public order and public safety. Limitations on rights should only be allowed where they are strictly necessary, justified by evidence and where the means used to protect security are proportionate and infringe human rights to the minimum extent possible.
134. Since 2001, Australia has passed over 50 pieces of legislation purportedly to counter the threat of terrorism in Australia.<sup>181</sup> These laws have greatly expanded the powers of the police and intelligence agencies and have created a number of broad new terrorism offences. These laws have been heavily criticised both domestically<sup>182</sup> and internationally<sup>183</sup> for being overly broad, overly coercive and for failing to allow for adequate judicial oversight and redress. Of particular concern in the area of counter-terrorism powers are:
- (a) overly broad powers provided to the Australian Security and Intelligence Organisation ('ASIO'), including the power to detain a person without charge for questioning for up to seven days.<sup>184</sup> During this time the person may be questioned in the absence of a

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<sup>181</sup> A list of the main legislation is available at:

<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument>.

<sup>182</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': S Morris and R DiGirolamo, 'Williams Backs Off over Terror Laws', *The Australian*, (Sydney), 19 June 2002.

<sup>183</sup> See, for example, M 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). See Human Rights Council, UPR, above n 37, recommendations at 86.137 to 86.140.

<sup>184</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34S, 34G (as amended by the *ASIO Legislation Amendment Act 2006* (Cth)).

lawyer and without their lawyer being given access to information for the reason for their detention;<sup>185</sup>

- (b) the power of the Australian Federal Police ('**AFP**') to obtain a 'preventative detention order' to detain a person without charge for up to 48 hours where to do so would substantially assist in preventing an imminent terrorist attack or to preserve related evidence after a terrorist attack. This time can be augmented by state law so that many states permit detention for a maximum of 14 days;<sup>186</sup>
  - (c) the power to detain a person without charge pending an investigation for up to eight days (originally unlimited in time);<sup>187</sup>
  - (d) the power for a control order to be imposed on a person (not on the basis of charge or conviction) which allows for effective house arrest and huge restrictions on a person's day to day life;<sup>188</sup>
  - (e) the extremely broad and vague definition of a 'terrorist act';
  - (f) the broad powers of the Government to ban organisations, even where the organisation is only thought to have 'praised' a terrorist act in circumstances where there is a substantial risk that this might lead to a person engaging in a terrorist act;<sup>189</sup>
  - (g) the reversal of the burden of proof in respect of bail relating to terrorism offences in the *Crimes Act 1914* (Cth) ('**Crimes Act**');
  - (h) the power of the executive to decide to freeze the assets of a person or entity without any judicial oversight of the merits of this decision;<sup>190</sup> and
  - (i) the harsh conditions of detention of unconvicted remand prisoners charged with terrorism-related offences.
135. Several general recommendations were made during the recent UPR process about how the Australian Government should ensure that its counter-terrorism laws comply with its human rights obligations.<sup>191</sup>

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<sup>185</sup> *Ibid.*, ss 34TB and 34VA.

<sup>186</sup> *Criminal Code Act 1995* (Cth), s 105.4 and, for example, *Terrorism (Police Powers) Act 2002* (NSW) s 26D.

<sup>187</sup> See Part 1C of the *Crimes Act 1914* (Cth) as amended by the *National Security Legislation Amendment Act 2010* (Cth).

<sup>188</sup> *Criminal Code 1995* (Cth), div 104.

<sup>189</sup> *Criminal Code Act 1995* (Cth), s 102.1.

<sup>190</sup> *Charter of the United Nations Act 1945* (Cth), s 15(1) and (3).

<sup>191</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.136, 86.137, 86.138, 86.139 and 86.140.

### 10.1 ASIO Detention Powers

136. Following amendments introduced in 2003 and 2006,<sup>192</sup> a person, including someone who is not themselves suspected of any criminal wrong-doing, can be detained without charge for questioning under an ASIO warrant for up to seven days.<sup>193</sup> A separate warrant can be issued at the end of this time if new material justifies it.<sup>194</sup> A person may thus be held in detention indefinitely for rolling periods of seven days, without any charge having been made out against them in accordance with conventional criminal procedure.
137. Further, under this legislation:
- (a) the person may be prohibited and prevented from contacting anyone at any time while in custody;<sup>195</sup>
  - (b) the person may be questioned in the absence of a lawyer;<sup>196</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>197</sup>
  - (d) the person is prohibited from disclosing information relating to their detention at risk of five years imprisonment,<sup>198</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>199</sup>
138. 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 has noted, "[t]he level of secrecy and lack of public scrutiny... has the potential to allow human rights violations to go unnoticed in a climate of impunity".<sup>200</sup>
139. While 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

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<sup>192</sup> See the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) and the *ASIO Legislation Amendment Act 2006* (Cth).

<sup>193</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34S and 34G(1).

<sup>194</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34F(6) and 34G(2).

<sup>195</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34K.

<sup>196</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZP.

<sup>197</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZT.

<sup>198</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZS(2).

<sup>199</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZS(1).

<sup>200</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>.

treatment,<sup>201</sup> it provides no penalties for contravening this. These provisions raise concerns in relation to the right to liberty, the right to a fair trial, and the prohibition on torture and ill-treatment. The CAT Committee has expressed its concerns over these powers, particularly the lack of a right to a lawyer of choice to be present during questioning, the levels of secrecy involved and the right to seek judicial review of the validity of detention.<sup>202</sup> The HRC has recently recommended that these powers should be repealed.<sup>203</sup> These secretive and punitive powers are an embarrassment to Australia's commitment to human rights and the rule of law and must be addressed by the National Action Plan.

**Priorities for inclusion in the National Action Plan**

Repeal powers of ASIO to detain a person without charge and without access to a lawyer for seven days or more.

## 10.2 Preventative Detention

140. Where the 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.
141. 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>204</sup> An AFP member may then apply to an 'issuing authority' for a continued preventative detention order for up to 48 hours.<sup>205</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 officer is merely required to produce 'such facts and grounds' which would make the continuation of a detention order 'reasonably necessary' in the circumstances.<sup>206</sup>
142. 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>207</sup>

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<sup>201</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), s 34T(2).

<sup>202</sup> CAT Committee, above n 34, [10].

<sup>203</sup> HRC, above n 32, [11].

<sup>204</sup> *Criminal Code 1995* (Cth), ss 105.7 and 105.8.

<sup>205</sup> "Issuing authorities" include judges, federal magistrates, Administrative Appeals Tribunal members and retired judges: *Criminal Code 1995* (Cth), ss 100.1 and 105.2.

<sup>206</sup> *Criminal Code 1995* (Cth), ss 105.10(2) and 105.11(2).

<sup>207</sup> *Criminal Code 1995* (Cth), ss 105.16. See also *Criminal Code* ss 105.14A and 105.15.

- (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>208</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>209</sup>
143. 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. In addition, under complementary state and territory legislation such detention can last up to 14 days.
144. This legislation raises concerns regarding its impact on freedom from arbitrary detention, the presumption of innocence and the right to a fair hearing, and the prohibition on ill-treatment due to the inadequacy of safeguards.

**Priorities for inclusion in the National Action Plan**

Repeal Division 105 of the Criminal Code which provides for preventative detention and require State and Territory Governments to repeal their complementary legislation.

### 10.3 Control Orders

145. Provisions were introduced in 2005 that allow for a 'control order' – a severe restriction on human rights – to be imposed on an individual without the need for a criminal conviction.<sup>210</sup> A control order can be imposed where the issuing court (which can be the Federal Court, the Federal Magistrates' Court or the Family Court) is satisfied on the civil standard of proof that such an order would substantially assist in preventing a terrorist act or that the person to be subject to it has given training to or received training from a listed terrorist organisation. An interim control order can be made on an *ex parte* basis – that is without the person subject to it being given notice of the hearing or being able to attend the hearing. While a confirmed control order must ensure that the 'controlee' is notified in advance of the hearing and can put forward submissions, if the order is not confirmed the 'interim' control order can continue and there is no time limit on how long the interim order can last.
146. Measures that can be imposed by a control order include a prohibition on where the person can go; house-arrest for specified times; electronic tagging; prohibitions or restrictions on who the person can see or communicate with; a ban on the use of the internet or mobile phones; a ban on working; and requirements to report to police.<sup>211</sup> The court must be satisfied that each

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<sup>208</sup> *Criminal Code 1995* (Cth), s 105.38.

<sup>209</sup> *Criminal Code 1995* (Cth), s 105.41.

<sup>210</sup> Introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth).

<sup>211</sup> *Criminal Code 1995* (Cth), s 104.5(3).

- of the conditions of the proposed control order is 'reasonably necessary'. Breach of one of these conditions becomes a criminal offence, subject to a maximum period of five years' imprisonment. Control orders can last for a maximum of 12 months, however these can be renewed indefinitely. Individuals the subject of a control order may apply to a federal court for a revocation or variation of the order.
147. To our knowledge, control orders have been imposed on two people to date, Jack Thomas and David Hicks.<sup>212</sup>
148. Control orders undermine the presumption of innocence and effectively allow for punishment on the basis of a civil standard of proof. Breach of a control order becomes a criminal offence. The restrictions that can be imposed by a control order can have a devastating effect on a person's life and their family's life. It effectively allows for indefinite house arrest without charge or conviction. It undermines a person's right to a private and family life by imposing huge restrictions on where a person can go, who they can speak to or see, where or if they can work etc. The ability to impose an interim order on an ex parte basis – without the person to be subject to it being able to make any submissions or refute any of the evidence – severely restricts the right to a fair trial. While the controllee has an opportunity to make submissions at the confirmation hearing, as has been seen in the two cases to date, the 'interim' order can last for months before there is any opportunity to test the 'evidence' for the making of the order.
149. It is also extremely concerning that one of the grounds on which the order can be made is that the court believes on the balance of probabilities that the person 'has received training from a terrorist organisation'.<sup>84</sup> This is a matter that is not preventative in nature – rather, if there is evidence that a person has received such training they should be charged with a criminal offence and their culpability should be proved beyond reasonable doubt. As a ground on which a control order can be made this effectively punishes a person retrospectively for an act which may not have been illegal under Australian law at the time. It was largely this reason which the AFP relied on in seeking an interim control order against David Hicks in December 2007.
150. The control order regime was modelled heavily on the regime brought into force in the UK in 2005. The main distinction with the regime in the UK and that in Australia is that it was

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<sup>212</sup> In 2006 Mr Thomas was placed under an 'interim' control order after he was acquitted of terrorism-related charges. The 'interim' order lasted for 12 months and was never confirmed. The control order subjected Mr Thomas to house arrest for 5 hours each day, required him to report to police three times a week, give his fingerprints and not to leave Australia among other things. In 2007 Mr Hicks was subjected to an ex parte 'interim' control order in similar terms to that made against Mr Thomas. It also imposed significant restrictions as to where Mr Hicks could live, who he could associate with, where he could travel, and restricted his ability to communicate via telephone, email and the internet. The control order was confirmed, with some of the conditions eased, in February 2008 without any of the evidence on which the interim order was made being tested. The order was allowed to lapse 12 months later.

enacted in a jurisdiction that has the *Human Rights Act 1998*. The UK's regime has been heavily criticised<sup>213</sup> and numerous legal judgments have declared the regime to breach the right to liberty, the right to a fair trial and the right to a private life. The current UK Government has recently pledged to repeal the current control order regime and replace it with a scheme that is intended to bring it more into line with human rights.<sup>214</sup> In addition, under the UK legislation the focus is meant to be on prosecuting people for terrorism offences, and only if that fails should a person be subjected to a control order. This is something that is not featured in the Australian legislation. In contrast, as has been seen in the case of Mr Thomas who was acquitted of terrorism-related offences and then put under a control order, the Australian regime seems designed almost to apply *instead* of the criminal law. This is completely contrary to the normal principles of the rule of law.

151. Given the very real and extreme impact on fundamental human rights that the control order regime can have on individuals, including the presumption of innocence, the right to liberty, freedom of movement, freedom of expression, freedom of association and the right to privacy, the National Action Plan must address this issue and incorporate priorities for change in this area. While to our knowledge there is no one currently under a control order, the mere fact that these powers are available in legislation raises serious concerns and sends a terrible message about Australia's commitment to human rights.

