

Joint NGO Submission to the UN Human Rights Committee

on the List of Issues Prior to Reporting for the Sixth Periodic Report of Australia



ENDORSED BY 95 ORGANISATIONS

August 2012



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UN Human Rights Committee on the
List of Issues Prior to Reporting for the
Sixth Periodic Report of Australia*

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1. About this Submission

This submission has been prepared in cooperation with 95 non-governmental organisations (NGOs) across Australia. It draws together input from national advocacy groups and community organisations, joint submissions from peak state associations, and contributions from networks of civil society organisations working at a grassroots level, to outline concerns about the Australian Government's compliance with the International Covenant on Civil and Political Rights (ICCPR).

Australian NGOs have contributed to this submission through a three-stage process. As a first step, a survey was sent out to NGOs inviting them to identify key issues relating to Australia's compliance with the ICCPR. The issues covered in this submission are based on data submitted by 44 NGOs who responded to the survey. Second, NGOs working on each of these issues were invited to explain our principal concerns to the Committee. Over 20 NGOs working collaboratively with partners and across networks have contributed the various sections of the report. Third, a draft of the submission was circulated to the NGOs who responded to the survey for comment. Finally, the consolidated submission was sent out to NGOs for endorsement. On August 3 2012, a total of 95 organisations had read and endorsed the submission.

In addition to this submission, which is intended to help inform the List of Issues Prior to Reporting, it is envisaged that a lengthier, more detailed NGO report will be compiled at a later stage in the review process. As this submission is concerned with the List of Issues Prior to Reporting it has focused on weaknesses in the Australian Government's compliance with the ICCPR. It is anticipated that positive developments made by the Australian Government will be given greater coverage in the NGO report.

The submission has been coordinated by the National Association of Community Legal Centres Inc (NACLC) and Kingsford Legal Centre (KLC) with support from community organisations across Australia.

2. List of Supporting Organisations

The following organisations have endorsed this submission in whole or in part:

Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
 Aboriginal Legal Rights Movement Inc. (ALRM)
 Aboriginal Legal Service (NSW/ACT)
 Aboriginal Legal Service of Western Australia (Inc.) (ALSWA)
 ACON
 African Think Tank Inc.
 Anex
 Annie North Inc.
 Anti-Slavery Australia
 Armadale Domestic Violence Intervention Project Inc. (ADVIP)
 Asylum Seeker Resource Centre (ASRC)
 Australian Centre for Disability Law (ACDL)
 Australian Communications Consumer Action Network (ACCAN)
 Australian Federation of AIDS Organisations (AFAO)
 Australian Federation of Medical Women (AFMW)
 Australian Lawyers for Human Rights (ALHR)
 Australian Women Against Violence Alliance (AWAVA)
 Australian Women's Health Network
 Canberra Rape Crisis Centre
 Castan Centre for Human Rights Law
 Centre for Non-Violence
 Centre for the Human Rights of Imprisoned People (CHRIP)
 Coalition of Women's Domestic Violence Services of SA Inc.
 Community Legal Centres Association (WA) Inc.
 Community Legal Centres NSW Inc. (CLCNSW)
 Dallas Colley Domestic Violence Consulting & Training Services
 Darwin Community Legal Service (DCLS)
 Deaths in Custody Watch Committee (WA) Inc.
 Domestic Violence Legal Workers' Network (DVLWN)
 Domestic Violence Victoria Inc. (DV Vic)
 Environment Defenders Office (Victoria) Ltd
 Federation of Community Legal Centres (Victoria) Inc.
 Flat Out Inc.
 Flemington & Kensington Community Legal Centre Inc. (FKCLC)
 Homelessness Australia
 Hotham Mission Asylum Seeker Project
 Human Rights Council of Australia
 Human Rights Law Centre (HRLC)
 IMARA advocacy
 Indigenous Social Justice Association Inc.
 Inside Access (of the Mental Health Legal Centre, Victoria)
 Kingsford Legal Centre (KLC)
 Koorie Women Mean Business Incorporated
 Lesbian Gay Bisexual Trans Intersex Legal Service Inc.

Liberty Victoria
Marrickville Legal Centre
Mental Health Legal Centre, Victoria
Mental Health Law Centre (WA)
Mid North Coast Community Legal Centre
National Aboriginal and Torres Strait Islander Women's Alliance (NATSIWA)
National Association of Community Legal Centres Inc. (NACLC)
National Children's and Youth Law Centre
National Congress of Australia's First People
National Council of Jewish Women of Australia Ltd (NCJWA)
National LGBTI Health Alliance
National Police Accountability Network
National Union Of Students
Network of Immigrant and Refugee Women Australia Inc. (NIRWA)
Newman Women's Shelter
North Australian Aboriginal Justice Agency (NAAJA)
NSW Council for Civil Liberties (NSWCCL)
NSW Young Lawyers Human Rights Committee
Patricia Giles Centre Inc.
Peninsula Community Legal Centre
People with Disability Australia Incorporated (PWD)
Prisoners' Legal Service, Inc.
Queensland Association of Independent Legal Services Inc. (QAILS)
Redfern Legal Centre (RLC)
Refugee Council of Australia
Rosemount Good Shepherd Youth and Family Services
SCALES Community Legal Centre
Secretariat of National Aboriginal and Islander Child Care (SNAICC)
The Human Rights Council of Australia
Top End Women's Legal Service
UnitingCare Cutting Edge
UnitingJustice Australia
Victorian Aboriginal Legal Service Co-operative Limited (VALS)
Victorian Medical Women's Society (VMWS)
Victorian Mental Illness Awareness Council (VMIAC)
Villamanta Disability Rights Legal Service Inc.
Women Everywhere Advocating Violence Elimination (WEAVE) Inc.
Western Young People's Independent Network (WYPIN)
Wurringa Baiya Aboriginal Women's Legal Centre Inc.
Women With Disabilities Australia (WWDA)
Women with Disabilities Victoria
Women's Law Centre of WA
Women's Legal Services Australia
Women's Legal Services NSW
Women's Legal Services Victoria
Women's Legal Centre (ACT & Region) Incorporated
Women's Mental Health Network Victoria
Women's Services Network (WESNET)
Youth Affairs Council of Victoria Inc.
Youthlaw
YWCA Australia

3. Proposed Questions for the List of Issues Prior to Reporting

Article 1 - Right to self-determination

Q1. What measures have been taken to ensure that the Stronger Futures legislation package is compliant with Australia's international human rights obligations?

Q2. What commitments have been made to independently review Income Management schemes? Please explain the Government's view on the lack of a sufficient evidence base for reviewing the need for, and effectiveness of, income management. Will the Government commit to ceasing the expansion of such schemes until a clear evidence base is established, and repeal such schemes if no evidence of its effectiveness is found?

Q3. What steps is the Australian Government taking, together with state and territory governments, to ensure the standards in UNDRIP are implemented within Australia? In particular:

- specifying the Australian Human Rights Commission can take UNDRIP into account in exercising its human rights functions;
- amending or introducing laws which ensure Aboriginal and Torres Strait Islander persons the right to participate in accordance with free, prior and informed consent - particularly in relation to government and company actions which impact on their lives.

Article 2, 26 & 27 - Treaty entrenchment and non-discrimination; Equality before the law & Rights of Minorities

Q4. When will the Australian Government introduce a comprehensive, judicially enforceable federal Human Rights Act?

Q5. Noting the new Parliamentary Committee on Human Rights, what further steps will the Government take to ensure that Australian laws can only be made if they are compliant with human rights?

Q6. Will the Australian Government's proposed consolidation of anti-discrimination laws address all prohibited grounds of discrimination, promote substantive equality, and provide effective remedies against systemic and intersectional discrimination?

Q7. Does the Australian Government support a Constitutional amendment to enshrine the right to non-discrimination and equality?

Q8. Does the Australian Government remain committed to holding a referendum within this Parliamentary term to recognise Aboriginal and Torres Strait Islander peoples in the Constitution?

Q9. What negotiations have been entered into by the Australian Government with the Opposition and State Premiers to pursue support for Constitutional Recognition of Aboriginal and Torres Strait Islander peoples?

Q10. What progress has been made in developing a National Partnership Agreement in relation to the Safe Communities Building Block under the Closing the Gap initiative? In particular, what progress has been made in developing justice targets to measure progress in addressing the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system?

Q11. Why does the Australian Government refuse to ratify the Convention on the Rights of Migrant Workers, which gives specific form to the human rights contained within conventions Australia has already ratified as they apply to the situation facing migrant workers?

Q12. Please explain the steps that the Australian Government has taken to identify real or potential violations of the rights of documented or undocumented migrant workers arising from its laws and policies, including visa conditions, and provide the results of any such investigations?

Article 3 - Equal rights of men and women

Q13. What steps is Australia taking to prevent family violence-related homelessness and ensure that women and their children are provided with culturally appropriate and accessible ongoing accommodation and integrated support?

Q14. How is the Australian Government addressing the need for a coordinated prevention approach to family/domestic violence deaths across Australia?

Q15. How does the National Plan to Reduce Violence Against Women and their Children address and fund the specific situation of Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse communities, and women with disabilities; and what steps are being taken to implement an independent monitoring and evaluation mechanism that involves civil organisations?

Article 6 - Right to life

Q16. What is the Australian Government doing to monitor and evaluate progress towards achieving Close the Gap health targets for Aboriginal and Torres Strait Islander peoples? In particular, what steps is it taking to improve the collection and availability of disaggregated data?

Q17. What measures has the Australian Government taken to partner with the National Health Leadership Forum in relation to the Aboriginal and Torres Strait Islander Health Equality Plan and health policy more generally.

Q18. What is the Australian Government doing to review, update and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and ensure the humane treatment of persons who are detained in custody at all levels?

Q19. What progress has Australia made towards ensuring the full realisation of the right to adequate housing, with particular attention to aspects of gender and racial equality and non-discrimination?

Q20. How has the Australian Government engaged in dialogue with the community sector and persons without adequate housing in their efforts to secure the right to adequate housing and the elimination of discrimination on the basis of homelessness?

Q21. Will the Australian Government work with States and Territories to ensure that families have genuine access to legal representation comparable to that accorded to government departments at coronial inquests, and how does it propose to address the failure in implementation of coronial recommendations?