**Priorities for inclusion in the National Action Plan**

1. Repeal Division 104 of the Criminal Code relating to control orders.
2. If Division 104 is not repealed in its entirety, at a minimum the following amendments should be made:
  - a) the ability to make an 'interim' control order on an ex parte basis should be removed;
  - b) introduce a requirement that the order only remain in place pending investigations for prosecution;
  - c) remove the ability to impose an order for having trained with a terrorist organisation (as this should be dealt with as a criminal offence); and
  - d) restrict the conditions that can be placed on a person to ensure there can be no 'house-arrest' or the imposition of internal exile (with a requirement to live far away from family members).

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<sup>213</sup> See From 'War' to Law": Liberty's Response to the Coalition Government's Review of the Counter-Terrorism and Security Powers 2010, July 2010, at Chapter 1, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf>.

<sup>214</sup> See Home Office Review of Counter-Terrorism and Security Powers – Review Findings and Recommendations, Cm 8004, January 2011, available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary>.

#### 10.4 Pre-charge Detention

152. Under Part 1C Division 2 of the Crimes Act., suspects can be detained without charge for questioning regarding terrorism and other serious Commonwealth offences. Non-terrorism suspects may be held for four hours, which can be extended by another eight hours (12 hours in total).<sup>215</sup> Terrorism suspects may be held initially for four hours, which can be extended by another 20 hours (24 hours in total).<sup>216</sup>
153. However, the actual time spent in detention may be significantly longer as certain periods, known as 'dead time', may be disregarded from the investigation period. Originally there was no cap on this period of time so that time could be disregarded because of a suspension or delay in questioning or to complete the investigation. Following amendments in 2010 a cap of seven days was set on the amount of 'dead time' that could be applied, and greater procedural requirements requiring a magistrate to grant an extension of time were imposed.<sup>217</sup> In effect this allows for a person to be detained before charge for a total of 8 days.
154. While the cap of eight days is clearly preferable to an unlimited period of time, this period is still far out of line with the limit of 12 hours applied to suspects for non-terrorism related offences. This detention applies before a person has been charged with any offence. The moment of 'charge' is extremely important as it marks the true beginning of criminal proceedings. Before a person is charged they are not formally accused of an offence and the detention is based on police suspicion rather than evidence that could stand a reasonable prospect of conviction. It is inevitable that the police will arrest those who they later do not find sufficient evidence with which to charge. The consequences of such actions will only be increased the longer the period of time a person can be detained without charge. It is due to the injustices that can inevitably arise from lengthy pre-charge detention that Australian law has required a suspect to be charged, or released, within a matter of hours or days. The effect on a person's right to liberty, presumption of innocence, freedom of movement, right to privacy and so on is extremely affected by lengthy pre-charge detention. Eight days detention is still far too long in the case of those who have not been charged with any offence and we trust that the National Action Plan will address this concern.

#### **Priorities for inclusion in the National Action Plan**

Amend the Crimes Act to remove the 'reasonable dead time' power and cap pre-charge detention in terrorism cases to ensure pre-charge detention does not exceed 48 hours.

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<sup>215</sup> See current *Crimes Act 1914* (Cth) ss 23C(4) and 23D(5).

<sup>216</sup> See current *Crimes Act 1914* (Cth) ss 23CA(4) and 23DA(7).

<sup>217</sup> See *National Security Legislation Amendment Act 2010* (Cth).

## 10.5 Banned Terrorist Organisations

155. Under the Criminal Code<sup>218</sup> the Attorney-General can ban an organisation when he or she is satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act or advocates the doing of a terrorist act. 'Advocates' the doing of a terrorist act includes 'praising' the doing of a terrorist act where there is a 'substantial risk' that the praise might lead to a person engaging in a terrorist act. This applies regardless of any mental impairment a person may have who hears the 'praise'. There is no need for the organisation to be actively involved in a terrorist act or for a terrorist act to occur as a result of the praise.
156. The definition is unworkably broad and disproportionate, as it allows an organisation to be banned where there is merely a substantial risk that 'praise' could, in the future, trigger a response from any individual, regardless of whether the individual hearing the praise was acting reasonably. This is particularly concerning given the effects that flow from the banning – where it becomes an offence for anyone to be associated with the banned organisation.<sup>219</sup>
157. While governments can legitimately ban organisations that seek to incite or encourage violence, banning organisations on the basis of the vaguely expressed views of the organisation that may or may not have an effect on any reasonable or unreasonable listener raises real concerns regarding freedom of expression and association. Proscription is a means of state censorship, and if it is to be carried out it must be reasonable and proportionate in a democratic society. As currently drafted, while the powers of proscription under this heading may not often be used, it likely has a chilling effect on freedom of expression. We are not better protected by criminalising individuals on the basis of association rather than intention and actions. Unnecessarily prohibiting political and religious expression seriously undermines fundamental democratic principles and may only serve to drive political opposition underground.
158. We believe, in line with the recommendations of the Security Legislation Review Committee<sup>220</sup> (the '**Sheller Committee**') that the provision including 'praising' a terrorist act is overly broad and could lead to banning non-violent organisations simply because a member of the organisation praised a terrorist act, without any intention of inciting violence. While we may vehemently disagree with the views of anyone who praises such violence, criminalising the expression of these views is a disproportionate interference with the right to freedom of

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<sup>218</sup> *Criminal Code Act 1995* (Cth), div 102.

<sup>219</sup> *Criminal Code Act 1995* (Cth), s 102.7.

- expression. The National Action Plan, in considering the importance of the right to free expression in our democracy must include steps to enhance this freedom, including recommending steps to be taken to amend these legislative provisions.
159. Further, the process by which a decision is made to proscribe an organisation is non-transparent, and the merits of proscribing an organisation cannot be reviewed. In 2006, the Sheller Committee considered the current process of proscription and included recommendations that the process be reformed to:<sup>221</sup>
- (a) provide notification, if it is practicable, to a person, or organisation affected, when the proscription of an organisation is proposed;
  - (b) provide the means, and right, for persons and organisations, to be heard when proscription is being considered; and
  - (c) provide for the establishment of a committee to advise the Attorney-General on cases that have been submitted for proscription of an organisation.
160. We also believe that if a decision is made by the Attorney-General to proscribe an organisation, members of that organisation must be given an opportunity to seek independent merits review of that decision. Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is confined to review of the legal process by which the decision was made. The absence of merits review is particularly concerning given the serious consequences of proscription, including potential infringement of fundamental rights such as freedom of expression and the potential criminalisation of association.

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<sup>220</sup> Security Legislation Review Committee, *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Criminal Code Act 1995* (Cth), *Report of the Security Legislation Review Committee* (2006) ('**Sheller Committee Report**'), p 21 and 73.

<sup>221</sup> *Ibid.*, p 9.

**Priorities for inclusion in the National Action Plan**

1. Repeal paragraph 102.1(1A)(c) of the Criminal Code to remove 'praise' of a terrorist act as being a ground on which an organisation can be proscribed as a terrorist organisation.
2. Amend the Criminal Code to allow decisions of the Attorney-General relating to proscribing terrorist organisation to be subject to independent merits review by the Administrative Appeals Tribunal (with the legislation providing that a successful appeal will void the provisions in the regulations that proscribed the organisation).

**10.6 Definition of 'Terrorist Act'**

161. The Criminal Code contains an extremely broad definition of 'terrorist act'. The definition not only includes actions that causes serious harm or death to individuals, but also includes acts which "involve serious damage to property", which "seriously interferes with, seriously disrupts or destroys an electronic system" and action "which creates a substantial risk to the health or safety of the public or a section of the public". We believe that attacks on property, whatever the motivation, should be subject to the existing criminal law. If a person damages an uninhabited building, their act should not be considered that of a terrorist. The HRC and the United Nations Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (the Special Rapporteur) have similarly expressed concern with the definition. In 2006, the Special Rapporteur strongly urged Australia to reconsider the definition, which fails to clearly distinguish between terrorist conduct and ordinary criminal conduct. The Special Rapporteur was of the view that the "definition goes beyond the UN Security Council's characterisation of the type of conduct which should be targeted in countering terrorism".<sup>222</sup> In particular, by including these acts that, while undoubtedly criminal in nature, the Special Rapporteur noted this "should not be brought within a framework of legislation intended to counter international terrorism unless that conduct is accompanied by an intention to cause death or serious bodily injury".<sup>223</sup> Similarly, the HRC recommended in its 2009 Concluding Observations that Australia should address "the vagueness of the definition of terrorist act in the Criminal Code, in order to ensure that its application is limited to offences that are indisputably terrorist offences".<sup>224</sup>
162. It is vital that the definition of a 'terrorist act' is drawn as tightly as possible as a number of important consequences result from the question of whether or not a particular action falls

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<sup>222</sup> M 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*, [15], UN Doc A/HRC/4/26/Add.3 (2006).

<sup>223</sup> *Ibid.*, [16].

<sup>224</sup> HRC, above n 32, [11].

within the definition. Continuing to have an overbroad definition can have wide-ranging impacts on all areas within counter-terrorism, including in relation to preventative detention orders, control orders, the banning of 'terrorist organisations' and so on – many of the problems with which are set out above. Given the serious consequences for human rights with such an overbroad definition we believe the National Action Plan must recommend steps to be taken to narrowly define this important term.

**Priorities for inclusion in the National Action Plan**

Amend the definition of 'terrorist act' in the Criminal Code to ensure it is properly confined to acts which are indisputably terrorist acts, and not merely general criminal acts.

**10.7 Bail**

163. The usual rules on bail for a person charged with an offence are that bail will be granted unless reasons are demonstrated by the prosecutor as to why it should not be granted. In terrorism cases however, section 15AA of the Crimes Act provides that bail for someone charged with a terrorism-related offence will not be granted unless exceptional circumstances exist to justify the grant of bail.<sup>225</sup> This reversal of the usual presumption in favour of bail heavily impacts on a person's right to be presumed innocent until proven guilty and the *ICCPR* which provides "It shall not be the general rule that persons awaiting trial shall be detained in custody".<sup>226</sup> The HRC has recently recommended that Australia's counter-terrorism legislation be addressed to ensure the notion of 'exceptional circumstances' does not create an automatic obstacle to release on bail.<sup>227</sup>

**Priorities for inclusion in the National Action Plan**

Amend section 15AA of the Crimes Act to remove the reversal of the presumption against bail.

**10.8 Expanded Powers to Stop and Search**

164. In 2005 powers were introduced which greatly expanded the power of the AFP, along with police officers from the states and territories, to stop and search people in relation to investigating and preventing terrorist acts.<sup>228</sup> The traditional approach to powers of the police to stop and search individuals require a police officer to form a reasonable suspicion of some form of criminality before the power is exercised. This need for 'reasonable suspicion' acts as

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<sup>225</sup> As amended by the *Anti-Terrorism Act 2004* (Cth).

<sup>226</sup> See Article 9(3).

<sup>227</sup> HRC, above n 32, [11].

- a safeguard against abuse as it offers a direct standard against which the exercise of police powers can be tested. The exceptional powers introduced in 2005 are of great concern as they allow for stop and search without the need for any suspicion.
165. Under these provisions the Attorney-General has the power to declare a 'prescribed security zone' if the Attorney-General considers that this will help prevent a terrorist act or help respond to a terrorist act. The police can use their stop, search, questioning and seizure powers on anyone in the prescribed security zone, regardless of whether the police officer has a reasonable suspicion that the person has committed, is committing or is planning to commit a terrorist act. The zone can be designated for up to 28 days and there is no limit on the size of the area that can be designated (just that it be in a 'Commonwealth place' – being a place where the Federal Government has the power to make laws).
166. These laws seem to be modelled on similar powers in the UK, which have recently been ruled to unlawfully breach human rights.<sup>229</sup> In the UK the powers have been disproportionately used against peaceful protesters and ethnic minorities. In the UK it has been demonstrated that black and Asian Britons are between 5 and 7 times more likely to be stopped and searched under these powers than their white counterparts.<sup>230</sup> The UK Government has recently recognised the inherent problems with this power and has pledged to repeal it and introduce a far more tightly prescribed power.<sup>231</sup>
167. Under the Australian powers the Attorney-General is not required to publish reasons explaining why it was necessary to declare a prescribed security zone and there is no mechanism for independent review of the use of these powers. The UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has expressed concern that the duration of the declaration of a prescribed security zone (28 days) could lead to potentially unnecessary or disproportionate interferences with liberty and security and could impact on the right to undertake lawful demonstrations.<sup>232</sup> Given the potential effect if this power were overused (as it was in the UK) on the right to privacy, the right to peaceful protest,

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<sup>228</sup> See *Crimes Act 1914* (Cth), ss 3UA- 3UK, as amended by the *Anti-Terrorism Act (No.2) 2005* (Cth).

<sup>229</sup> See *Terrorism Act 2000* (UK), s 44 and *Gillan and Quinton v United Kingdom* (Application no. 4158/05), European Court of Human Rights, 12 January 2010.

<sup>230</sup> For example, statistics have revealed that of those stopped and searched under s44, 17.7% of the people stopped in England and Wales were identified by the police as Asian, as against 4.7% of the population. 63.1% of those stopped and searched were identified as White, as against 91.3% of the population. See The Ministry of Justice Statistics on Race and the Criminal Justice System 2007/8, available at: <http://www.justice.gov.uk/publications/docs/stats-race-criminal-justice-system-07-08-revised.pdf>

<sup>231</sup> See Home Office Review of Counter-Terrorism and Security Powers – Review Findings and Recommendations, Cm 8004, January 2011, available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary>.

<sup>232</sup> 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), [30].

the right to freedom of movement and liberty and the effect on race-relations, we believe the National Action Plan must consider actions that can be taken to reduce these concerns.

**Priorities for inclusion in the National Action Plan**

Amend Division 3A of the Crimes Act to heavily circumscribe the power to declare a 'prescribed security zone' and introduce safeguards against misuse. In particular, this should limit the time by which such a designation should last to no more than 24 hours, be confined to a specific area and ensure that such a designation can only be made when it is reasonably necessary to prevent acts of terrorism.

**10.9 Conditions of Detention**

168. The type, length, conditions and effects of the detention of a number of individuals charged with various offences under Australia's counter-terrorism laws have amounted to serious ongoing human rights violations. Of particular concern is the situation of 12 detainees who were charged with various terrorist offences under the anti-terror provisions of the Criminal Code.
169. 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>233</sup> The Working Group expressed significant concerns in relation to:
- (a) the 'particularly severe' conditions of detention, especially taking into account that the detainees had not been found guilty and were therefore presumed to be innocent;<sup>234</sup>
  - (b) the 'extraordinarily restrictive conditions' of detention prescribed for any person charged with a terrorist offence;<sup>235</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.<sup>236</sup>
170. The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has also expressed serious concern

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<sup>233</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>234</sup> *Ibid.*, [22].

<sup>235</sup> *Ibid.*, [26].

<sup>236</sup> *Ibid.*

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>237</sup>

171. The conditions of detention of the 12 detainees was also 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 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>238</sup>

172. The presumption against bail, the length of pre-trial detention and the oppressive conditions of detention raise significant human rights issues such as the prohibition on arbitrary detention and the prohibition against ill-treatment, as well as various provisions of the *Standard Minimum Rules for the Treatment of Prisoners*<sup>239</sup> and the *Basic Principles for the Treatment of Prisoners*.<sup>240</sup> The National Action Plan must address this issue and recommend actions for change.

#### **Priorities for inclusion in the National Action Plan**

Immediately review the conditions of detention for terrorism suspects and work with state and territory governments to ensure such detention is in line with international human rights standards.

## **11. Mental Health Care**

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173. Mental health services are significantly under-resourced in Australia and there are widespread problems with access to care, quality of care and adequate accommodation for people

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<sup>237</sup> See M 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).

<sup>238</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>239</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>240</sup> GA Res 45/111, 45<sup>th</sup> sess, 68th plen mtg, UN Doc A/RES/45/111 (1990).

- requiring mental health services. 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>241</sup>
174. This 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>242</sup> These findings are supported by a series of state-based reports into the adequacy of mental health services.<sup>243</sup>
175. In 2009 the HRC noted its concern with the insufficient support for persons with mental health problems, as well as the difficult access to mental health services, in particular for Aboriginal and Torres Strait Islander peoples, prisoners and asylum seekers in detention.
176. 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>244</sup> The relative ease with which involuntary detention is currently imposed on individuals raises concerns with the right to be free from arbitrary detention.
177. 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>245</sup> 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.
178. The failure of many mental health review bodies to conduct timely external reviews of the involuntary detention of persons raises serious concerns. Indeed, the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental*

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<sup>241</sup> Senate Select Committee on Mental Health, *A National Approach to Mental Health*, [3.18].

<sup>242</sup> *Ibid.*, p 185.

<sup>243</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, *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>244</sup> Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health*, p 37.

<sup>245</sup> V Topp and M Thomas, 'Advance Directive for Mental Health', (2008) *New Paradigm*.

- Health Care* provide that initial involuntary admission shall be for a 'short period' pending external review<sup>246</sup> and that the review shall take place 'as soon as possible'.<sup>247</sup>
179. However, most Australian jurisdictions fail to comply with these principles.<sup>248</sup> For example, in Victoria and Western Australia, the period within which initial automatic review must take place is 8 weeks,<sup>249</sup> in Queensland it is 6 weeks,<sup>250</sup> South Australia 45 days<sup>251</sup> and Tasmania 28 days.<sup>252</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>253</sup>
180. 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>254</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>255</sup> This issue is compounded by an inability to access legal representation to assist individuals to challenge their treatment order.

#### **Priorities for inclusion in the National Action Plan**

1. Allocate adequate resources for mental health services and other support measures for persons with mental health problems in line with the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.
2. Implement the recommendations of the Australian Medical Association's 2008 report on Aboriginal and Torres Strait Islander health.
3. 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.
4. Reduce the high rate of incarceration of people with mental diseases.

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<sup>246</sup> UN Principles, Principle 16.2.

<sup>247</sup> *Ibid.*, Principle 17.2.

<sup>248</sup> See generally, S Delaney, 'An Optimally Rights Recognising Mental Health Tribunal – What Can Be Learned from Australian Jurisdictions', (2003) 10 *Psychiatry, Psychology and Law* 71.

<sup>249</sup> *Mental Health Act 1986* (Vic). s 30; *Mental Health Act 1986* (WA), s 138.

<sup>250</sup> *Mental Health Act 2000* (Qld), s 187.

<sup>251</sup> *Mental Health Act 1993* (SA), s 12.

<sup>252</sup> *Mental Health Act 1996* (Tas), s 52.

<sup>253</sup> Auditor-General for Victoria, *Mental Health Services for People in Crisis* (2002), 8.

<sup>254</sup> *Mental Health Act 1986* (Vic), s 30.

<sup>255</sup> Delaney, above n 248, 76.

5. Ensure that all detainees receive an adequate and appropriate mental health treatment when needed.
6. Increase engagement with community health providers by prisons, which would improve continuity of care and facilitate reintegration into the community.
7. Increase resource allocation for diagnosis, treatment and prevention of mental illnesses within prisons and immigration centres and assess and invest in the primary health care sector throughout the prison system and immigration detention system.
8. Provide specialist mental health and psychiatric services on Christmas Island.
9. Ensure all jurisdictions ensure that mental health involuntary admissions are for as short as period as possible pending external review.

## 12. Children's Rights

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181. Despite Australia's ratification of the United Nations Convention of the Rights of the Child ('**CRC**') in 1990, Australia does not have a comprehensive national policy framework for children. There has been a lack of integration of children's rights into Australian law, and no appropriate and effective mechanism exists to ensure the "coherence and compliance of all jurisdictions"<sup>256</sup> in Australia for the protection of children's rights.
182. In 2005, the United Nations Committee on the Rights of the Child ('**CRC Committee**') noted that "there is no comprehensive policy at national level for children specifically addressing human rights issues that may impact on them,"<sup>257</sup> and also noted the need for more effective monitoring.<sup>258</sup> Without a human rights framework for children, Australia fails to effectively set benchmarks or measure progress – particularly to improve the circumstances of Aboriginal and Torres Strait Islander children – and disadvantage and abuse is not consistently monitored or addressed. For example, Aboriginal and Torres Strait Islander children continue to experience high levels of abuse, neglect and exploitation.<sup>259</sup> In many areas, Australia still lacks the necessary data regarding the health and wellbeing of Aboriginal and Torres Strait Islander children. This lack of data inhibits progress to be made in overcoming

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<sup>256</sup> CESCR, above n 33, [11].

<sup>258</sup> CESCR, above n 33, [16].

<sup>259</sup> L Chenoweth, *Children with Disabilities: What evidence do we have for better practice?*, September 2002, available at [http://www.acwa.asn.au/Conf2002/Conf\\_proceedings/04%20Lesley%20CHENOWETH.doc](http://www.acwa.asn.au/Conf2002/Conf_proceedings/04%20Lesley%20CHENOWETH.doc). Many children, including those with disability, continue to experience severe disadvantage due to lack of supports and services.

disadvantage.<sup>260</sup> Only with reliable data against internationally recognised measures, we can accurately direct resources to the areas of the greatest need and ensure that prevention and intervention strategies are implemented and effective.

183. Aboriginal and Torres Strait Islander children continue to suffer significant disadvantage in the enjoyment of human rights. The Committee on the Rights of the Child has called on Australia to “take all possible measures to raise the standard of living of Indigenous children and children living in rural and remote areas.”<sup>261</sup> In March 2010, the UN Special Rapporteur on Indigenous Peoples<sup>262</sup> (Special Rapporteur) reported the following areas of significant disadvantage faced by Aboriginal and Torres Strait Islander peoples:

- **Health and wellbeing:** The living conditions of many Aboriginal and Torres Strait Islander children increase the risk of lower standards of health and wellbeing<sup>263</sup>. There are still significantly higher infant mortality rates compared with the rest of the population. Efforts at improvement are further impeded by the lack of culturally appropriate health services available for Aboriginal and Torres Strait Islander peoples.
- **Education:** Adequate education is lacking and is hampered not only by the accessibility of services but also by the lack of training and provision of bilingual teachers and culturally adequate education programs in remote areas.
- **Abuse and violence:** Many Aboriginal and Torres Strait Islander children continue to experience high rates of abuse and violence and poor living conditions. The government has yet to adequately support culturally-appropriate child care and child protection strategies.
- **Over-representation in the criminal justice system:** Aboriginal and Torres Strait Islander children continue to be alarmingly over-represented in the justice system, being 28 times more likely to be incarcerated than non-Indigenous children. Access to justice is poor in remote areas and is contributed to by inadequate provision of culturally appropriate justice services.

184. The establishment of a national children’s commissioner in Australia was the subject of a number of recommendations of the UN Human Rights Council during the UPR. A national children’s commissioner would assist in addressing some of the issues described above.<sup>264</sup>

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<sup>260</sup> Australian Research Alliance for Children & Youth, *The ARACY Report Card on the Wellbeing of Young Australians: Technical Report* (2008), p 14.

<sup>261</sup> CESCR, above n 33. [57].

<sup>262</sup> J Anaya, UN Special Rapporteur Report: ‘The situation of Indigenous Peoples in Australia’ (4 March 2010).

<sup>263</sup> The Australian Parliament Senate Committee on Regional and Remote Indigenous Communities found in its 2008 Report that children in Indigenous communities still too often lived in poverty, unhygienic conditions, poor quality housing and without access to appropriate food and water.

<sup>264</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.28 and 86.29.

**Priorities for inclusion in the National Action Plan**

1. Develop a comprehensive national policy framework for the protection and promotion of the rights of children.
2. Appoint an independent national children's commissioner which should include a mandate to monitoring implementation of the CRC.
3. Enact stronger legislative protections and enforcement for children.
4. Review and implement each of the recommendations made by the UN Committee on the Rights of the Child and the Special Rapporteur in real partnership with Aboriginal and Torres Strait Islander peoples.
5. Ensure no child is held in immigration detention or immigration-like detention.
6. Provide adequate funding to address school bullying.