Q22. What steps is the Australian Government taking, together with state and territory governments to:

- address the need not just for mitigation of climate change impacts, but adaptation to those impacts?
- ensure equality in and security of access to clean water supplies for present and future generations?

- ensure that mining, logging and oil developments don't deprive Aboriginal and Torres Strait Islander peoples of the physical basis for their cultures and subsistence?

Articles 7, 9 & 10 - Prohibition of torture and cruel, inhuman or degrading treatment; Freedom from arbitrary detention & Conditions of detention

Q23. How has Australia complied with the Committee's previous recommendations to consider the abolishment of the mandatory immigration detention policy?

Q24. What measures have been taken to address the Committee's concerns about the lack of effective review processes available for detention decisions (Arts 9 and 14). In particular, what safeguards are in place to ensure the automatic periodic judicial review of the necessity and legality of detention of individuals determined to be stateless, of adverse security assessment, or 'persons of interest'. (Art 9.4) Finally, are there any cases of asylum seekers being told they will be detained for reasons other than those established by law. (Art 9.1)

Q25. How does the Government intend to address the high prevalence of mental health concerns experienced by asylum seekers in Australian detention centres? How does the Government intend to improve the current inadequate availability of mental health care?

Q26. Please explain how the Australian Government intends to comply with its positive obligations under Articles 6, 7 and 10 of the ICCPR to protect the rights of asylum seekers. Specifically, please identify steps it will take to:

- prevent the loss of life; and
- prevent cruel and inhuman treatment.

Q27. Please describe the proposed safeguards in place to ensure that the State party will not violate the rights enshrined in the ICCPR and other relevant UN conventions of asylum seekers if they are sent to countries such as Malaysia and Nauru for 'off-shore processing'. Additionally, please explain why the State party has not implemented the Committee's recommendation to consider closing down the Christmas Island detention centre.

Q28. What is the Australian government doing to monitor the extent and duration of solitary confinement in order to ensure humane treatment of prisoners, in particular prisoners with a mental illness and other vulnerable people?

Q29. What steps is the Australian government doing to monitor the extent and duration of solitary confinement for administrative (non-punitive) purposes in prison?

Q30. Will the Australian government ensure legislative protections to guarantee humane treatment and ensure legislative protections to prevent people suffering from mental illness/cognitive impairment from being housed in supermax prisons and maximum security units?

Q31. What steps is the Government taking to improve the provision of healthcare in Australian prisons? In particular, what steps are being taken to implement the recommendation by the UN Special Rapporteur on the right to the highest attainable standard of health, to "increase engagement with community health providers by prisons [to]...improve continuity of care and facilitate reintegration into the community"?

Q32. What is the Government doing to provide suitable alternatives to prison in order to reduce the high rates of incarceration for prisoners with mental health issues?

Q33. What are Australian governments doing to address allegations of discrimination in the prison system and eliminate discriminatory practices against women in prisons?

Q34. Will the Australian Government introduce a high threshold test for the use of Tasers by all police forces in Australia to prevent deaths from Taser use? What are they doing to prevent police from using Tasers as instruments of torture?

Q35. What is the Australian Government doing to implement the Committee's 2009 recommendation to establish a mechanism to carry out independent investigations of complaints of police misconduct?

Q36. What is the Australian Government doing to ensure that effective data collection and accountability mechanisms, such as stop and search receipting, are in place to prevent racial profiling and other discriminatory practises in Australian police forces?

Q37. What is the Australian Government doing, together with state and territory governments, to invest in the reforms necessary to end institutional models of accommodation and disability support?

Q38. What is the Australian Government doing to comply with the recommendations of UN Human Rights Bodies to enact national legislation prohibiting sterilisation of:

- girls, regardless of whether they have a disability, except where there is a serious threat to life or health; and
- adult women with disabilities in the absence of their fully informed and free consent?

Q39. What is the Australian Government doing to redress the human rights violations against women and girls with disabilities who have been sterilised without their consent?

Q40. How does Australia ensure that people receiving treatment in psychiatric facilities are provided with high quality care and treatment in the least restrictive environment, and kept safe and protected against sexual harassment or assault? Specifically, what legislative, policy and accountability measures have been implemented to:

- eliminate the use of restrictive interventions such as chemical and physical restraint and seclusion and
- ensure the availability, accessibility, implementation and evaluation of female-only psychiatric wards

and when and how will these be monitored and evaluated?

Q41. Please explain how the process and criteria for involuntary psychiatric treatment and the external review of such treatment – both in hospital and in the community – are consistent with Articles 9 and 14 of the ICCPR and Article 12 of the UN Convention on the Rights of Persons with Disabilities.

Article 8 - Freedom from slavery, servitude and forced labour

Q42. What is the Australian Government doing to implement the recommendations by the Special Rapporteur on Trafficking in Persons on Australia, particularly the establishment of a comprehensive national compensation scheme for victims of trafficking?

Q43. What is the Australian Government doing to ensure all trafficked people have appropriate access to safe and sustainable accommodation and other support services irrespective of their participation in criminal proceedings against perpetrators?

Q44. What commitments have been made to ensure the establishment of compensation schemes for the victims of the Stolen Generations and Stolen Wages, or where they have deceased, their descendants?

Article 14 - Right to a fair trial

Q45. What steps, including legislative amendments, have been taken to ensure that all aspects of Australia's counter-terrorism measures are compatible with Australia's obligations under the covenant?

Q46. What progress has been made to both significantly increase the funding of Aboriginal and Torres Strait Islander Legal Services, Aboriginal and Torres Strait Islander women's legal services, Family Violence Prevention Legal Services and community legal centres to ensure their long term maintenance?

Q47. What progress has been made to increase the availability of Aboriginal and Torres Strait Islander interpreters and establish a national framework of Aboriginal and Torres Strait Islander interpreters?

Q48. Is the Government prepared to ensure that individuals have access to appropriate mechanisms to seek review of their case in light of fresh evidence? Specifically, will the Government commit to the establishment of a Criminal Cases Review Commission accessible by people of all Australian jurisdictions?

Article 23 - Protection of the family

Q49. How is the Government ensuring that each state and territory has laws which ensure equal access to the law for same sex couples and their children and in financial and workplace benefits?

Q50. What is the Australian Government doing, together with state and territory governments, to develop a nationally consistent approach to equal relationship recognition, including for same-sex and mixed-sex couples? In particular please provide information on the status of the *Marriage Equality Amendment Bill 2012* and the *Marriage Amendment Bill 2012*.

Article 24 - Rights of the child

Q51. What is the Australian Government doing to reduce the over-representation of Aboriginal and Torres Strait Islander children in the child protection system? In particular, what prevention and early intervention mechanisms are being used to prevent separation?

Q52. What mechanisms are in place to ensure that Aboriginal and Torres Strait Islander children's rights to their culture and language are protected and maintained once they are in out-of-home care, and how is the quality of Cultural Support Plans ensured?

Q53. What is the Australian Government doing to reduce the number of children and young people in the juvenile justice system? In particular

- What is the Australian Government's response to calls to change the age of criminal responsibility and repeal mandatory sentencing laws?
- What is the Australian Government doing to reduce the over-representation of children with disabilities and Aboriginal and Torres Strait Islander Children in the juvenile justice system?

Q54. What has the Australian Government been doing to address the concerns previously expressed by the Committee about children and juveniles being held in immigration detention facilities?

Q55. What is the Australian Government doing to develop a national disability education action plan which specifically identifies current inadequacies in funding and resources, sets appropriate benchmarks, targets and goals and allocates sufficient funding so that the educational rights of children with a disability are adequately met?

Article 25 - Participation in public life

Q56. What steps will the Australian Government take to resource opportunities for Aboriginal and Torres Strait islander women, specifically in relation to participation on top 200 company boards and within the federal parliament?

Q57. Will the Government make substantial long term investment in the participation of women in public and political life? If so please provide information on the impact this will have for Aboriginal and Torres Strait Islander women.

Q58. What steps is the Australian Government taking, together with state and territory governments, to better secure access to justice in environmental matters, and particularly to extend Commonwealth legal aid for public interest environmental matters, and to introduce public interest costs orders in all jurisdictions, to avoid the risks of adverse costs orders in litigation brought in the public interest?

Q59. What steps is the Australian Government taking, together with state and territory governments, to implement comprehensive “anti-SLAPP” legislation to strengthen protection of public participation?

Q60. What steps is the Australian Government taking to ratify the Aarhus Convention?

Q61. What is the Australian Government doing to ensure that people with disabilities can realise their right to participate fully in public life, including by exercising their right to vote on an equal basis?

4. Article 1 - Right to self-determination

4.1 Intervention into Northern Territory Aboriginal and Torres Strait Islander Communities

Before the original legislation that enabled the Northern Territory Emergency Response (NTER) expired on June 30, 2012, the Australian Government rushed through a new package of legislation, entitled 'Stronger Futures', which will continue compulsory income management, alcohol management plans, increased police powers and a ban on considering customary law during sentencing and bail hearings. It will also introduce new measures such as the cutting of welfare payments to parents whose children do not meet attendance standards and the escalation of penalties for possessing alcohol in dry communities to include a 6 month imprisonment term if caught with than 1.35 litres of alcohol in an alcohol protected area.¹ The Stronger Futures legislation has a 10 year sunset period.

* 2009 Concluding Observations

The Committee noted the inconsistency of the NTER with Australia's obligations under the covenant. Lack of adequate consultation and many of the measures that infringe on the enjoyment of rights of Aboriginal and Torres Strait Islander peoples, which were criticised by the Committee will continue under the Stronger Futures legislation.

See, CONC OBS 14.

The effectiveness of Government consultations with Aboriginal and Torres Strait Islander communities in relation to the Stronger Futures package has repeatedly been called into question for issues like the way in which options are presented and discussed, the facilitation of consultations, the willingness of the Government to incorporate community feedback and ideas into what appear to be already decided upon policies, the use of interpreters and the time given to consultations. Reports argue that such consultations have not equated to the free, prior and informed consent of communities affected by Stronger Futures being obtained.²

The Stronger Futures package was introduced three days before the Parliamentary Joint Committee on Human Rights was established and hence, has not been subject to comprehensive scrutiny as to its compatibility with Australia's international human rights obligations. While the government, at the prompting of the Joint Parliamentary Committee, provided a human rights compatibility statement to accompany the Stronger Futures Bills shortly before the Bills were passed by Parliament, given the significant and long lasting impact of the legislation, a more comprehensive review by the Joint Parliamentary Committee is warranted.