## **12.1 Juvenile Justice System**

185. 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>265</sup>
186. The inquiry received extensive evidence of the problems and failures of legal processes for children. This included evidence of:<sup>266</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;

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<sup>265</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>266</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).

- (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.
187. 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.
188. 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 *CRC*. 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 *CRC*. Article 37(b) of the *CRC* also requires that children be deprived of liberty only as a last resort and for the shortest appropriate period of time. Despite these principles, mandatory sentencing laws continue to operate in Western Australia which have a particular impact on young people, especially young Indigenous people.
189. 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.
190. Australia's mandatory sentencing laws have previously been the subject of criticism by the *CRC* Committee and the *CERD* Committee.<sup>267</sup> Indeed, in its 2000 Concluding Observations on Australia, the *CERD* Committee 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>268</sup>
191. There is a range of other, more suitable sentencing options, such as:
- (a) conferencing schemes, which involve the offender meeting with the victim;

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<sup>267</sup> Committee on the Rights of the Child, *Concluding Observations: Australia*, [73]–[74], UN Doc CRC/C/15/Add.268 (2005) ('**CRC Committee**'); 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>268</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).

- (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.
192. 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>269</sup>
- (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.
193. 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 contravention of the principle that children should be detained as a matter of last resort.<sup>270</sup>
194. Children continue to be held in adult facilities across Australia. In particular, children in remote and regional areas face the most time in adult lock-ups and remand centres. 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>271</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>272</sup>

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<sup>269</sup> *Seen and Heard Report*, above n265, recommendation 228.

<sup>270</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, Article 37(b) (entered into force 2 September 1999).

<sup>271</sup> *Juvenile Justice Act 1992* (Qld), sch 4.

<sup>272</sup> *Children (Detention Centres) Act 1987* (NSW), s 28.

195. 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>273</sup> and also raises issues under Article 14(4) of the *ICCPR*.

**Priorities for inclusion in the National Action Plan**

1. Review and implement the recommendations of the Australian Law Reform Commission and the AHRC report *Seen and Hear: Priority for Children in the Legal Process*.
2. Consider raising the minimum age of criminal responsibility from 10 to an internationally acceptable level.
3. Take steps to reverse the increase in numbers and length of stay of juveniles in detention (both sentenced and in remand).
4. Ensure all jurisdictions in Australia apply juvenile justice legislation to under 18-year-olds.

## 12.2 Forced Sterilisation of Children with Disability

196. 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>274</sup> The CRC Committee 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 the child to her or his physical integrity and results in adverse life-long physical and mental health effects'.<sup>275</sup>
197. HREOC also expressed similar concerns in its 2001 report, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress*.<sup>276</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-

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<sup>273</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).

<sup>274</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).

<sup>275</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>276</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).

- 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>277</sup>
198. In its previous Concluding Observations, the CRC Committee encouraged Australia to 'prohibit the sterilisation of children, with or without disability'.<sup>278</sup> Despite this, Australian legislation still fails to prohibit forced sterilisation.
199. 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, *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>279</sup>
200. During the UPR, several states recommended that Australia act to prevent the non-therapeutic sterilisation of women and girls with disabilities.<sup>280</sup>

**Priorities for inclusion in the National Action Plan**

Legislate to prohibit the sterilisation of children, including children with disabilities.

### 12.3 Curfews

201. 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>281</sup> This recommendation has not been implemented.
202. 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>282</sup> In Victoria, statutory provisions allow for the imposition of curfews on youth offenders as conditions of certain orders.<sup>283</sup> In Western Australia, the entertainment district of Northbridge has a 'curfew' that

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<sup>277</sup> *Ibid.*, Chapter 6.

<sup>278</sup> CRC Committee, above n 267, [46(e)].

<sup>279</sup> L Dowse and C 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>280</sup> See Human Rights Council, UPR, above n 37, recommendation at 86.39.

<sup>281</sup> *Seen and Heard Report*, above n 265, recommendation 205.

<sup>282</sup> *Children (Protection and Parental Responsibility) Act 1997* (NSW).

<sup>283</sup> See, for example, *Children and Young Person's Act 1989* (Vic), s 144(3)(d).

- seeks to prevent children (particularly Indigenous children) from being in the district unaccompanied during certain hours of evening and night.<sup>284</sup>
203. A report undertaken in Sydney in the early 1990s surveyed a group of young people and found that a staggering 80% had been stopped and spoken to by the police in public spaces. A further 50% had been taken to the police station.<sup>285</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>286</sup>
204. The picture has not improved since the 1990s; in fact, with the introduction of move-on orders in many jurisdictions<sup>287</sup> and the mooting of anti-social behaviour orders,<sup>288</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>289</sup>

**Priorities for inclusion in the National Action Plan**

Laws permitting preventative apprehension or restricting movement of persons not suspected of any crime (particularly those targeting children) should be repealed.

### 13. Housing and Homelessness

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205. According to the most recent ABS statistics, at least 105,000 people experience homelessness across Australia on any given night (53 in 10,000 of the population).<sup>290</sup> This figure has been steady over the past two census periods, indicating current measures are not producing a positive net effect in reducing homelessness in Australia.<sup>291</sup> The causes of homelessness in Australia are multiple and interrelated and include an acute shortage of

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<sup>284</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 A Copeland and J Goodie, 'The Child, the Young Person and the Law' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (2008), p 158.

<sup>285</sup> C Alder *et al*, *Perceptions of the Treatment of Juveniles in the Legal System*, (1992).

<sup>286</sup> H Blagg and M Wilkie, *Young People and Police Powers*, (1995), The Australian Youth Foundation.

<sup>287</sup> Move-on notices have been introduced in Western Australia, South Australia, Tasmania, Australian Capital Territory, Queensland and the Northern Territory.

<sup>288</sup> Anti-social behaviour orders have been considered by Western Australia, and are in place in the Northern Territory.

<sup>289</sup> See M Taylor and T Walsh (eds), *Nowhere to Go: The Impact of Police Move-on Powers on Homeless People in Queensland* (2006) 72 available at [http://www.gpilch.org.au/dbase\\_upl/Nowhere%20To%20Go.pdf](http://www.gpilch.org.au/dbase_upl/Nowhere%20To%20Go.pdf), p 23.

<sup>290</sup> *Counting the Homeless 2006*, Australian Bureau of Statistics, p vii.

<sup>291</sup> *Counting the Homeless 2006*, Australian Bureau of Statistics, p vii.

affordable housing, unemployment, poverty, discrimination, structural inequalities and family violence, as well as individual hardships such as physical and mental health issues, contact with the criminal justice system and experiences with state care and child protection systems. The shortage of housing is a key cause of homelessness in Australia. There are 173,000 households on waiting lists for public housing in Australia<sup>292</sup> and the wait can be up to 15 years. In 2009, there was a deficit of 493,000 affordable dwellings for people with the lowest incomes.<sup>293</sup> Recent Government initiatives have made significant investments in social and affordable housing, but this does not offset the decline in stock over preceding decades. The fact that the number of homeless Australians continues to rise indicates that Australia has failed to implement the right to adequate housing.

206. Homelessness is a human rights issue. Yet, to date Australia has not acknowledged Australia's homeless situation as a human rights issue. It does not recognise that 105,000 homeless Australians represent a failure to protect the human right to adequate housing; or that these Australians also face other human rights breaches, including of their rights to privacy, health, education, public participation, liberty, security, freedom from inhuman and degrading treatment, access to justice, exercise of civil and political rights and freedom from discrimination.
207. Homelessness is both a cause and a consequence of poverty and other human rights violations. The Special Rapporteur on Adequate Housing has stated that "homelessness is often, in addition to social exclusion, a result of human rights violations in diverse forms, including discrimination on the basis of race, colour, sex, language, national or social origin, birth or other status".<sup>294</sup> Homelessness also impacts certain groups in society more profoundly, in particular women, children, young people, Indigenous people and persons with a disability, including persons with a mental illness.
208. There is a strong positive correlation between a state's respect for human rights and that state's success in addressing homelessness and poverty. The effective protection and promotion of human rights can ensure the underlying enabling conditions of social inclusion, meaningful participation and empowerment.<sup>295</sup> An effective, workable and practical response to homelessness therefore requires government to address the range of human rights issues

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<sup>292</sup> Productivity Commission, *Report on Government Services 2010* (2010) available at <http://www.pc.gov.au/gsp/reports/rogs/2010>.

<sup>293</sup> National Housing Supply Council, Australian Government, *National Housing Supply Council – 2<sup>nd</sup> State of Supply Report* (2010) p 103.

<sup>294</sup> M Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* (E/CN.4/2005/48), [3].

<sup>295</sup> See generally, A Sen, *Development as Freedom* (1999) 49, 87, 90, 144; UN OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004); UN OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002).

- that relate to homelessness. Under a human rights-based approach, homelessness is not an individual problem, but a community matter which engages the responsibilities of the state.<sup>296</sup> It recognises that, in responding to homelessness, governments must do more than abstain from interfering with rights; governments must take pro-active steps to ensure the enjoyment of all rights by members of the community.<sup>297</sup>
209. The right to adequate housing is 'of central importance for the enjoyment of all economic, social and cultural rights'.<sup>298</sup> The UN Committee on Economic, Social and Cultural Rights has stated that all individuals and families are entitled to enjoy adequate housing, without discrimination on the basis of age, economic status, group or other affiliation or status.<sup>299</sup>
210. Australia does not have national legislation that protects the right to adequate housing. In December 2008, the Australian Government released its White Paper on Homelessness, *The Road Home: A National Approach to Reducing Homelessness*, which recommended the enactment of national legislation to ensure that people who are homeless or at risk of homelessness receive quality services, adequate support to meet their needs and are treated with dignity and respect. Further, in 2009, a bipartisan Parliamentary Committee recommended the enactment of a national Homelessness Act which enshrines the right to adequate housing. Despite this, Australia has to date failed to specifically recognise the right to adequate housing in domestic law. The lack of a comprehensive legal framework to respond to homelessness prevents the progressive realisation of the right to adequate housing in Australia.
211. There needs to be a human rights-based approach to the issue of homelessness in order to address the complex human rights issues that homelessness raises. In particular, Australia has obligations under international human rights law to respect, protect and fulfil a range of human rights, including the right to adequate housing. This means that the Australian Government must establish a housing system:
- that provides legal security of tenure;
  - where services, materials and infrastructure are available; and
  - in which housing is affordable, habitable, accessible, located near amenities and culturally appropriate.

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<sup>296</sup> P Lynch and J Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4 *Melbourne Journal of international Law* 139, 173.

<sup>297</sup> *Ibid.*, 175.

<sup>298</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art 11(1))* UN Doc E/1992/23, [1].

<sup>299</sup> *Ibid.*, [6].

212. The right to adequate housing also requires proper protection against forced or arbitrary evictions and the prohibition of all forms of discrimination in access to housing. Equality and non-discrimination form part of the core of the right to adequate housing.<sup>300</sup> Discriminatory access to housing will also affect other human rights, such as the right to freedom of movement and residence.<sup>301</sup> Protection of equality against discrimination is particularly important given that homelessness has been found to disproportionately affect women, children, Indigenous Australians and the mentally ill.<sup>302</sup>
213. The National Action Plan must acknowledge that Australia's homelessness situation is a human rights issue. It should ensure that homelessness is properly addressed in the National Action Plan and, based on the numerous reports already undertaken in this area in recent years, agree on specific action points to address this important human right. Particular regard should be had to the recommendations of the HRC,<sup>303</sup> the CESCR<sup>304</sup> and of the Special Rapporteur on the Right to Adequate Housing, and the recent House of Representatives Report into homelessness.<sup>305</sup>

**Priorities for inclusion in the National Action Plan**

1. Recognise Australia's obligations to progressively implement the right to adequate housing in legislation and policy.
2. Commit sustained funding for public and community housing which takes into account expected population increases.
3. Provide a greater range of emergency, transitional and public and community housing and relevant support services which recognise the needs of particular groups who are disproportionately affected by homelessness (including Aboriginal and Torres Strait Islander peoples, people in rural and remote areas, people suffering mental illness, victims of domestic violence, asylum-seekers, immigrants and people released from detention).

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<sup>300</sup> M Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, (E/CN.4/2006/41), Part 1, [9].

<sup>301</sup> ICCPR, Article 12.

<sup>302</sup> Australian Bureau of Statistics, *Counting the homeless 2001*, (2003)  
[http://www.ausstats.abs.gov.au/ausstats/free.nsf/Lookup/5AD852F13620FFDCCA256DE2007D81FE/\\$File/20500\\_2001.pdf](http://www.ausstats.abs.gov.au/ausstats/free.nsf/Lookup/5AD852F13620FFDCCA256DE2007D81FE/$File/20500_2001.pdf).

<sup>303</sup> See HRC, above n 32, [18].

<sup>304</sup> See CESCR, above n 33, [26].

<sup>305</sup> *Housing the Homeless: Report on the inquiry into homelessness legislation*, House of Representatives Standing Committee on Family, Community, Housing and Youth, November 2009, available at:  
<http://www.aph.gov.au/house/committee/fchy/homelessness/report/fullreport%20as%20at%2025%20Nov.pdf>

4. Reconsider the current home ownership model (including tax incentives such as negative gearing and capital gains tax) in regards to its contribution to diminished availability and affordability of housing.
5. Implement homelessness legislation to address the causes and consequences of homelessness and inadequate housing in Australia which should:
  - require the Australian Government to take reasonable legislative and other measures to progressively realise the right to adequate housing, as defined in international law;
  - provide priority to vulnerable groups through an immediately enforceable right of access to emergency accommodation. Within a 10 year period, this right should be progressively expanded to apply to all persons in need;
  - adequately protect persons from forced evictions, including providing for necessary procedural protection and effective remedies;
  - provide that rental for public housing be calculated by reference to the income of its occupants;
  - require that where resources are limited, priority for accommodation be given to those who are most vulnerable;
  - require that an applicant for housing be provided with reasons for any adverse decision with respect to the applicant's assessment and that the applicant be informed of his/her right of review;
  - provide for a range of remedies for breaches of the right to adequate housing; and
  - require the Australian Government to adopt a comprehensive national housing strategy that provides for (a) the upgrade of existing public and social housing; (b) the development of public, social and low cost housing, including by requiring developers to develop a certain volume of affordable housing; (c) accessibility to services, materials, facilities and infrastructure; (d) cultural needs; (e) protecting those that are in the most desperate of conditions and addressing any discrimination in access to adequate housing; and (f) genuine consultation and meaningful participation by persons who are homeless or at risk of homelessness and their representatives.
2. Establish a Housing Commission and appoint an independent Housing Commissioner to investigate and conciliate complaints relating to the right to adequate housing, and to investigate systemic issues.
3. Set appropriate structural, process and outcome indicators to monitor the progressive realisation of the right to adequate housing, in particular the enjoyment of the right by vulnerable groups.

## 14. Police

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### 14.1 Use of Force

214. There have been a number of concerning and high profile incidents involving excessive use of force by law enforcement officers in Australia, including the death of Mulrunji on Palm Island, the death of a Queensland man after he was Tasered up to 28 times and the shooting death of a 15-year-old boy by the Victoria Police.
215. Australia has been criticised in relation to use of force by law enforcement officers by the HRC. The HRC has called on Australia to:<sup>306</sup>
- (a) eradicate all forms of excessive use of force by law enforcement officials;
  - (b) bring proceedings against alleged law enforcement perpetrators;
  - (c) increase training on use of force and principles of proportionality;
  - (d) ensure TASERs only used when greater force would have been appropriate; and take steps to consider relinquishing the use of TASERs;
  - (e) bring legal provisions and policies on use of force in line with the *UN Basic Principles on Use of Force and Firearms*; and
  - (f) provide adequate reparation to victims.
216. Recently, the Human Rights Council, through the UPR, called on Australia to improve the human rights training provided to law enforcement officers, to take effective legal measures to prohibit the use of excessive force and TASERs and to ensure adequate and independent investigation of police use of force, police misconduct and police related deaths.<sup>307</sup>

#### **Priorities for inclusion in the National Action Plan**

1. Australia should use intergovernmental mechanisms to address use of force by law enforcement officers.
2. Through those mechanisms it should seek to establish mechanisms to:
  - a) eradicate all forms of excessive use of force by law enforcement officials;
  - b) bring proceedings against alleged law enforcement perpetrators;
  - c) increase training on human rights, use of force and principles of proportionality;
  - d) ensure TASERs are only used when greater force would have been appropriate, taking steps to consider relinquishing the use of Tasers;

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<sup>306</sup> See Human Rights Committee, above n32, [21].

<sup>307</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.96, 86.88 and 86.89

- e) bring legal provisions and policies on use of force in line with UN Basic Principles on Use of Force and Firearms; and
- f) Provide adequate reparation to victims.

#### 14.2 Stop and Search Powers

217. In addition to Australia's counter-terror legislation which expanded the power of the AFP (see section 10 above), legislation has been introduced and implemented in states and territories as part of a commitment towards "tackling the growing incidences of drunkenness, disorderly behaviour and violence".<sup>308</sup> Such legislation significantly extends the coercive powers available to police to search and apprehend individuals including, in some instances, without any need for suspicion on reasonable grounds regarding the commission of an offence. The legislation has had a disproportionate affect and impact on young, Aboriginal and Torres Strait Islander peoples, homeless and mentally ill individuals.

#### Priorities for inclusion in the National Action Plan

1. Intergovernmental mechanisms should be used to reinstate the need for suspicion on reasonable grounds that an offence has been committed as a standard all police search powers across Australia.
2. Greater resources should be put towards human rights-based education and training which advocates for a community-oriented solution to addressing the root causes of criminal behaviour such as disorderly behaviour and violence.

#### 14.3 Independent Investigations

218. Both the right to life and the freedom from torture and ill-treatment impose on the Government a positive obligation to adopt measures to safeguard life; in particular, to establish independent and effective procedures for the investigation and monitoring of the use of force, including deadly force, by state authorities such as the police.<sup>309</sup>

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<sup>308</sup> See, for example, the Summary Offences and Control of Weapons Acts Amendments Bill 2009 (Vic).

<sup>309</sup> *McCann v United Kingdom* (1996) 21 EHRR 97, [3], [188]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC, 653, [19]-[20]; *Osman v United Kingdom* (1998) 29 EHHR 245, [115]. The duty to investigate has been enshrined in the following international instruments: the CAT; the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions; the Code of Conduct for Law Enforcement Officials; and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ('**Basic Principles**'). In particular, the Basic Principles require governments and law enforcement agencies to establish effective reporting and review procedures for all incidents in which injury or death is caused by the use of force and firearms by law enforcement officials and

219. There is no comprehensive independent, effective and adequate system for the investigation of complaints about police in any Australian jurisdiction. Recently Queensland has made steps in the right direction. Following three coronial inquests into the death of Mulrunji Doomadgee in police custody on Palm Island, and serious misgivings about the investigation by the Queensland Police Service of that case, on 18 May 2010, the Crime and Misconduct Commission took over the role of investigating deaths in police custody from the Queensland Police Service.<sup>310</sup> Most complaints in other jurisdictions about police misconduct are investigated by other members of the same police force, and often by officers from the same police station. In Victoria, for example, only 1.2% of the most serious complaints of assault by police were substantiated as a result of police investigation.<sup>311</sup>
220. The Human Rights Council through the UPR recently recommended that Australia introduce a requirement that all deaths in custody be reviewed and investigated by independent bodies tasked with considering prevention of deaths and that the recommendations of Coronial investigations be implemented.<sup>312</sup> It also recommended the implementation of specific steps to combat the high level of deaths of indigenous persons in places of detention.<sup>313</sup> Similar recommendations have already been made by the Human Rights Committee.<sup>314</sup>

**Priorities for inclusion in the National Action Plan**

1. Establish human rights-compliant independent, effective police oversight mechanisms in each state and territory jurisdiction.
2. Implement a system whereby any death that occurs in police custody (and especially those concerning the death of an Aboriginal person) be investigated by an independent and impartial body.

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'access to an independent process' for persons affected by the use of force and firearms (see Articles 22 and 23 of the Basic Principles).

<sup>310</sup> This decision was made following findings from the coronial inquest into the death in custody of Mulrunji Doomadgee on Palm Island: Cameron Atfield, 'CMC to investigate custody deaths', *brisbanetimes.com.au*, 18 May 2010, available at <http://www.brisbanetimes.com.au/queensland/cmc-to-investigate-custody-deaths-20100518-vaxq.html>.

<sup>311</sup> Tamar Hopkins, cited in the Aboriginal and Torres Strait Islander Legal Services, *Joint Submission to the Human Rights Consultation* (June 2009), p 29.

<sup>312</sup> See Human Rights Council, UPR, above n 37, recommendation at 86.91

<sup>313</sup> See Human Rights Council, UPR, above n 37, recommendation at 86.90.

<sup>314</sup> See Human Rights Committee, above n 32, [21].

## 15. Equality and Non-Discrimination

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221. Enhanced protection of the right to equality must be central to the Government's human rights agenda. The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties.<sup>315</sup>
222. At present, these rights are not adequately protected in Australia. Federal anti-discrimination laws have they have significant shortcomings in that they:
- are reactive and complaints-based;
  - fail to actively promote equality or address systemic discrimination;<sup>316</sup>
  - do not address all grounds of discrimination or multiple discrimination;<sup>317</sup> and
  - are ineffective in areas that have been granted permanent exemptions.<sup>318</sup>
223. The National Human Rights Consultation Report noted that that “[a] large number of submissions focused on the inadequacies of anti-discrimination legislation” and recommended that the Government audit and amend anti-discrimination legislation to ensure that it complies with Australia's human rights obligations.<sup>319</sup>
224. Internationally, the HRC, the CESCR, the CEDAW Committee and the CERD Committee have all recommended that Australia strengthen its anti-discrimination laws.<sup>320</sup>

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<sup>315</sup> See, for example, *ICCPR*, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171, arts 2, 3, 26; *ICESCR*, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3, art 2; *CEDAW*, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13; *ICERD*, Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006) (*CRPD*), Article 5.

<sup>316</sup> See, for example, Senate Legal and Constitutional Affairs Committee, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (December 2008).

<sup>317</sup> Under domestic law, sex, race, age and disability are all protected attribute. This is a narrower set of grounds that under international human rights treaties, which prohibit discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Multiple (or compounded) discrimination occurs when a person or group is discriminated against on more than one grounds; for example, where an Indigenous woman is discriminated against on the basis of her sex and her race, her experience of discrimination is different than if she had been discriminated against on one of those grounds alone.

<sup>318</sup> For example, under the *Sex Discrimination Act 1984* (Cth), sporting clubs, religious bodies and charities are permanently exempt from the operation of the Act.

<sup>319</sup> National Human Rights Consultation Committee Report (September 2009), recommendation 4.

<sup>320</sup> Human Rights Committee, *Concluding Observations: Australia*, CCPR/C/AUS/CO/5, 2 April 2009 [12], Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia*, E/C.12/AUS/CO/4, 12 June 2009 [14]; Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Australia*, CEDAW/C/AUS/CO/7, 30 July 2010 [25]; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, CERD/C/AUS/CO/15-17, 27 August 2010 [10].

225. Most recently, the inadequacy of our legal protections against discrimination received significant attention at the UPR, where several countries made recommendations that Australian laws ensure comprehensive protection of the rights to equality and non-discrimination.<sup>321</sup>
226. We note that the mere harmonisation of federal anti-discrimination laws, referred to in the Background Paper, will not adequately address the gaps in Australia's legal framework. For this project to be a legitimate human rights initiative, the reform must be based on a transparent and consultative process and must aim to strengthen and modernise our anti-discrimination regime.