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities** and **Article 4 - Derogations.**

Proposed Question for List of Issues

→ Q1. What measures have been taken to ensure that the Stronger Futures legislation package is compliant with Australia's international human rights obligations?

¹ See, *Stronger Futures in the Northern Territory Bill 2012*.

² See, Jumbunna. *Listening but not Hearing: A response to the NTER Stronger Futures Consultations June to August 2011* and Australian Human Rights Commission. *Stronger futures requires stronger consultation*.

4.2 Income management

Income Management is a punitive system based on offensive assumptions about welfare recipients that are not supported by evidence and fail to address the root causes of social disadvantage. While the Government's position is that Income Management is now race neutral, after extending the policy to the whole of the Northern Territory in 2010, statistics clearly demonstrate that Income Management indirectly discriminates against Aboriginal and Torres Strait Islander peoples. While only being 30% of the population, in May 2012 90.5% of people in the Northern Territory who were on Income Management were Aboriginal and Torres Strait Islander peoples. In the Kimberley in Western Australia, 97% of those on Income Management were Aboriginal and Torres Strait Islander peoples and in Cape York, Income Management exists almost exclusively in Aboriginal and Torres Strait Islander communities. The Government has also just passed legislation to extend Income Management to 5 additional trial sites in Victoria, South Australia, New South Wales and Queensland with significant Aboriginal and Torres Strait Islander populations. Exemptions to Income Management are rarely granted to Aboriginal and Torres Strait Islander peoples.³

The effectiveness of Government consultations with Aboriginal and Torres Strait Islander communities affected by Income Management have repeatedly been called into question since its introduction in 2007. See, *Intervention into Northern Territory Aboriginal and Torres Strait Islander Communities* (above).

Income Management is also relevant to **Article 12 - Freedom of Movement** as the welfare recipient's payments are quarantined onto a BasicsCard which can only be used at certain locations for certain purchases. Also, **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities**.

* 2009 Concluding Observations

The Committee advised the Australian Government to "increase its efforts for an effective consultation with Indigenous peoples in decision-making in all areas having an impact on their rights". As discussed here and above at [4.1] the effectiveness of consultations with Aboriginal and Torres Strait Islander communities in regards to income management and stronger futures has been heavily criticised.

See, CONC OBS 13.

Proposed Question for List of Issues

→ **Q2.** What commitments have been made to independently review Income Management schemes? Please explain the Government's view on the lack of a sufficient evidence base for reviewing the need for, and effectiveness of, income management. Will the Government commit to ceasing the expansion of such schemes until a clear evidence base is established, and repeal such schemes if no evidence of its effectiveness is found?

4.3 Implementation of the UN Declaration on the Rights of Indigenous Persons (UNDRIP)

Aboriginal and Torres Strait Islander Australians do not have genuine decision-making authority and power over their lives and futures, with governments continuing to retain extensive power and authority over their rights.⁴ This is particularly apparent in the 'intervention' in the Northern Territory (discussed above); and in the native title

³ Eg. While Aboriginal and Torres Strait Islander peoples represent 9 out of 10 people on Income Management in the Northern Territory, they account for just 22.9% of exemptions and non-Aboriginal and Torres Strait Islander peoples, who account for just 9.5% of those on the scheme, have been granted 77.1% of all exemptions.

⁴ See, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2011*, Australian Human Rights Commission, 28 October 2011, p133.

system with its laws, and state government policies, which impose industrial developments on Aboriginal and Torres Strait Islander lands without the free, prior and informed consent of the lands' Aboriginal and Torres Strait Islander owners.⁵

The United Nations Human Rights Council recommended that Australia fully implement the UNDRIP through revising its Constitution, legislation, public policies and programs.⁶ Similar statements have been made by other UN bodies.⁷ The Human Rights Committee has also criticised the lack of protections of participation for Indigenous Australians.⁸ The Australian Government essentially ignores these recommendations, saying it simply “supports promotion of and respect for the principles in [UNDRIP and that] where appropriate in law and in policy, the Australian Government will ... recognise and protect the culture and heritage of Indigenous peoples”.⁹

Proposed Questions for List of Issues

→ **Q3.** What steps is the Australian Government taking, together with state and territory governments, to ensure the standards in UNDRIP are implemented within Australia? In particular:

- specifying the Australian Human Rights Commission can take UNDRIP into account in exercising its human rights functions;
- amending or introducing laws which ensure Aboriginal and Torres Strait Islander persons the right to participate in accordance with free, prior and informed consent - particularly in relation to government and company actions which impact on their lives.

Under Article 1 - Right to Self-determination

See also:

Progress towards Close the Gap Targets in Health Standards and Life Expectancy, p23

⁵ See, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, ch3; Special Rapporteur on Indigenous People, *Situation of indigenous peoples in Australia*, UN doc A/HRC/15/37/Add.4, 1 Jun 2010, ptIII B; Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN doc A/HRC/12/34, 15 Jul 2009, [62]-[74].

⁶ Human Rights Council, *Australia: Report of the Working Group on the Universal Periodic Review*, UN doc A/HRC/17/10, 24 Mar 2011, [86.106].

⁷ See, Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility*, UN doc E/C.19/2009/CRP. 8, 4 May 2009, [80], [82], [83]. The need to ensure participation of Indigenous people in decisions that affect them was further echoed in the recommendations made by Special Rapporteur, James Anaya. See, James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum – The Situation of Indigenous Peoples in Australia*, 1 June 2010, UN Doc A/HRC/15/37/Add.4 at [79], [87]–[88], [91], [94] – [95].

⁸ UN HRCtee, *Concluding Observations of the Human Rights Committee - Australia A/55/40*, 24 July 2000, sec 3.

⁹ Australia's Permanent Representative to the United Nations, *Australia's formal response to the UPR recommendations*, 8 June 2011, p7.

5. Article 2, 26 & 27 - Treaty entrenchment and non-discrimination; Equality before the law & Rights of Minorities

5.1 Federal Charter of Rights

Australia has not fully incorporated the ICCPR into its domestic law and has failed to adopt a comprehensive legal framework for the protection of human rights, as recommended by numerous human rights monitoring bodies.¹⁰ Human rights legislation exists in Victoria and the Australian Capital Territory, but not in other Australian states or territories.¹¹

In 2008, the Federal Government appointed an independent committee to conduct a National Human Rights Consultation on the protection and promotion of human rights in Australia. The committee received 35,000 submissions and found that:

- Australia's democratic and legal institutions do not provide adequate protection of human rights;
- human rights are not enjoyed fully or equally by all Australians, both in fact and in law; and
- there is strong public support for enhanced legal and institutional protection of rights.

The committee recommended that Australia adopt a Human Rights Act, a recommendation supported by over 87% of submissions. The Government's response - a "Human Rights Framework" - does not include a federal Human Rights Act. Instead, it focuses on enhanced human rights education and parliamentary engagement with human rights.

The Government created a Parliamentary Joint Committee on Human Rights to review legislation referred to it for compliance with human rights. A Member of Parliament introducing a Bill must also prepare a statement of compatibility on the Bill's compliance with human rights. However, Parliament can still make laws that are not compliant with human rights.

* 2009 Concluding Observations

In 2009 the Committee called for the adoption of a "comprehensive legal framework for the protection of the Covenant rights at the Federal level". The Committee's 2000 Concluding Observations and Universal Periodic Review recommendation 86.22 also call for the introduction of a Federal Human Rights Act.

See, CONC OBS 8.

Proposed Questions for List of Issues

→ **Q4.** When will the Australian Government introduce a comprehensive, judicially enforceable federal Human Rights Act?

→ **Q5.** Noting the new Parliamentary Committee on Human Rights, what further steps will the Government take to ensure that Australian laws can only be made if they are compliant with human rights?

5.2 Comprehensive Federal Equality and Anti-Discrimination Legislation

Australia has enacted federal laws to prevent discrimination on the basis of race, sex, disability and age.¹² However, there remain significant gaps in Australia's discrimination laws.

¹⁰ See, for example, UN HRCtee, *Concluding observations of the Human Rights Committee - Australia*, CCPR/C/AUS/CO/5, 7 May 2009 at [8]; UN HRCtee, *Concluding observations of the Human Rights Committee - Australia*, A/55/40, 24 July 2000; UN HRC, *Report of the Working Group on the Universal Periodic Review: Australia*, A/HRC/17/10.

¹¹ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and *Human Rights Act 2004 (ACT)*.

Whilst the Government has committed to consolidate federal anti-discrimination legislation into one piece of legislation,¹³ there remain concerns the process will not result in stronger protections and that the Federal law will remain deficient by:

- continuing to be reactive and complaints-based;
- failing to promote substantive equality or address systemic discrimination;
- not addressing all grounds of discrimination or intersectional discrimination; and
- continuing to be ineffective in areas in which permanent exceptions may be granted.¹⁴

Furthermore, the Australian Constitution does not enshrine the right to equality and discrimination with the result that Federal anti-discrimination law may be overridden by subsequent legislation (as was the case with the Northern Territory Intervention laws).¹⁵

* 2009 Concluding Observations

The Committee recommended that Australia “adopt Federal legislation, including all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination.” Similar recommendations were made during Australia’s UPR Review.

See, CONC OBS 12.

Expanding the list of protected attributes

To recognise the diversity of the Australian community and to fulfil the Government’s obligations under the ICCPR, any Federal consolidated legislation must include an expanded list of grounds of unlawful discrimination. This expanded list should include sexual orientation,¹⁶ gender identity (including gender presentation), intersex identity, irrelevant criminal record, homelessness/low socio economic status,¹⁷ being a victim or survivor of domestic violence,¹⁸ religious belief/activity,¹⁹ political belief/activity,²⁰ trade union membership and industrial activity,²¹ status as non-citizens, physical features,²² and carer and family responsibilities.

Also relevant to **Article 3 - Equal rights of men and women; Article 6 - Right to Life; Article 23 - Protection of the family.**

Proposed Questions for List of Issues

→ **Q6.** Will the Australian Government’s proposed consolidation of anti-discrimination laws address all prohibited grounds of discrimination, promote substantive equality, and provide effective remedies against systemic and intersectional discrimination?

→ **Q7.** Does the Australian Government support a Constitutional amendment to enshrine the right to non-discrimination and equality?

¹² *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth).

¹³ See, Australian Government Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws - Discussion Paper*, September 2011.

¹⁴ Eg. Under the *Sex Discrimination Act 1984* (Cth), religious bodies, sporting clubs and charities are permanently exempt from the Act’s operation.

¹⁵ The Northern Territory Emergency Response (discussed above) involved the suspension of the *Racial Discrimination Act 1975* (Cth).

¹⁶ We note the Federal Government’s commitment to include new protections to prevent discrimination on the basis of sexual orientation and gender identity. See, *Report of the Working Group on the Universal Periodic Review, Australia, Addendum - Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/17/10/Add.1*, 31 May 2011, response to recs 42 and 44.

¹⁷ Art 2 of ICCPR and Art 2 of ICESCR provide for respect of the human rights within the Covenants without distinction of any kind, including “other status”. Art 26 of ICCPR provides for protection from discrimination on any ground, including “other status”. See also, general comment 20.

¹⁸ Consistent with Art 2, 3, 7 and 26 of ICCPR.

¹⁹ Art 26 of the ICCPR.

²⁰ Art 26 of the ICCPR.

²¹ Federal laws should provide protections in line with the *Fair Work Act 2009* (Cth).

²² Including height, weight, size or other bodily characteristics as per the *Equal Opportunity Act 2010* (Vic).

5.3 Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

The Government appointed an Expert Panel to make recommendations to amend the Australia's Constitution to include recognition and provide greater protection of the rights of Aboriginal and Torres Strait Islander peoples. The Panel's report²³ details a number of recommendations that if supported by the Australian people at referendum will enable the Australian Constitution to specifically prohibit racial discrimination and remove the powers of the Government to make laws based on race that have had detrimental impacts on the rights of Aboriginal and Torres Strait Islander peoples.

Referenda in Australia are historically only successful if supported across the Parliament and states. It is essential that the Australian Government engages with the Opposition party, other members of the Australian Parliament and State Premiers to ensure the success of this important reform. The non-government community welcomes the provision of funds for public education about these important proposals however notes the necessity of large scale public awareness and engagement if the referendum is to be successful.

Proposed Questions for List of Issues

→ Q8. Does the Australian Government remain committed to holding a referendum within this Parliamentary term to recognise Aboriginal and Torres Strait Islander peoples in the Constitution?

→ Q9. What negotiations have been entered into by the Australian Government with the Opposition and State Premiers to pursue support for Constitutional Recognition of Aboriginal and Torres Strait Islander peoples?

5.4 Over-representation of Aboriginal and Torres Strait Islander Peoples within the Criminal Justice System

Aboriginal and Torres Strait Islander peoples are chronically over-represented in the criminal justice system. Aboriginal and Torres Strait Islander peoples are incarcerated at a rate 14 times higher than non-Aboriginal and Torres Strait Islander peoples, a rate which has increased from 2000-2010 by almost 59% for Aboriginal and Torres Strait Islander women and 35% for Aboriginal and Torres Strait Islander men.²⁴ Aboriginal and Torres Strait Islander children are 22 times more likely to be in detention than non-Aboriginal and Torres Strait Islander children,²⁵ a situation which has been deemed a "national crisis" by the Australian House of Representatives inquiry into Aboriginal and Torres Strait Islander youth and the criminal justice system.²⁶ The UN Committee on the Rights of the Child also recently determined that this over-representation was the result of serious and widespread discrimination.²⁷

Under the Australian Government's Closing the Gap initiative, a range of 'Building Blocks' have been identified as areas for priority action. Each Building Block bar one has a National Partnership Agreement (NPA) attached to it which binds all Australian governments to taking action and committing resources to achieve progress targets

²³ *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel January 16, 2012.*

http://www.youmeunity.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20DF%2012%20Jan%20v4.pdf.

²⁴ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators 2011*(2011) 4.12.1.

²⁵ Australian Institute of Criminology, *Australian Crime: Facts and figures* (2009), 113.

²⁶ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011), 2.4.

²⁷ Committee on the Rights of the Child, *Concluding Observations*, 60th sess, [29 (a)] UN Doc CRC/C/AUS/CO/4 (2012).

in that area. The only Building Block without such an agreement is the justice related Safe Communities Building Block. Also missing from the Safe Communities Building Block are justice targets relating to benchmarks that progress can be measured against in relation to addressing the over-representation of Aboriginal and Torres Strait Islander peoples within the criminal justice system. Without an NPA to set out a clear strategy for action and bind Australian governments to taking such action and committing the necessary resources, it is likely that over-representation rates will continue to rise.

Proposed Questions for List of Issues

→ **Q10.** What progress has been made in developing a National Partnership Agreement in relation to the Safe Communities Building Block under the Closing the Gap initiative? In particular, what progress has been made in developing justice targets to measure progress in addressing the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system?

5.5 Migrant Workers: Visa Holders and Undocumented Workers

The Australian Government has made some progress in addressing the exploitation of migrant workers with the enactment of the *Migration Legislation Amendment (Worker Protection) Act 2008*, and with the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* currently before a Senate Inquiry. Migrant workers are covered by domestic legislation that applies to all workers in Australia such as the *Fair Work Act 2009*, and are entitled to protection under national anti-discrimination legislation such as the *Racial Discrimination Act 1975*.

However, Australian law does not protect migrant workers from the inherent power imbalances they face with employers. There have been repeated cases of migrant workers being subjected to exploitation and abuse including wage discrimination,²⁸ conditions resulting in death²⁹ and forced labour. Migrant workers are internationally recognised as a vulnerable group that requires the protection of a specific human rights treaty.³⁰ Yet Australian legislation and policy fails to ensure migrant workers can realise their rights under the ICCPR. The *Migration Act 1958* (Cth) requires that all non-citizens in Australia hold a visa. Aspects of the current visa scheme are open to abuse. For example, the current temporary skilled workers visa scheme (457 visa) prevents some categories of visa-holders from changing employers at all and requires all 457 visa holders to leave the country within 28 days of becoming unemployed. This acts as a clear disincentive for visa holders to report violations of the law or discrimination. There is also no visa that permits migrant workers to stay in Australia to pursue civil or industrial claims, such as for workplace injury or to recover wages. The Department of Immigration and Citizenship has, on occasion, provided a bridging visa to allow a 457 visa holder to stay beyond 28 days if involved in such a claim. However, there is no certainty to this process and visa holders would be aware of this possibility only if they pursued a complaint with the relevant authorities. A specific visa category for this purpose needs to be created and publicised.

²⁸ Wallace, Natasha (25 July 2011) "Employers avoid fines despite visa abuse sanctions" *Sydney Morning Herald*: <http://www.smh.com.au/nsw/employers-avoid-fines-despite-visa-abuse-sanctions-20110725-1hx98.html> (last accessed on 14 February 2012).

²⁹ 'Silent victims of cut-price industry', *Sydney Morning Herald*, 20 Sep 2010, at <http://www.smh.com.au/nsw/silent-victims-of-cut-price-industry-20100919-15hy1.html>.

³⁰ 1990 *UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

The Australian Government is not a party to the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Government rejected recommendations made during Australia's last Universal Periodic Review to consider ratification of the Convention.

Also relevant to **Article 8 - Freedom from slavery, servitude and forced labour**.

Proposed Questions for List of Issues

→ **Q11.** Why does the Australian Government refuse to ratify the Convention on the Rights of Migrant Workers, which gives specific form to the human rights contained within conventions Australia has already ratified as they apply to the situation facing migrant workers?

→ **Q12.** Please explain the steps that the Australian Government has taken to identify real or potential violations of the rights of documented or undocumented migrant workers arising from its laws and policies, including visa conditions, and provide the results of any such investigations?

Under Article 2, 26 & 27 - Treaty entrenchment and non-discrimination; Equality before the law & Rights of Minorities

See also:

Intervention into Northern Territory Aboriginal and Torres Strait Islander Communities, p12

Income Management, p13

Homelessness, p24

Australian Police Forces, p31

People with Disability, p33

People with Psychosocial Disability, p34

The Stolen Generations and Stolen Wages, p37

Equality in Marriage and Parenting Laws Regardless of Sex, Sexual Orientation or Gender Identity, p43

Protection of the Rights of Vulnerable Children, p44

Increased Participation of Aboriginal and Torres Strait Islander Women in Public Life, p47

Right to Vote of People with Disability, p48

6. Article 3 - Equal rights of men and women

6.1 Violence Against Women

Violence against women continues to occur at appalling levels in Australia.³¹

Services and justice processes are still not accessible, fair, effective and seamlessly integrated, and are not supported by comprehensive databases and ongoing evaluation. Various human rights

committees have expressed particular concern about federal, state and territory governments' record in preventing violence against women who experience other forms of discrimination and marginalisation, including protecting these groups of women from violence and supporting victims/survivors.³² For example, Aboriginal and Torres Strait Islander women are 35 times more likely to be hospitalised as a result of family violence-related assaults, and 10 times more likely to die from family violence, than other Australian women.³³ Women with disabilities experience more severe violence more often than other women, endure additional violence because of their disabilities - such as forced sterilisation and deprivation of liberty - and encounter more barriers when they try to protect themselves and seek justice.³⁴

* 2009 Concluding Observations

The Committee recommended the Australian Government “strengthen its efforts towards the elimination of violence against women, especially perpetrated against indigenous women” and “promptly implement its National Plan of Action to Reduce Violence against Women and their Children”. Implementation of the plan is still in question with regards to adequate funding and independent monitoring. Jurisdictional implementation plans are still yet to be released
See, CONC OBS 17.

In 2007-8 there were 134 domestic homicides in Australia, of which 80 were intimate partner homicides, mostly killings of women by men.³⁵ Family/domestic violence homicides often have predictive elements to them, and death reviews help to prevent future deaths by identifying risk indicators and systems failures, resulting in stronger and nationwide collaborative risk assessment and management.³⁶ However, there are no family/domestic violence death reviews in Western Australia, Tasmania, the ACT and the Northern Territory, and no existing death review adheres to all core best practice principles.

Most government responses to domestic violence still require women to leave their homes. However, women with disabilities, Aboriginal and Torres Strait Islander women and women from culturally and linguistically diverse communities are often not appropriately supported in the majority of refugees, and may not be able to even

³¹ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021*, March 2009.