**Priorities for inclusion in the National Action Plan**

1. The Government should ensure that the harmonisation of anti-discrimination laws is based on full and transparent consultation with relevant stakeholders, most importantly of individuals and groups affected by discrimination.
2. The National Action Plan should contain a commitment to enact comprehensive equality legislation that addresses all prohibited grounds of discrimination, promotes substantive equality and provides effective remedies against discrimination, including systemic and intersectional discrimination.
3. The National Action Plan should include a commitment that the Government will conduct an inquiry into a constitutional amendment aimed at enshrining the right to equality.

## **16. Women's Rights**

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227. The *Sex Discrimination Act 1984* ('**SDA**') does not adequately address systemic discrimination or promote substantive equality – there is no general prohibition on sex discrimination; the burden for addressing sex discrimination is on individual complainants; intersectional discrimination is not adequately addressed; and exemptions to the SDA, such as those for religious institutions, perpetuate unfair and unreasonable discrimination against women. Protection from discrimination against women in the workforce remains inadequate, particularly in the areas of pregnancy and family responsibilities. Proposed changes to the SDA, which will improve protections against sexual harassment, and discrimination on the basis of breastfeeding and family responsibilities, are welcome but further improvements are needed, such as those recommended in the 2008 Senate Committee Inquiry into the SDA. The Australian Government has committed to consolidating and harmonising federal anti-

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<sup>321</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.42, 86.43, 86.44, 86.45, 86.46, 86.47 and 86.48.

- discrimination law into a single Act and to considering the unimplemented Inquiry recommendations as part of this process, but it is not yet clear how this will happen.
228. Women remain significantly underrepresented on boards and at senior management level. In 2010, only 8.4% of directors of the largest 200 publicly listed companies in Australia and 33.4% of government boards are women. Australia has recently introduced a new gender diversity target of 40% representation for both women and men on Australian Government boards. However the target of 40% applies when looking at the *total* number of women and men across all Australian Government boards – it does not address representation on individual government boards and may therefore have little impact.
229. The gender pay gap continues to widen, with women earning 82 cents in the male dollar (the biggest gap since 1994), and the gap is as big as 35% in some industries. The gender pay gap affects current incomes, living standards and the capacity of women to save for retirement. The report of the 2008-09 Parliamentary Committee Inquiry into pay equity, *Making it Fair*, made a large number of recommendations to which the Government has not yet responded.
230. High rates of violence against women remain a major issue, with almost one-in-three Australian women experiencing physical violence and almost one in five women experiencing sexual violence in their lifetime. The government-appointed National Council to Reduce Violence Against Women and Children delivered its report in April 2009. In August 2010, the Australian Government released a draft National Plan to Reduce Violence against Women and Children, but this has yet to be implemented fully.
231. Women from different population groups experience particular difficulties. There is limited access to family violence and sexual assault services in rural and remote areas. Women from culturally and linguistically diverse backgrounds face difficulties in reporting violence and accessing culturally appropriate accommodation. Violence against women with disabilities often goes undetected, unreported or uninvestigated, and there is a lack of access to appropriate services, including crisis accommodation, for women with disabilities. Violence against women identifying as lesbian, bisexual, transgender, transsexual or intersex within relationships often goes unacknowledged by national anti-violence strategies. Aboriginal and Torres Strait Islander women also experience high rates of violence.
232. Three major government-commissioned reports have found that the family law system does not respond effectively to issues of family violence. As part of its election platform, the Australian Labor Party committed to amending legislation responding to these reports but has not done so since being re-elected.
233. In particular Aboriginal and Torres Strait Islander women experience horrific levels of violence and are 35 times more likely to be hospitalised as a result of spousal or partner violence than non-Indigenous women. Violence against Aboriginal and Torres Strait Islander women is

associated with a number of factors, including racism, dispossession, disadvantage and poor living conditions. Australia provides funding to Aboriginal and Torres Strait Islander Legal Services, however Aboriginal and Torres Strait Islander women experience difficulties in accessing and gaining representation from these services. Australia has also funded family violence prevention legal services to provide services to Aboriginal and Torres Strait Islander people, however these services are not available in all parts of Australia, including urban areas, and are not adequately funded for law reform and policy development work.

234. The rights of women in Australia was the subject of much discussion at the recent UPR. Many recommendations were made in relation to this topic. These recommendations included that Australia should work towards greater equality amongst Indigenous women, that it should work to prevent and combat violence against women and girls and that Australia should have target of 40% representation of women on public and private sector boards.<sup>322</sup>

**Priorities for inclusion in the National Action Plan**

1. Ensure that the consolidation and harmonisation of anti-discrimination laws be based on broad consultation and undertaken in a manner that strengthens anti-discrimination laws, including by addressing all prohibited grounds of discrimination, promoting substantive equality, providing effective remedies against systemic and intersectional discrimination, and implementing the remaining recommendations of the 2008 Senate Committee inquiry into the SDA.
2. Adopt targets of at least 30% representation of women on public and private sector boards, with a view to adopting compulsory quotas if targets are not met after three years.
3. Implement and fund the recommendations of the pay equity report, *Making it Fair*, as a matter of priority.
4. As a matter of priority, implement and adequately fund a National Plan to Reduce Violence Against Women and Children, a mechanism for independent monitoring, and amend the family law system and legislation to better protect the safety of women and children.
5. Fund culturally-appropriate Aboriginal and Torres Strait Islander women's legal services in urban, rural and remote areas of Australia and a peak body to ensure coordinated law reform and policy development.

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<sup>322</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.51, 86.52, 86.53, 86.54, 86.55, 86.56, 86.72, 86.73, 86.74, 86.76, 86.77, 86.78, 86.79, 86.80, 86.81, 86.82 and 86.99.

## 17. Business And Human Rights

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235. There is no comprehensive legal framework that imposes human rights obligations on Australian corporations either in Australia or when they are operating overseas.<sup>323</sup> Although the Criminal Code allows for corporations to be ascribed with criminal responsibility for direct or indirect involvement in a limited number of the most serious crimes, such as genocide, torture and apartheid,<sup>324</sup> to date there has only been one known investigation by the AFP and no prosecutions of corporations under those provisions.
236. Recently, the CERD Committee noted 'with concern the absence of a legal framework regulating the obligation of Australian corporations, at home and overseas, whose activities, notably in the extractive sector, when carried out on the traditional territories of Indigenous peoples, have had a negative impact on Indigenous peoples' rights to land, health, living environment and livelihoods.'<sup>325</sup>
237. The CERD Committee recommended that Australia 'take appropriate legislative or administrative measures to prevent acts by Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad'.<sup>326</sup> The CERD Committee also encouraged Australia 'to fulfil its commitments under the different international initiatives it supports to advance responsible corporate citizenship'.<sup>327</sup>
238. During the UPR process, several states recommended that Australia should sign and ratify the *International Convention on the Rights of Migrant Workers*.<sup>328</sup>

### Priorities for inclusion in the National Action Plan

1. Explicitly adopt the UN Secretary General's Special Representative on Business and Human Rights' framework as a basis for Australia's approach to both international and domestic corporate human rights law and policy.<sup>329</sup>

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<sup>323</sup> Australia does not have a federal bill of rights. Two jurisdictions in Australia (Victoria and the ACT) have enacted dedicated human rights legislation, but that legislation has only limited application to private companies exercising functions 'of a public nature' and the legislation is presumed not to operate extra-territorially. The RDA protects people from racial discrimination in Australia but it is presumed not to have any extra-territorial effect.

<sup>324</sup> In 2002 Australia introduced the offences of genocide, crimes against humanity and various war crimes (including slavery, torture, rape and apartheid) into the *Criminal Code Act 1995* (Cth), when it ratified the *Rome Statute of the International Criminal Court*. The liability of corporations is governed by Part 2.5 of the *Criminal Code*, which provides, among other things, for the *mens rea* of corporations to be established.

<sup>325</sup> CERD Committee, above n 35, [13].

<sup>326</sup> CERD Committee above n 35, [13].

<sup>327</sup> CERD Committee, above n 35, [13].

<sup>328</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.9 and 86.10.

2. Take all necessary legislative or administrative measures domestically to prevent Australian corporations from taking action which negatively impacts on human rights, both here and overseas. This could be done through means such as corporate human rights due diligence, procurement practices or legislation.
3. Publicly support human rights-compliant practices for businesses and develop Australian guidelines for business and human rights.
4. Ratify the *International Convention on the Rights of Migrant Workers*.

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## 18. People with Disabilities

(NB: The issue of forced sterilisation of children with disabilities is discussed in part 0 above and the issue of violence against women with disabilities is discussed in part 16 above.)

### 18.1 Implementation of the UN Convention on the Rights of Persons with Disabilities

239. People with disability do not enjoy their fundamental human rights on an equal basis with others in Australia. Although the *Disability Discrimination Act 1992* (Cth) ('**DDA**') provides limited protection from discrimination and harassment for people with disability in areas of employment, education and the provision of goods and services, many people with disability are unable to assert their rights due to the lack of human rights in legislation. As a result, many people with disability remain significantly disadvantaged in Australian society in relation to key indicators of social and economic well-being.
240. During the recent UPR of Australia, recommendations were made about protecting the rights of persons with disabilities, particularly through pursuing a National Disability Strategy.<sup>330</sup>

#### **Priorities for inclusion in the National Action Plan**

Fully incorporate the *United Nations Convention on the Rights of Persons with Disabilities* into domestic law through legislation.

### 18.2 Exercising the Right to Vote

241. The ability of people with disability to vote independently and in secret in national, state and local government elections is still not a reality for many people with disability in Australia. This is despite the legal requirements to provide voting accessibility for people with disability under

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<sup>329</sup> Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', April 2008, A/HRC/8/5.

the DDA and obligations under Article 29 of the *United Nations Convention on the Rights of Persons with Disabilities* ('*CRPD*').

242. Barriers to exercising a right to vote include:

- (a) lack of accessible polling venues; lack of accessible information; and lack of access to the same postal voting arrangements as other citizens;
- (b) lack of ballot papers in accessible formats, such as Braille, and in formats other than print means that many people with disability have to rely on another person to record their vote, and therefore are not able to cast a secret ballot;
- (c) provisions in legislation that enable people to be excused from voting if they are of "unsound mind" – these provisions exclude many people on the grounds of their impairment rather than on their capacity to understand and make decisions. This is contrary to principles and concepts of "capacity" contained in Article 12 of the *CRPD*; and
- (d) receiving penalty notices for not voting when many people with disability may not understand voting information or may be unwell at the time of the election.

**Priorities for inclusion in the National Action Plan**

That a thorough, critical review of the legislative and administrative arrangements governing electoral matters be conducted to ensure that people with disability can fully and equally participate in electoral processes, including obtaining the right to cast a secret ballot freely and independently.

### 18.3 Disability and Migration

243. Australia's migration law, policy and practice still have discriminatory aspects that impact adversely on families. For example, decisions made under the Migration Act are not subject to Australia's disability discrimination laws.<sup>331</sup> This means that decisions on immigration can be made on the basis of the disability or health condition of a family member (see case study below).

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<sup>330</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.40 and 86.41,

<sup>331</sup> See *Disability Discrimination Act* 1992 (Cth), s 52, which in effect exempts migration laws, regulations, policies and practices from the operation of the Act.

**Case Study: Dr Bernhard Moeller<sup>332</sup>**

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

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

244. The CESCR expressed concern at this discriminatory nature of Australia's immigration policies and called on Australia to amend the Migration Act and DDA to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice.<sup>333</sup>

**Priorities for inclusion in the National Action Plan**

That the Migration Act and the DDA be amended to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice.

## 19. Sexual and Gender Identity

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245. A wide range of social research has found that Gay, Lesbian, Bisexual, Transgender and Intersex ('**GLBTI**') Australians experience high levels of prejudice, stigma, exclusion, discrimination, abuse and hate-motivated assault. As a result, GLBTI Australians also experience higher-than-average levels of a range of mental and physical risk factors including suicide ideation, depression, and drug and alcohol abuse.