³² UN HRCttee, *Concluding Observations of the Human Rights Committee: Australia (2009)*, CCPR/C/AUS/CO/5, [17], [25]; CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia (2010)*, CEDAW/C/AUL/CO/7, [40-45]; Women with Disabilities Australia, *Submission to the UN Analytical Study on Violence Against Women with Disabilities (2011)*.

³³ Australian Institute of Health and Welfare, *Family Violence Among Aboriginal and Torres Strait Islander Peoples (2006)*.

³⁴ Women with Disabilities Australia, *Submission to the UN Analytical Study on Violence Against Women with Disabilities (2011)*.

³⁵ Virueda, M & Payne, J, *Homicide in Australia: 2007-08 National Homicide Monitoring Program Annual Report*, Australian Institute of Criminology, Canberra (2010), pp7-20.

³⁶ Betty Taylor for the Domestic Violence Death Review Action Group, *Dying to be Heard: Domestic and Family Violence Death Reviews Discussion Paper (2008)*.

access a refuge, especially if they have several children.³⁷ Women also struggle to find adequate ongoing accommodation.³⁸

The federal, state and territory governments have produced the National Plan to Reduce Violence Against Women and their Children, but the Plan does not include all the necessary actions, including many recommended by the CEDAW Committee, and the Universal Periodic Review of Australia³⁹ and accepted by Australia. It does not incorporate all the recommendations from a comprehensive law reform commission inquiry into family violence in Australia.⁴⁰ Two years in, some key actions remain unimplemented, such as the establishment of a National Centre of Excellence. It is also unclear whether the Plan will be adequately funded for effective implementation, and there are no independent monitoring and evaluation mechanisms to monitor its implementation and measure its effectiveness.

Also relevant to **Article 6 - Right to Life** and **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities**.

Proposed Questions for List of Issues

→ **Q13.** What steps is Australia taking to prevent family violence-related homelessness and ensure that women and their children are provided with culturally appropriate and accessible ongoing accommodation and integrated support?

→ **Q14.** How is the Australian Government addressing the need for a coordinated prevention approach to family/domestic violence deaths across Australia?

→ **Q15.** How does the National Plan to Reduce Violence Against Women and their Children address and fund the specific situation of Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse communities, and women with disabilities; and what steps are being taken to implement an independent monitoring and evaluation mechanism that involves civil organisations?

Under Article 3 - Equal Rights of Men and Women

See also:

People with Disability, p33

People with Psychosocial Disability, p34

Increased Participation of Aboriginal and Torres Strait Islander Women in Public and Political Life, p47

³⁷ State Coroner of Western Australia, Inquest into the Death of Andrea Louise Pickett, 28 June 2012; Women's Centre for Health Matters Inc., *Culturally and Linguistically Diverse Women in the ACT: Enablers and Barriers to Achieving Social Connectedness* (2009) p27; Women with Disabilities Australia, *Submission to the UN Analytical Study on Violence Against Women with Disabilities* (2011), pp31-32.

³⁸ Liesl Mitchell, *Domestic Violence in Australia - An Overview of the Issues*, Department of Parliamentary Services (2011), pp25-28.

³⁹ CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia* (2010), CEDAW/C/AUL/CO/7, para 29; UN GA Universal Periodic Review, A/HRC/17/10.

⁴⁰ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010), pp 1459-1483; Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (2011).

7. Article 4 - Derogations

Under Article 4 - Derogations

See also:

Intervention into Northern Territory Aboriginal and Torres Strait Islander Communities, p12

Counter-terrorism Measures, p39

Protection of the Rights of Vulnerable Children, p44

8. Article 6 - Right to life

8.2 Progress towards Close the Gap Targets in Health Standards and Life Expectancy

The Australian Government has committed: “To developing a comprehensive, long-term plan of action, that is targeted to need, evidence based and capable of addressing the existing inequalities in health services, in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians by 2030”.⁴¹ In 2011 it announced a process for developing an Aboriginal and Torres Strait Islander Health Equality Plan with the goal of achieving health equality by 2030.

Consistently with a rights-based approach to policy development, the Government must develop, implement and monitor the Aboriginal and Torres Strait Islander Health Equality Plan and other health related policy in partnership with Aboriginal and Torres Strait Islander peoples and their representatives. To facilitate this partnership the National Health Leadership Forum (NHLF) established itself as the national representative body for Aboriginal and Torres Strait Islander peak bodies whose core business is the health of Aboriginal and Torres Strait Islander peoples. The NHLF is based within the National Congress Of Australia’s First Peoples and is intended to be the Congress’ partnership vehicle in health matters.

It is estimated that by 2031 Aboriginal and Torres Strait Islander life expectancy would need to increase by 20.6 years for males and 15.9 years for females for equality with the life expectancy of the general population to be achieved. In their 2012 shadow report, the Close the Gap Steering Committee notes that while available data indicates that the gap may have narrowed in the long term, “progress has slowed since 2001”.⁴² The report calls for the Australian Government to address long-standing data issues and emphasises the need for the continued provision of adequate funding to closing the gap programs when the current national partnership agreements expire in 2013.⁴³

Proposed Questions for List of Issues

→ **Q16.** What is the Australian Government doing to monitor and evaluate progress towards achieving Close the Gap health targets for Aboriginal and Torres Strait Islander peoples? In particular, what steps is it taking to improve the collection and availability of disaggregated data?

→ **Q17.** What measures has the Australian Government taken to partner with the National Health Leadership Forum in relation to the Aboriginal and Torres Strait Islander Health Equality Plan and health policy more generally.

⁴¹ Close the Gap, *Indigenous Health Equality Summit*. March 20 2008.

http://www.hreoc.gov.au/social_justice/health/statement_intent.html.

⁴² Close the Gap Campaign Steering Committee, *Close the Gap Shadow Report 2012*.

http://www.hreoc.gov.au/social_justice/health/OAus-CloseTheGapShadowReport-0212.pdf?ref=687.

⁴³ Close the Gap Campaign Steering Committee, *Close the Gap Shadow Report 2012*.

http://www.hreoc.gov.au/social_justice/health/OAus-CloseTheGapShadowReport-0212.pdf?ref=687.

8.2 Aboriginal and Torres Strait Islander Deaths in Custody

There has been a near total failure by successive State and Commonwealth Governments to ensure that the 339 recommendations of the 1991 Royal Inquiry into Aboriginal Deaths in Custody were implemented.

Additionally, widely reported in the mainstream media, have been actual occurrences of several totally avoidable deaths in custody across Australia (Mr Doomagee, Palm Island, Qld, 2004; Mr Ward, Laverton Region, WA, 2008; Mr Phillips, Kalgoorlie, WA, 2011; and Mr Briscoe, Alice Springs, NT, 2012). These deaths demonstrate the failure of the Australian Government to prevent avoidable deaths in custody.

Combined with deaths in custody that have their origin in extreme police and custodial services violence (the Mr Doomagee case), almost inconceivable substandard treatment of a human being (the Mr Ward case) and extremes of indifference to a person's medical condition (the Mr Phillips case), there have been several cases of near occurrences of deaths in custody due to the grossly inadequate provision of medical and general welfare services in Australian prisons.

Also relevant to **Articles 7, 9 & 10 - Prohibition of torture and cruel, inhuman or degrading treatment; Freedom from arbitrary detention & Conditions of detention.**

Proposed Questions for List of Issues

→ **Q18.** What is the Australian Government doing to review, update and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and ensure the humane treatment of persons who are detained in custody at all levels?

8.3 Homelessness

Census data shows that just over 100,000 Australians experience

homelessness on any given night.⁴⁴ This issue is exacerbated by a severe lack of available affordable housing.

Progress has been made over the past few years, particularly in the areas of voting rights for people experiencing homeless and access to legal processes. There has also been substantial investment at a national and jurisdictional level to end and prevent homelessness.

However, people experiencing homelessness continue to be denied basic rights including access to adequate accommodation, loss of the right to privacy and their ability to participate economically and socially in institutions such as education and training, the labour force and the political process is often severely curtailed.

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities; Article 17 - Right to Privacy**

* 2009 Concluding Observations

The Committee recommended the Australian Government "increase its efforts in order to ensure that social, economic and other conditions do not deprive homeless persons of the full enjoyment of the rights enshrined in the Covenant." Though progress has been made, access to adequate housing is still a major problem, particularly for disadvantaged groups.

See, CONC OBS 18.

⁴⁴ Commonwealth of Australia. *Which Way Home? A new approach to homelessness*. 2008:

http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/which_way_home_green_paper_full_report.pdf.

Proposed Questions for List of Issues

- **Q19.** What progress has Australia made towards ensuring the full realisation of the right to adequate housing, with particular attention to aspects of gender and racial equality and non-discrimination?
- **Q20.** How has the Australian Government engaged in dialogue with the community sector and persons without adequate housing in their efforts to secure the right to adequate housing and the elimination of discrimination on the basis of homelessness?

8.4 Coronial Reform

Coronial investigations and inquests have a preventative role in producing long-term solutions to any systemic problems at the heart of the death.⁴⁵ However, many families are not able to participate effectively because they do not have access to affordable legal representation, and experience delays far above national standards.⁴⁶ Only Victoria and the Northern Territory statutorily mandate government and other agency responses to all coronial recommendations. Recommendations often fail to be implemented or get lost, and there is no independent monitoring to ensure that patterns of avoidable deaths are not repeated.⁴⁷

Also relevant to **Article 23 - Protection of the family.**

Proposed Questions for List of Issues

- **Q21.** Will the Australian Government work with States and Territories to ensure that families have genuine access to legal representation comparable to that accorded to government departments at coronial inquests, and how does it propose to address the failure in implementation of coronial recommendations?

8.5 Environmental Rights

International and comparative law has recognised that the right to life is broad, extending to the “bare necessities of life”⁴⁸ including clean water, food, basic health care and Indigenous and cultural rights.⁴⁹ These basic needs are easily undermined as a result of environmental damage.

The Australian Government has recognised the connection between human rights and a clean and healthy environment in the context of climate change.⁵⁰ It has proposed that this concern be addressed via its *Clean Energy Future* plan⁵¹ which, by regulating carbon emissions, will better protect the human rights of Australians, including by improving air quality, and mitigating temperature rises, sea level rises and the likely increases in extreme weather and health impacts. However, the *Clean Energy Future* plan does not address the human rights implications of environmental

⁴⁵ State Coroner of Western Australia, *Findings and Recommendations of the Inquest into the Death of Mr Ward*, 12 June 2009.

⁴⁶ Australian Inquest Alliance, *Saving Lives By Joining Up Justice: Why Australia Needs Coronial Reform and How to Achieve It*; Productivity Commission, *Report on Government Services 2012*, 7.30, 7.36.

⁴⁷ Ray Watterson, Penny Brown and John McKenzie, ‘Coronial Recommendations and the Prevention of Indigenous Death’ (2008) 12 (6) *Australian Indigenous Law Review* 4.

⁴⁸ *Francis Coralie Mullin v Union Territory of Delhi* (AIR 1981 SC 746).

⁴⁹ See the *1972 Declaration of the United Nations Conference on the Human Environment* (Stockholm Declaration), Principle 1; Earthjustice, ‘Environmental Rights Report 2008: Human Rights and the Environment’, p6.

⁵⁰ The Government referred to climate change as a ‘human rights concern of the general community’ in Attorney-General’s Department, *National Human Rights Action Plan*, 2012, Priority 61.

⁵¹ See the *Clean Energy Act 2011* (Cth) and associated legislation, also www.cleanenergyfuture.com.au.

damage more broadly (ie, beyond climate change), in particular, threats to the right to life such as clean water supply and basic health care.⁵²

Proposed Question for List of Issues

→ **Q22.** What steps is the Australian Government taking, together with state and territory governments to:

- address the need not just for mitigation of climate change impacts, but adaptation to those impacts?
- ensure equality in and security of access to clean water supplies for present and future generations?
- ensure that mining, logging and oil developments don't deprive Aboriginal and Torres Strait Islander peoples of the physical basis for their cultures and subsistence?

Under Article 6 - Right to Life

See also:

Violence Against Women, p20

Asylum Seekers, p27

Australian Police Forces, p31

Protection of the Rights of Vulnerable Children, p44

⁵² Importantly, it is not sufficient to achieve the Government's 5% emissions reduction target - further actions need to be taken to achieve this. See submission by the Environment Defenders Office (Vic), 'Review of the Victorian Climate Change Act' (November 2011), available at: <http://www.edovic.org.au/law-reform/submissions-and-issues-papers/review-victorian-climate-change-act>.

9. Articles 7, 9 & 10 - Prohibition of torture and cruel, inhuman or degrading treatment; Freedom from arbitrary detention & Conditions of detention

9.1 Asylum Seekers

Mandatory detention

Australia is the only country in the world where immigration detention is mandatory for all unlawful non-citizens⁵³ and where there exists no judicial or administrative review to challenge the basis for detention. This is in spite of the fact that UNHCR's detention guidelines for asylum seekers state that "as a general principle asylum seekers should not be detained" except under exceptional circumstances where it must be "subject to judicial or administrative review to ensure that it continues to be necessary."⁵⁴ In 2004, the Australian Human Rights Commission declared Australia's Immigration laws "create a detention system that is fundamentally inconsistent with the Convention on the Rights of the Child (CRC)" and constitute cruel, inhumane and degrading punishment.⁵⁵ Today, children are still subject to Australia's policy of mandatory detention. As of 31 May 2012, there were 516 children in detention.⁵⁶ Since April 2010, 59 babies have been born into detention facilities, 3 of whom still remain.⁵⁷

* 2009 Concluding Observations

The Committee clearly stated that the government should "consider abolishing the remaining elements of its mandatory immigration detention policy" and expressed concern with the detention of children in immigration detention facilities. These fundamental issues have clearly not been resolved.

See, CONC OBS 23 & 25.

Indefinite detention and inadequate judicial oversight

Since its introduction in 1992, and despite recent promises that detention would be used as a "last resort and for the shortest practicable time",⁵⁸ long-term detention has been a constant feature of the refugee status determination process in Australia with disastrous mental health impacts.⁵⁹ More recently, as a result of non-reviewable adverse security assessments, over 50 recognised refugees, including children, face indefinite detention with little prospect of release. The result has been a spate of suicide attempts.⁶⁰ A recent parliamentary inquiry stated that it "resolutely rejects the indefinite detention of people without any right of appeal. Such detention, effectively condemning refugees who have not been charged with any crime to detention for the

* 2009 Concluding Observations

The Committee expressed concern "at the lack of effective review process available with respect to detention decisions". Effective review processes have not been implemented.

See, CONC OBS 23.

⁵³ Janet Phillips and Harriet Spinks, *Immigration Detention in Australia*, *Parliamentary Library of Australia*, 23 January 2012, p2:

http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1311498/upload_binary/1311498.pdf.

⁵⁴ UNHCR, 'UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers', February 1999, p2: <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>.

⁵⁵ Australian Human Rights Commission, 'A last resort?' National Inquiry into Children in Immigration Detention (2004).

⁵⁶ Department of Immigration and Citizenship, *Immigration Detention Statistics Summary*, 31 May 2012.

⁵⁷ Senate Estimates, *Immigration and Citizenship Portfolio*, 21 May 2010, p92:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/estimates/bud_1213/index.htm.

⁵⁸ Immigration Minister Chris Bowen, *New Directions in Detention – Restoring Integrity to Australia's Immigration System*, 29 July 2008, <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

⁵⁹ For Cambodian asylum seekers in 1989, the average length of stay in detention was 523 days. In 2005, 31% of detainees had been held for more than one year and in 2007 there were 367 who had been held for two years or more. As of 31 May 2012, 1434 people had spent more than one year in detention, 433 greater than two years. See Janet Phillips and Harriet Spinks, pp23-26 and Department of Immigration and Citizenship, 'Immigration Detention Statistics Summary', 31 May 2012.

⁶⁰ In May, three Tamils given adverse security assessments attempted to kill themselves. See Daniel Flitton and Maris Beck, 'Refugees' ASIO despair,' *Sydney Morning Herald*, 16 May 2012, <http://www.smh.com.au/opinion/political-news/refugees-asio-despair-20120515-1yp6d.html>.

term of their natural life, runs counter to the basic principles of justice underpinning Australian society".⁶¹ Despite this dire declaration, the policy of indefinite, non-reviewable detention remains.

Mental health impacts

The duration and conditions of detention have come under stern and consistent criticism from leading health organisations, human rights bodies and official parliamentary inquires over the past 20 years. In November 2011, over 30 key health organisations and advocates demanded the Government take urgent action to provide adequate mental health care for people in detention suffering from increased incidents of self-harm and suicide.⁶² In March 2012, a parliamentary investigation into the mental health of asylum seekers found almost 90% of detainees suffer from clinically significant depression, half have been diagnosed with post-traumatic stress disorder and a quarter report suicidal thoughts.⁶³ The mental health impacts of detention are well established and known to the Australian Government. Clinical psychologists are still treating children and parents today from the trauma they suffered in detention over a decade ago.⁶⁴ Unfortunately, history is repeating itself. As the President of the Australian Medical Association in the Northern Territory, Dr Paul Bauret, said in response to long-term detention in 2012: "once again, it looks as though we're producing a cohort of Australian citizens who can be permanently damaged because of what we are doing to them."⁶⁵

Offshore processing and the ICCPR

The Australian Government is committed to offshore processing by continuing to process asylum seekers on Christmas Island (despite the recommendation of the 2009 Human Rights Committee concluding observations) and implementing its plan to send asylum seeker boat arrivals to Malaysia for processing.⁶⁶ There are grave concerns with this plan as Malaysia is not a signatory to the Refugee Convention and has a history of abuse towards asylum seekers and refugees.⁶⁷ It is for these reasons that the High Court of Australia struck down the Government's plan as contrary to the *Migration Act 1958* (Cth).⁶⁸ The Australian Government is currently attempting to abrogate existing legislative arrangements in order to circumvent the High Court's ruling and implement its plan to transfer asylum seekers to Malaysia,⁶⁹ clearly avoiding its own protection obligations and breaching Article 7 and 9 of the ICCPR. Also of considerable concern is the Government's Memorandum of Understanding (MOU) with Afghanistan to return unsuccessful asylum seekers,

* 2009 Concluding Observations

The Committee requested the Government enact legislative measures to prevent asylum seekers from being returned to places where "they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment."

See, CONC OBS 19.

⁶¹ Joint Select Committee on Australia's Immigration Detention Network, 12 April 2012, p175, at http://aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_ctte/immigration_detention/report/index.htm.

⁶² 'Leading Organisations Demand Immediate Action on Mental Health Standards in Immigration Detention,' Australian College of Mental Health Nurses media release, 1 November 2011, <http://www.acmhn.org/images/stories/News/111101over30leadinghealthorgs.pdf>.

⁶³ Statistics quoted by Tom Iggulden, 'Inquiry finds detention causes mental illness,' *Lateline*, 30 March 2012, <http://www.abc.net.au/lateline/content/2012/s3467992.htm>.

⁶⁴ ABC interview with Professor of Psychiatry Dr Louise Newman, 'Immigration Detention system on verge of collapse,' 14 September 2010: <http://www.abc.net.au/lateline/content/2010/s3011845.htm>.

⁶⁵ ABC interview with Dr Paul Bauret, President Australian Medical Association, Northern Territory, 22 March 2012: <http://www.abc.net.au/radionational/programs/breakfast/asylum-seekers-hospitalised/3905668>.

⁶⁶ Malaysian National News Agency, 'Joint Statement By Prime Ministers Of Malaysia, Australia On People Smuggling,' at, <http://www.bernama.com/bernama/v5/newsgeneral.php?id=584652>, 07 May 2011.

⁶⁷ Amnesty International, 'Malaysia: Abused and abandoned: Refugees denied rights in Malaysia,' 16 June 2010.