### 19.1 Discrimination Laws

246. There is no Australian national law which comprehensively prohibits discrimination, harassment and vilification on the grounds of sexual orientation and gender identity. Some national laws governing workplace conditions provide some limited protection. The AHRC can investigate and report on discrimination in employment but cannot enforce remedies if discrimination is proven.

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<sup>332</sup> Senator Evans, 'Statement on Dr Bernhard Moeller' (Press Release, 26 November 2008), available at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08113.htm>.

247. Australian states and territories provide varying degrees of protection. 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>334</sup> However, these laws do not protect people employed by or receiving goods and services from the Government. Also, most state and territory laws allow private clubs or religious organisations to discriminate.
248. The Human Rights Council through the UPR has recommended that Australia continue to implement the harmonisation and consolidation of anti-discrimination laws on a national level and to move forward with the promulgation of laws protecting persons against discrimination on the grounds of sexual orientation or gender.<sup>335</sup>

**Priorities for inclusion in the National Action Plan**

Implement a national law that prohibits discrimination, harassment and vilification on the grounds of sexual orientation and gender identity.

## 19.2 Parenting Laws

249. Most Australian states and territories fail to extend the equal rights, responsibilities and recognition to same-sex partners seeking to have, or currently raising, children. For example, the Northern Territory, Queensland, Victoria and South Australia do not allow same-sex partners to be assessed as potential adoptive parents. South Australia does not allow the same-sex partner of a woman who has given birth through artificial reproductive technologies to be presumed to be a co-parent. New South Wales, Tasmania, South Australia, Western Australia, the Northern Territory and the Federal Government do not recognise the surrogacy arrangements entered into by same-sex partners.

**Priorities for inclusion in the National Action Plan**

Ensure that equal legal rights exist for same-sex partners seeking to become parents, or currently parenting.

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<sup>333</sup> CESCR, above n33, [16].

<sup>334</sup> All states and territories have prohibited discrimination on grounds of sexual orientation, however, in New South Wales this is limited to homosexuality. All states and territories have prohibited discrimination on grounds of gender identity.

<sup>335</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.66, 86.67 and 86.68.

### 19.3 Marriage Equality

250. In 2004, the former Australian Government amended the *Marriage Act 1961* (Cth) ('**Marriage Act**') specifically to exclude same-sex couples from marrying.<sup>336</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>337</sup> Consequently, same-sex partners cannot marry in Australia. Same-sex marriages entered into overseas are not recognised as marriages in most Australian jurisdictions. Australian citizens seeking to enter into a same-sex marriage in another country are denied the documentation required by some foreign governments before they can marry (for example, a Certificate of Non-Impediment to marriage).
251. The Human Rights Council through the UPR has recommended that Australia move towards ensuring greater equality between heterosexual and same-sex relationships and that it amend the Marriage Act to allow same-sex partners to marry and to recognize same-sex marriages from overseas.<sup>338</sup>

#### **Priorities for inclusion in the National Action Plan**

Amend the Marriage Act to allow same-sex partners to marry and to recognise same-sex marriages from overseas.

### 19.4 Gender Identity

252. It is impossible for transgender people who have not undergone gender re-assignment surgery to have cardinal documents such as birth certificates or passports amended to reflect their gender identity. There are no laws prohibiting sex-assignment surgery on intersex children prior to them having the capacity to give consent.

#### **Priorities for inclusion in the National Action Plan**

Ensure that all cardinal documents be amendable to accurately represent gender identity and choice of gender identity to be protected for all citizens.

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<sup>336</sup> See *Marriage Amendment Act 2004* (Cth).

<sup>337</sup> Commonwealth, Parliamentary Debates, House of Representatives, 24 June 2004, 314 460 (Nicola Roxon, Shadow Attorney-General).

<sup>338</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.69 and 86.70.

## 20. Culturally and Linguistically Diverse Communities

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253. On the whole, Australia has effectively managed cultural diversity with proactive and positive multicultural policies that have fostered social inclusion and embraced cultural, linguistic and faith diversity. These policies have always stipulated that multiculturalism requires an overriding commitment to Australia, including its underlying democratic and legal framework.
254. However, challenges that still exist in areas such as settlement, social inclusion, economic participation, employment, education, English language training, health, housing and discrimination remain acute for many migrant and refugee communities.
255. Australia's last multicultural policy, the former Australian Government's *Multicultural Australia United in Diversity* (2003-2006) expired in 2006. A new multicultural advisory body, the Australian Multicultural Advisory Council ('**AMAC**'), was established by the current Australian Government in late 2008. In April 2010, AMAC presented a statement entitled 'The People of Australia' to the Minister for Immigration and Citizenship, recommending that the Australian Government implement an anti-racism strategy, and ensure that all services are accessible to persons from diverse backgrounds.<sup>339</sup> While the statement is welcome and in line with recommendations made to the Australian Government by multicultural organisations, including the Federation of Ethnic Communities' Council of Australia,<sup>340</sup> AMAC has not released an updated multicultural policy. An updated contemporary multicultural policy is needed to reflect an increasingly culturally diverse society and to strengthen the Government's commitment and capacity to address ongoing issues of discrimination, barriers of access and inequity in delivery of services.
256. The CERD Committee encouraged Australia to develop and implement an updated comprehensive multicultural policy that reflects our increasingly ethnically and culturally diverse society.<sup>341</sup> The Human Rights Council through the UPR has made several recommendations that Australia take measures to combat discrimination against CALD communities and to promote cultural diversity and strengthening the relationships between different cultures and communities.<sup>342</sup>

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<sup>339</sup> Senator Chris Evans, Minister for Immigration and Citizenship, *Launch of the Australian Multicultural Advisory Council's Advice*, 30 April 2010, available at <http://www.minister.immi.gov.au/media/speeches/2010/ce100430.htm>.

<sup>340</sup> Federation of Ethnic Communities' Council of Australia, *AMAC Statement on Cultural Diversity: A Big Step Forward*, Press Release, 5 May 2010, available at [http://www.fecca.org.au/Media\\_Releases.cfm](http://www.fecca.org.au/Media_Releases.cfm).

<sup>341</sup> CERD Committee, above n35, [14].

<sup>342</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.59, 86.60, 86.61, 86.62, 86.63, 86.64, and 86.65.

**Priorities for inclusion in the National Action Plan**

Develop and implement a new comprehensive Multicultural Policy that affirms Australia's commitment to multiculturalism and seeks to address issues of access and equity in the delivery of services and information by Government to culturally and linguistically diverse communities.

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## 21. Access to Justice

### 21.1 Legal Aid and Community Lawyers

257. Funding for legal aid commissions, community legal services and specialist legal services for Aboriginal and Torres Strait Islander peoples is inadequate. In May 2010, the Australian Government announced an increase in funding to specialist community legal services, including Aboriginal and Torres Strait Islander legal services ('**ATSILS**'). While this has been welcomed by the sector, there are concerns that the increase does not go far enough to address the systemic crisis in the resourcing of, and access to, specialist services.
258. Of particular concern:
- between 1997 and 2007, there was an 18% reduction in real funding to community legal centres, who are the 205 not-for-profit community-based organisations that provide free legal advice and services to disadvantaged members of the Australian community and those with special needs;
  - a 2009 Australian Senate Inquiry found that there are areas of law not sufficiently funded for the provision of essential legal aid, namely family law and civil law services;
  - despite Aboriginal and Torres Strait Islander incarceration rates increasing at an alarming rate over the past decade and the subsequent increase in demand for the ATSILS services, the amount of real funding provided has been declining, compared to mainstream legal aid service providers and departments of public prosecutions; and
  - Family Violence Prevention Legal Services ('**FVPLS**') (legal aid providers specialising in family violence, often existing in regional and remote areas) are not always funded to service urban areas where large proportions of Aboriginal and Torres Strait Islander peoples reside. The high incidence of family violence against Aboriginal and Torres Strait Islander women, means that often the FVPLS are the only culturally appropriate legal assistance option available to Aboriginal and Torres Strait Islander women.

**Priorities for inclusion in the National Action Plan**

1. Work with community legal service providers, including Aboriginal and Torres Strait Islander Legal Services, to determine and meet the minimum level of funding necessary to meet legal need; .

2. Ensure the funding of the AT SILS and Family VPLS is proportionally increased to equal that of mainstream legal aid services and departments of public prosecutions.

## 21.2 Access Issues for CALD Communities

259. The ability to understand language is crucial for accessing justice in terms of seeking and understanding legal advice, communicating with other parties and utilising the court system. The right to free access to an interpreter is generally available throughout Australia's criminal justice system,<sup>343</sup> in most Australian Tribunals<sup>344</sup> and in a limited range of civil disputes.<sup>345</sup> However, funding of interpreter services in civil matters, particularly in Victoria, is limited. As a result, the organisation and funding of interpreter services falls to the parties requiring those services, who may not be able to do so for financial or other reasons. For the more than 186,000 Victorians who speak English 'not well' or 'not at all',<sup>346</sup> as well as Aboriginal people for whom English is not a first language, or people with hearing or speaking difficulties, this presents a substantial problem in defending themselves in or enforcing their legal rights through civil actions.<sup>347</sup> English difficulties can also discourage the pursuit of meritorious legal claims.<sup>348</sup> According to a 2010 report from the Law Institute of Victoria ('LIV'), there is significant unmet demand for interpreter services in Victoria which the report estimates are required by at least 30,000 Victorians in 80,000 civil matters every year.<sup>349</sup> In particular, the report highlights the need for interpreters in:
- (a) the provision of sometimes complicated legal advice for clients of community legal centres and other pro bono legal services;
  - (b) the preparation and review of court documents and forms for clients of community legal centres; and
  - (c) the initial meeting between legal aid panel lawyers and clients who may apply for legal aid.

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<sup>343</sup> Law Institute of Victoria, *Interpreting Fund Scoping Project* (2010) sch 1, available at <http://www.liv.asn.au/getattachment/80358a3c-d0d5-460c-bbae-af9dccc3f8/Final-Report---Interpreting-Fund-Scoping-Project.aspx>.

<sup>344</sup> See, for example, *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 63.

<sup>345</sup> *Dietrich v The Queen* (1992) 177 CLR 292, p 301.

<sup>346</sup> Australian Bureau of Statistics, *2006 Census of Population and Housing – Victoria (State), Proficiency in Spoken English / Language by Age for Time* (Series Cat No 2068.0), available at: <http://abs.gov.au/websitedbs/D3310114.nsf/home/Census+data>.

<sup>347</sup> Law Institute of Victoria, above n 343.

<sup>348</sup> Victorian Law Reform Commission, *Civil Justice Review Report* (2008), available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/8137a400404a0bed9549ff5f2791d4a/VLRC+Civil+Justice+Review+-+Report.pdf?MOD=AJPERES>.

<sup>349</sup> Law Institute of Victoria, above n 343.

260. At five Victorian community legal centres with the highest demand for interpreters, 72% of requests for interpreting services across all matters were not fulfilled. Given that 57% of work in Victorian community legal centres is civil in nature, the LIV considers this to be indicative of significant language barriers to civil justice.<sup>350</sup> Both the Victorian Law Reform Commission and the LIV have recommended that an interpreting fund be established to address this issue.<sup>351</sup>

**Priorities for inclusion in the National Action Plan**

The development of programs to ensure that interpreters are provided to CALD communities in court disputes.

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## 22. Poverty

### 22.1 Unacceptable Levels of Poverty

261. An adequate income is necessary to ensure an adequate standard of living, to ensure that a person lives with dignity and free from want and to facilitate participation in the civil, political, economic, social and cultural aspects of community life.<sup>352</sup> An adequate income is also necessary for, and interdependent with, the realisation of other human rights including, particularly, the rights to health, sufficient food and water, education, housing and participation.
262. In 2008, 12% of Australians were found to be living in poverty, which is a higher proportion than the OECD average.<sup>353</sup> The risk of poverty for Australian sole parents is extremely high, at 70%.<sup>354</sup> Older Australians are also particularly affected by poverty. For single people aged over 65, the income poverty rate is 50% - the highest of all the countries in the OECD.<sup>355</sup>
263. Not all people in Australia who require social security are able to access it. Such people include newly arrived migrants,<sup>356</sup> people unable to provide adequate proof of identity and

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<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid.*, See also Victorian Law Reform Commission, above n 348.