⁶⁸ Statement by the High Court of Australia, *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, 31 August 2011: <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca32-2011-08-31.pdf>

⁶⁹ Although the proposed bill to achieve this was recently defeated, the Government is still committed to its 'Malaysia solution' plan. Judith Ireland, 'Senate rejects 'compromise' asylum seeker bill,' *Sydney Morning Herald*, 28 June 2012: <http://www.smh.com.au/opinion/political-news/senate-rejects-compromise-asylum-seeker-bill-20120628-214x4.html>

including children and unaccompanied minors.⁷⁰ Previous attempts to deport asylum seekers by the Australian Government resulted in death upon return, and many others continue to live with grave threats to their lives.⁷¹ The current Government has privately acknowledged that “mistakes were made” with previous returns but has failed to re-open these cases.⁷² Grave doubts over the safety of asylum seekers under the current MOU has led to over 70 key refugee human rights organisations and 45 prominent individual advocates demanding the Government revoke the agreement.⁷³

Proposed Questions for List of Issues

- **Q23.** How has Australia complied with the Committee’s previous recommendations to consider the abolishment of the mandatory immigration detention policy?
- **Q24.** What measures have been taken to address the Committee’s concerns about the lack of effective review processes available for detention decisions (Arts 9 and 14). In particular, what safeguards are in place to ensure the automatic periodic judicial review of the necessity and legality of detention of individuals determined to be stateless, of adverse security assessment, or ‘persons of interest’. (Art 9.4) Finally, are there any cases of asylum seekers being told they will be detained for reasons other than those established by law. (Art 9.1)
- **Q25.** How does the Government intend to address the high prevalence of mental health concerns experienced by asylum seekers in Australian detention centres? How does the Government intend to improve the current inadequate availability of mental health care?
- **Q26.** Please explain how the Australian Government intends to comply with its positive obligations under Articles 6, 7 and 10 of the ICCPR to protect the rights of asylum seekers. Specifically, please identify steps it will take to:
- prevent the loss of life; and
 - prevent cruel and inhuman treatment.
- **Q27.** Please describe the proposed safeguards in place to ensure that the State party will not violate the rights enshrined in the ICCPR and other relevant UN conventions of asylum seekers if they are sent to countries such as Malaysia and Nauru for ‘off-shore processing’. Additionally, please explain why the State party has not implemented the Committee’s recommendation to consider closing down the Christmas Island detention centre.

9.2 Prisoners

Solitary Confinement in Australian Prisons

Many people in prison experience solitary confinement, which can cause severe, lasting psychiatric harm.⁷⁴ In many cases, solitary confinement will result from a

⁷⁰ The MOU was signed on 17 January 2011. Five Afghans have been deported under this arrangement; all were voluntary. Comments by Dr Wendy Southern, Deputy Secretary of the Department of Immigration and Citizenship, Senate Estimates, Legal and Constitutional Affairs, 21 May 2012, p41. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/estimates/bud_1213/index.htm.

⁷¹ Edmund Rice Centre, ‘Deported to Danger’ reports I and II, 2004 and 2006 respectively, http://www.erc.org.au/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=80&MMN_position=83:79.

⁷² See comments by Phil Glendenning, Petition to reopen cases of wrongly deported Afghan asylum seekers, <http://www.change.org/en-AU/petitions/departments-of-immigration-reopen-cases-of-wrongly-deported-afghani-asylum-seekers-as-promised>.

⁷³ Edmund Rice Centre, ‘Public Statement: Grave Concerns Over Australia’s MOU with Afghanistan’, http://www.erc.org.au/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=126.

⁷⁴ See, Grassian, S (1993) ‘Psychiatric Effects of Solitary Confinement’ Declaration in Madrid v. Gomez,

diagnosis or symptoms of mental illness, such as a safety order segregating a prisoner showing signs of depression. In this way, people with a mental illness or cognitive impairment are the most likely to be placed in solitary confinement and are also at greatest risk of harm. Solitary confinement has been recognised to place people “in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in detention centres.”⁷⁵ Administrative and punitive solitary confinement practices prioritise operational risk management over human rights.

Conditions in Supermax Prisons

Supermax prisons and Maximum Security Units are designed to hold prisoners who have caused problems with other prisoners, been violent towards other inmates or prison officers, or show other seriously disruptive behaviours. The restriction of their environmental stimulation together with social isolation may result in prolonged or permanent psychiatric disability.⁷⁶ People with a mental illness or cognitive impairment are overrepresented in supermax prisons and MSUs, despite the fact that these isolating conditions exacerbate illness.⁷⁷ Legislative protection is needed to guarantee humane conditions.

Inadequate healthcare in prisons

Australian prisoners face far higher levels of disability, injuries, chronic and communicable diseases, mental illness, and higher mortality rates. For example, 3 in 4 prisoners suffer from mental illness, harmful drug use, or both⁷⁸ and, among Aboriginal and Torres Strait Islander prisoners, 73% of men and 86% of women have a diagnosed mental illness.⁷⁹ While the number of prisoners with mental health issues is steadily increasing, there has not been a corresponding increase in mental health resources to address this need. Prisoners are precluded from accessing Australia's publicly funded universal health care system. This can lead to differences in care, including limiting access to Aboriginal Health checks, and hindering the exchange of information between prison and community health providers, which further compounds the lack of continuity in both pre and post release support services. Health problems for prisoners continue after release with high rates of death after release.⁸⁰

Women Prisoners

Women in prison are discriminated against on the basis of sex through the practice of strip searching and in poor access to low security beds, conditional and community release, education and training programs, work and health services. Fewer rehabilitation, education and training opportunities exist for women prisoners than for men. Protocols and policies for arresting and incarcerating parents with dependent children are minimal and, where they do exist, are inconsistent and inadequate. Culturally and linguistically diverse women are discriminated against through inadequate translation/interpretation services, inappropriate food, and a failure to meet religious needs. Women labelled with an intellectual, psychiatric or learning disability are more likely to be classified as maximum security prisoners. The Queensland Government has recently stopped funding two essential programs run by an advocacy and rights NGO, Sisters Inside, to support women in prison and going through the criminal justice system.

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment and non-discrimination; Equality before the law & Rights of Minorities**

889F.Supp.1146.

⁷⁵ *Bamaca-Velasquez v Guatemala*, IACHR (Series C) No. 70, judgement of 25 November 2000, p150.

⁷⁶ Grassian, S (1993) ‘Psychiatric Effects of Solitary Confinement’ Declaration in *Madrid v. Gomez*,

889F.Supp.1146.

⁷⁷ See, King (2009) Proposal for Acute Care Unit, AGCC.

⁷⁸ AIHW 2011. *The health of Australia's prisoners 2010*. Cat. no. PHE 149. Canberra: AIHW at 3.

⁷⁹ Heffernan et al, 2012, *Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons*, Medical Journal Australia.

⁸⁰ Between 380 and 527 ex-prisoners died in 2007-8 within one year of release and, of those, up to 30% died in their first four weeks out of jail: Kinner, 2011 “High rate of Death Among Ex Prisoners”, *Medical Journal of Australia*.

Proposed Questions for List of Issues

- **Q28.** What is the Australian government doing to monitor the extent and duration of solitary confinement in order to ensure humane treatment of prisoners, in particular prisoners with a mental illness and other vulnerable people?
- **Q29.** What steps is the Australian government doing to monitor the extent and duration of solitary confinement for administrative (non-punitive) purposes in prison?
- **Q30.** Will the Australian government ensure legislative protections to guarantee humane treatment and ensure legislative protections to prevent people suffering from mental illness/cognitive impairment from being housed in supermax prisons and maximum security units?
- **Q31.** What steps is the Government taking to improve the provision of healthcare in Australian prisons? In particular, what steps are being taken to implement the recommendation by the UN Special Rapporteur on the right to the highest attainable standard of health, to “increase engagement with community health providers by prisons [to]...improve continuity of care and facilitate reintegration into the community”?
- **Q32.** What is the Government doing to provide suitable alternatives to prison in order to reduce the high rates of incarceration for prisoners with mental health issues?
- **Q33.** What are Australian governments doing to address allegations of discrimination in the prison system and eliminate discriminatory practices against women in prisons?

9.3 Australian Police Forces

Taser-related deaths

Taser use may constitute torture especially if used in ‘drive stun’ mode to inflict pain. There are reports from Australia of misuse and abuse of Tasers by police.⁸¹ National Taser use policies should explicitly state that Tasers should not be used to gain compliance or used to restrain a person in custody. All Australian Police forces should have clear publicly available policies and adequate training to make sure that Taser use complies with human rights.

The first peer reviewed study has been published which unequivocally links the use of Tasers to cardiac arrest and death.⁸² There should be a consistent Australia-wide high threshold test for Taser use that prohibits use unless there is a real risk of serious injury or death where there are no other reasonable alternatives that can be used. To ensure and demonstrate compliance with this standard, each jurisdiction needs to ensure that there is adequate data collection and reporting on Taser use.

Also relevant to **Article 6 - Right to Life**.

* 2009 Concluding Observations

The Committee recommended that Australia “ensure that restraint devices, including TASERS, are only used in situations where greater or lethal force would otherwise have been justified.” With continuing reports of misuse by police, the need for a high threshold test for Taser use persists.

See, CONC OBS 21.

⁸¹ See for example the WA police taserings of Kevin Spratt 41 times in a police watch house in 2008.

⁸² Douglas Zipes, ‘Sudden Cardiac Arrest and Death Associated with Application of Shocks from a TASER Electronic Control Device’, *Circulation*, (Published online) 2012.

Independent investigations of police misconduct

The overwhelming majority of complaints about police misconduct, excessive use of force by the public are sent back to the police for investigation or “performance management” procedures. In all Australian jurisdictions currently, Police investigate themselves when there is a death in police custody; or there is a complaint of torture, degradation, abuse, ill-treatment, assault, racial abuse or excessive force by police. Police are rarely prosecuted or disciplined for human rights abuses.⁸³

International Human rights standards demand that the investigation of these human rights abuses is conducted by an independent body that is capable of conducting an adequate investigation; open to public scrutiny; victim centred and state initiated.

Also relevant to **Article 6 - Right to Life**.

Racially Discriminatory Policing

Police officers engage with members of the public differently on the basis of their race, ethnic background, national origin or religious beliefs, thus discriminating against them. Studies of young people’s encounters with police have shown that racial profiling, over-policing and differential treatment are experienced widely by Aboriginal and Torres Strait Islander and African youth in Australia.⁸⁴

Stop and Search receipting, as a mechanism adopted in other countries to identify and reduce discriminatory police stops, should be introduced in Australia. Stop and Search Receipting would require police officers to complete a form and issue a receipt (an administrative form to be kept by both parties) every time they stop, or stop and search, someone.

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities** and **Article 6 - Right to life**.

* 2009 Concluding Observations

The Committee observed that Australian police must be independently investigated and recommended that Australia “establish a mechanism to carry out independent investigations of complaints concerning excessive use of force by law enforcement officials.” Currently the overwhelming majority of complaints are sent back to the police for investigation

See, CONC OBS 21.