<sup>352</sup> A Sen, above n 295, 87.

<sup>353</sup> OECD, 'Country Note: Australia', *Growing Unequal?: Income Distribution and Poverty in the OECD Countries* (2008), 1, available at <http://www.oecd.org/dataoecd/44/47/41525263.pdf>. This means that 12% of the population lives on less than half of the median average income.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.*

<sup>356</sup> See, Centrelink, *Recently Moved to Australia? A Guide to your Options and Our Services* (2007) *Social Security Act 1991* (Cth) s 739A(7).

- people unable to satisfy 'mutual obligation' requirements.<sup>357</sup> The mutual obligation requirements have a particularly adverse impact on marginalised and disadvantaged people. Asylum seekers also have no right to access Australia's mainstream social security system.<sup>358</sup> They might be eligible for assistance through the Asylum Seeker Assistance Scheme but this is less than the Special Benefit Payment available through Centrelink. These payments are discontinued after an asylum seeker's Protection Visa application is decided (even if that asylum seeker applies for judicial review) and after they have been released from detention.
264. Australia's Social Inclusion Agenda aims to address social exclusion and reduce disadvantage. However, social security benefits are currently pegged at rates that leave people living in poverty and the needs of many people on extremely low incomes are not being met. A sufficient amount of social security should be paid to people to ensure the achievement of human dignity and an adequate standard of living. The benefits provided should ensure that the recipient does not fall below a clearly defined minimum subsistence level of poverty line. Further, Australia is not using a human rights framework to underpin its Social Inclusion Agenda.
265. In 2009, the Committee on Economic, Social and Cultural Rights recommended that Australia take all necessary measures to combat poverty and social exclusion and develop a comprehensive poverty reduction and social inclusion strategy.
266. Recently, the UN Human Rights Council through the UPR has recommended that Australia develop a comprehensive strategy on poverty reduction and social inclusion.<sup>359</sup>

#### **Priorities for inclusion in the National Action Plan**

Develop and implement a comprehensive national poverty reduction strategy, which recognises the need to enhance the availability of adequate levels of social security and adjusts the amounts paid in social security benefits accordingly.

## **22.2 Compulsory Income Management**

267. In 2010, the Australian Government passed legislation expanding the operation of compulsory income quarantining to apply to all "vulnerable" welfare payment recipients across the Northern Territory. Previously, the income management had only applied to Aboriginal

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<sup>357</sup> According to the Australian Institute of Health and Welfare, 8% of homeless people have no form of income or income support: Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2003-04* (2005), 63.

<sup>358</sup> A scheme funded by the Department of Immigration and Citizenship and administered by the Australian Red Cross. In order to be eligible for ASAS, asylum seekers must be in financial hardship and must have lodged a valid Protection Visa application more than six months previously.

<sup>359</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.32 and 86.33.

communities as part of the Northern Territory Emergency Response (see above). The measure is punitive in nature and its operation is not based on reliable or credible evidence to support its effectiveness.

268. In 2009, the Committee on Economic, Social and Cultural Rights expressed concern that such conditionalities for the payment of welfare and benefits have a negative impact on disadvantaged and marginalised individuals and groups and strongly recommended the abolition of the quarantining of welfare payments under the Northern Territory Emergency Response. Despite this recommendation by CESCR, Australia has expanded the operation of the scheme.

**Priorities for inclusion in the National Action Plan**

Abolish compulsory income quarantining in all communities.

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## **23. Prisoners and Prison Conditions**

### **23.1 Access to Health Services**

269. 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 disease.<sup>360</sup>
270. The number of forensic patients and mentally ill inmates housed in Australian prisons has steadily increased, without a proportionate increase in mental health resources available. Around one in every five prisoners in Australia suffer from serious mental illness.<sup>361</sup> There is substantial evidence from across Australia that access to adequate mental health care in prisons is manifestly inadequate, that the mentally ill in prison are often 'managed' by segregation, and that such confinement – often for very long periods, - can seriously exacerbate mental illness and cause significant psychological harm.<sup>362</sup>
271. Following his visit to Australia in 2009, the UN Special Rapporteur on the right to the highest attainable standard of health, Mr Anand Grover, made the following specific recommendations relating to health services in prisons:
- Increase engagement with community health providers by prisons, which would improve continuity of care and facilitate reintegration into the community;

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<sup>360</sup> Australian Institute of Health and Welfare, Australian Government, *Australia's Health 2006* (2006) 249.

<sup>361</sup> J P R Ogloff *et al*, 'The Identification of Mental Disorders in the Criminal Justice System', Australian Institute of Criminology, March 2007.

<sup>362</sup> See, for example, Forensicare (Victorian Institute of Forensic Mental Health), *Submission to Senate Select Committee on Mental Health*, May 2005, 4, 5, 19 & 20. See also: *NSWXXK Shadow Report*, [149]-[150].

- Increase resource allocation for diagnosis, treatment and prevention of mental illnesses within prisons;
  - Assess and invest in the primary health care sector throughout the prison system; and
  - Undertake research regarding Aboriginal and Torres Strait Islander incarceration issues as a matter of urgency.
272. Similar recommendations were also made by the CESCR in 2009, as well as the CAT Committee in its 2008 Concluding Observations, regarding the insufficient provision of mental health care in prisons and mentally ill inmates being subject to excessive use of solitary confinement.

**Priorities for inclusion in the National Action Plan**

1. Take further steps to provide appropriate health care, including particularly mental health care, to people in prison, including by implementing the recommendations of the Special Rapporteur on the right to health, the CESCR and CAT.
2. Provide adequate resources for mental health diagnosis and treatment within prisons, in particular for the provision of services to specific groups of prison populations.

### **23.2 Conditions in Prisons**

273. Conditions in prison, including transport between prisons and in “supermaximum” prisons in Australia, raises serious human rights concerns in Australia. Australian “supermaximum” prisons are currently used to house a range of inmates, including those on remand, terrorist suspects and convicted prisoners. Some of these inmates suffer from mental illness. In 2008, the Committee against Torture expressed concern about these prisons and asked the Australian Government to review conditions in these facilities and report back to the Committee on its progress.<sup>363</sup>
274. Overcrowding is also a real problem in many Australian prisons. The Committee against Torture also recommended in 2008 that Australia take urgent action to reduce overcrowding. Additionally, reports have emerged from the Northern Territory about the increase in intellectually disabled and mentally ill people who remain incarcerated due to lack of appropriate care facilities.
275. Recently, the Human Rights Council, through the Universal Periodic Review, called on Australia to ensure the humane treatment of prisoners and the ratification of the Optional

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<sup>363</sup> *Brough v Australia*, UN Doc CCPR/C/86/D/1184/2003 (2006).

Protocol to the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment (**OP-CAT**) on the treatment of prisoners.<sup>364</sup>

**Priorities for inclusion in the National Action Plan**

Ratify the OP-CAT.

**23.3 Imprisonment of Aboriginal and Torres Strait Islander Peoples**

276. Aboriginal and Torres Strait Islander peoples in Australia are among the most incarcerated people in the world. The national rate of imprisonment of Aboriginal and Torres Strait Islander peoples is 14 times higher than the rate for non-Indigenous Australians.<sup>365</sup> In 2008 this difference was 13 times higher for Indigenous prisoners. The highest ratio of Indigenous to non-Indigenous imprisonment rates in Australia was in Western Australia (20 times higher for Indigenous prisoners). Tasmania had the lowest ratio (three times higher for Indigenous prisoners).<sup>366</sup> Aboriginal and Torres Strait Islander children between 10 and 14 years of age are 30 times more likely to be incarcerated than their non-Indigenous peers. Aboriginal and Torres Strait Islander women are almost 20 times more likely to be incarcerated than non-ATSI women.<sup>367</sup> In 2006, the HRC found that the treatment of an Aboriginal juvenile in a NSW prison amounted to inhumane treatment. The juvenile, Mr Brough, was placed in isolation in an adult prison, exposed to artificial light for long periods and had his blanked and some of his clothes removed.<sup>368</sup>

277. These issues are discussed in more detail above at 8.6.

**Priorities for inclusion in the National Action Plan**

1. Place greater emphasis on access to education and rehabilitative services in prison and on post-release programs and support for Aboriginal and Torres Strait Islander peoples, including in the areas of health care, housing and education.
2. Conduct an independent inquiry on the interaction of Aboriginal and Torres Strait Islander peoples with the criminal justice system, with a view to implementing strategies to reduce imprisonment rates.

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<sup>364</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.1, 86.2, 86.3, 86.4, 86.5, 86.6 and 86.71.

<sup>365</sup> At 30 June 2010. See Australian Bureau of Statistics, *Prisoners in Australia 2010* (2010)

<sup>366</sup> *Ibid.*

<sup>367</sup> See generally, Australian Bureau of Statistics, *Prisoners in Australia 2006* (2006) which reveals that prison numbers across Australia increased by 42% between 1996 and 2006 and that Aboriginal people constitute 24% of the prison population compared with approximately 2% of the general population.

<sup>368</sup> *Brough v Australia*, UN Doc CCPR/C/86/D/1184/2003 (2006).

## **24. Extra-territorial Obligations.**

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### **24.1 International assistance**

278. In 2009/2010, Australia only contributed 0.29% of its gross national income (GNI) to official development assistance ('ODA') notwithstanding the United Nations target of 0.7% of GNI for developed countries.<sup>369</sup> Australia recently committed to increasing its assistance to 0.5% of GNI by 2015-2016.<sup>370</sup> However, this remains well short of the Millennium Development Goal target of 0.7% of GNI.
279. Recently, the Human Rights Council, through the UPR, called on Australia to work to prevent cuts to its foreign aid budget and to make every effort to bring it up to the 0.7% target. A recommendation was also made that the AusAID program should work to strengthen human rights in the Asia-Pacific region.<sup>371</sup>

#### **Priorities for inclusion in the National Action Plan**

1. Increase overseas development assistance to 0.7% of GNI;
2. Collaborate with interested groups, communities and experts in the fields of global poverty and climate change so as to develop and lodge with the UN a detailed and transparent action plan and timetable for achieving an increase in ODA TO 0.7% OF GNI.
3. Take a human rights-based approach towards foreign policy in the areas of trade, investment, business, labour, migration, defence, military cooperation, security and the environment.

### **24.2 Business**

280. There are a number of Australian companies whose actions and/or activities have had a severe impact on the human rights of individuals across the world.<sup>372</sup> Nevertheless, there remains no comprehensive legal framework which imposes human rights obligations on Australian corporations when operating overseas, particularly in areas where is related or no regulation.

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<sup>369</sup> CESCR, above n 33.

<sup>370</sup> Australian Government Budget 2010-2011, Australia's Development Assistance Program, [http://www.budget.gov.au/2010-11/content/ministerial\\_statements/ausaid/html/ms\\_auaid-03.htm](http://www.budget.gov.au/2010-11/content/ministerial_statements/ausaid/html/ms_auaid-03.htm), as at 20 October 2010.

<sup>371</sup> See Human Rights Council, UPR, above n 37, recommendations at 86.135 and 86.144.

<sup>372</sup> Australian Human Rights Commission, The Australian Mining and Resource Sector and Human Rights, [http://www/hreoc.gov.au/pdf/human\\_rights/corporate\\_social\\_responsibility/factsheet3.pdf](http://www/hreoc.gov.au/pdf/human_rights/corporate_social_responsibility/factsheet3.pdf).

**Priorities for inclusion in the National Action Plan**

1. Enact legislation which both domestic and extra-territorial effect and application to ensure that Australian companies respect human rights within the Special Representative's framework.<sup>373</sup>
2. Develop a range of 'hard' and 'soft' law measures to ensure that corporations respect human rights, including through public procurement and investment, human rights impact assessment processes, directors' duties, the establishment and strengthening of corporate grievance mechanisms, and guidelines and capacity building for businesses on human rights.

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<sup>373</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5, 7 April 2008.