Proposed Questions for List of Issues

→ **Q34.** Will the Australian Government introduce a high threshold test for the use of Tasers by all police forces in Australia to prevent deaths from Taser use? What are they doing to prevent police from using Tasers as instruments of torture?

→ **Q35.** What is the Australian Government doing to implement the Committee’s 2009 recommendation to establish a mechanism to carry out independent investigations of complaints of police misconduct?

→ **Q36.** What is the Australian Government doing to ensure that effective data collection and accountability mechanisms, such as stop and search receipting, are in place to prevent racial profiling and other discriminatory practises in Australian police forces?

⁸³ See for example McCulloch & Palmer 2005 – Report to the Criminology Research Council, “Civil Litigation by citizens Against Australian Police between 1994 and 2002”, Human Rights Watch 1998 “Shielded from Justice, Police Brutality and Accountability in the United States.” British Columbia Civil Liberties Association Press Release dated 30/09/08 Deaths in Custody Investigation needs reform, “Torture in Chicago” 2008 Report by Peoples Law Office et al. Conversations with Imran Khan and Raju Bhatt in the UK 2008.

⁸⁴ Duff, A. (2006) ‘Creating a better city for young people: The needs of young people living in Flemington, North Melbourne, Kensington and Ascot Vale,’ City of Moonee Valley: Melbourne and Reside, S & Smith, B. (2010) ‘Boys, you wanna give me some action? Interventions into Policing of Racialised Communities in Melbourne,’ Fitzroy Legal Service, Western Suburbs Legal Service & Springvale Monash Legal Service, Victoria.

9.4 People with Disability

Despite Australia's ratification of the Convention on the Rights of Persons with Disabilities, Australia fails to ensure that people with disability enjoy their rights on an equal basis with others. People with disability experience widespread abuse, inhumane treatment and neglect. Girls and women, people from non-English speaking backgrounds and Aboriginal and Torres Strait Islander people with disability are particularly vulnerable to discrimination and disadvantage.⁸⁵

Institutionalisation

Many people with disability are effectively forced to live in institutions or residential care facilities in order to receive social and personal care supports. This places them at a heightened risk of physical and sexual violence and verbal, emotional, psychological or financial abuse as well as neglect and poor care, threatened and actual abuse and institutional violence and harassment perpetrated by co-residents, residential managers and support workers.⁸⁶ Despite the introduction of legislation to end institutional models of accommodation and disability support, many people with disability continue to rely on institutional warehoused housing and support arrangements due to the lack of a commitment by governments in each jurisdiction to invest in the necessary reforms.

Forced Sterilisation of Girls and Women with Disabilities

Forced and coerced sterilisation of girls and women with disabilities is a gross violation of the most fundamental human rights, yet remains an ongoing practice in Australia. Instead of developing and enacting universal legislation which prohibits this recognised form of torture and violence, the Australian Government has consistently taken the view that there are instances in which sterilisation of disabled women and girls can, and should be authorised.⁸⁷ Since 2005, United Nations treaty monitoring bodies have consistently and formally recommended that the Australia Government enact national legislation prohibiting, except where there is a serious threat to life or health, the use of sterilisation of girls, regardless of whether they have a disability, and of adult women with disabilities in the absence of their fully informed and free consent.⁸⁸ The Committee Against Torture has further recommended that States take urgent measures to investigate all allegations of involuntary sterilisation of women, prosecute and punish the perpetrators, and provide the victims with fair and adequate compensation.⁸⁹ To date, the Australian Government has failed to comply with any of these recommendations.

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities; Article 3 - Equal Rights of Men and Women; Article 12 - Freedom of Movement; Article 17 - Right to Privacy; Article 25 - Right to Participation in Public Life.** The disproportionately high number of people with disability in the justice system is also covered in **Articles 7, 9 & 10** under *Prisoners*. Issues specific to children and youth with disability are covered under **Article 24 - Rights of the Child.**

⁸⁵ *Australian Civil Society Shadow and Baseline Report to the UN Committee on the Rights of Persons with Disabilities*, compiled by Disability Representative, Advocacy, Legal and Human Rights Organisations, June 2012.

⁸⁶ Carolyn Frohmader, *Women with Disabilities Australia*, Submission, National Human Rights Consultation, May 2009, 7 at www.wwda.org.au/wwdahrsb1.pdf. p22.

⁸⁷ Australian Government (2008) *Fourth Report under the Convention on the Rights of the Child: Australia*, October 2008, 159, p31.

⁸⁸ CEDAW (2010) *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*. CEDAW/C/AUS/CO/7. See also, CRC (2005), *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, CRC/C/15/Add.268, [45, 46(e)]. See also, CRC (2012), Sixtieth session, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Australia*. 29 May–15 June 2012, CRC/C/AUS/CO/4. See also: UN GA HRC (2011) *Report of the Working Group on the Universal Periodic Review: Australia*, A/HRC/17/10 [86.39].

⁸⁹ UN CAT (2009), *Concluding Observations: Slovakia*, [14], U.N. Doc. CAT/C/SVK/CO/2 (2009); Czech Republic, para 6(n), U.N. Doc. CAT/C/CR/32/2.

Proposed Questions for List of Issues

- **Q37.** What is the Australian Government doing, together with state and territory governments, to invest in the reforms necessary to end institutional models of accommodation and disability support?
- **Q38.** What is the Australian Government doing to comply with the recommendations of UN Human Rights Bodies to enact national legislation prohibiting sterilisation of:
 - girls, regardless of whether they have a disability, except where there is a serious threat to life or health; and
 - adult women with disabilities in the absence of their fully informed and free consent?
- **Q39.** What is the Australian Government doing to redress the human rights violations against women and girls with disabilities who have been sterilised without their consent?

9.5 People with Psychosocial Disabilities

All Australian states and territories permit forced psychiatric treatment without full free and informed consent and over 62% of public psychiatric hospital admissions are involuntary.⁹⁰ This may occur even where the person has legal capacity but refuses treatment.⁹¹ Compulsory treatment in the community is also widespread.⁹² Enforceable advance directives for mental health, which enable a person to decide treatment preferences in advance of a mental health crisis, are not available. Poor standards of overall health and incidences of deaths among people detained and treated involuntarily remains a serious concern.⁹³

People are frequently subjected to forced medications which have severe, debilitating side effects.⁹⁴ Despite efforts to reduce their use, seclusion and restraint are still permissible interventions in psychiatric facilities, and can constitute torture or cruel, inhuman and degrading treatment. The continued use of chemical restraint to control behaviour and subdue rather than 'treat' a person is concerning, particularly given the lack of regulation and safeguards around its use, compared with physical restraint.⁹⁵

Safety in public hospital psychiatric wards, particularly for women and girls, is an ongoing concern. Most women and girls do not have a choice of a female-only ward, despite the fact that 50-80% of women using psychiatric services have a history of sexual abuse and/or assault⁹⁶ and 60% have experienced sexual harassment or assault in a psychiatric ward.⁹⁷

⁹⁰ See Australian Institute of Health and Welfare. *Mental health services in Australia*. Canberra: AIHW, 2011. <http://mhsa.aihw.gov.au/services/admitted-patient/specialised-separation-characteristics/>.

⁹¹ Eg, *Mental Health Act (Vic) (MHA) 1986*, s 8(1)(d).

⁹² See Australian Institute of Health and Welfare. *Mental health services in Australia*. Canberra: AIHW, 2011. <http://mhsa.aihw.gov.au/services/community-care/>

⁹³ Eg, A Western Australian Coroner found the death of Vicki Greeuw in 2007 in a psychiatric hospital 10 days after admission from a side-effect of her medication was preventable: WA Coroner, *Vicki Margaret Greeuw*, ref: 12/09.

⁹⁴ Eg, a 28-year-old man developed severe osteoporosis in his spine as a result of nearly 8 years' administration of the antilipidinal medication, Depo Provera: *Re Review 09-085* [2009] VMHRB 1.

⁹⁵ Eg, after refusing to get in a wheelchair, Mrs N, an involuntary inpatient was forcibly injected with an antipsychotic and sedative, so as to transport her from the emergency department to the ward: Tasmanian Health Complaints Commission's Investigation Report (July 2011).

⁹⁶ Cox, M 1994, *Good practices in women's mental health*, Health Sharing Women's Resource Service, Melbourne.

⁹⁷ Victorian Women and Mental Health Network, 'Listening to Women Consumers' Experiences in Mixed Sex Psychiatric Wards', 2008, p 4-5.

Competent, independent and impartial external reviews of involuntary treatment fall far short of human rights standards.⁹⁸ They do not always occur within the statutory time frames⁹⁹ and rates of legal representation are low.¹⁰⁰ Genuinely independent and adequately resourced monitoring and oversight bodies with broad investigative, reporting and enforcement powers are urgently needed for psychiatric facilities.

Also relevant to **Article 3 - equal rights of men and women; Article 17 - right to privacy** and **Article 12 - freedom of movement**.

Proposed Questions for List of Issues

→ **Q40.** How does Australia ensure that people receiving treatment in psychiatric facilities are provided with high quality care and treatment in the least restrictive environment, and kept safe and protected against sexual harassment or assault? Specifically, what legislative, policy and accountability measures have been implemented to:

- eliminate the use of restrictive interventions such as chemical and physical restraint and seclusion and
- ensure the availability, accessibility, implementation and evaluation of female-only psychiatric wards

and when and how will these be monitored and evaluated?

→ **Q41.** Please explain how the process and criteria for involuntary psychiatric treatment and the external review of such treatment – both in hospital and in the community – are consistent with Articles 9 and 14 of the ICCPR and Article 12 of the UN Convention on the Rights of Persons with Disabilities.

Under Articles 7, 9 & 10 - Prohibition of torture and cruel, inhuman or degrading treatment; Freedom from arbitrary detention & Conditions of detention

See also:

Aboriginal and Torres Strait Islander Deaths in Custody, p24
Protection of the Rights of Vulnerable Children, p44

⁹⁸ WHO recommends initial reviews take place within 3 days of an order being made (1996 *Mental health care law: ten basic principles* WHO, Geneva) yet in Victoria and Western Australia, reviews may take place up to 8 weeks after involuntary admission and 70% of people may never have their orders reviewed before discharge (see *MHA 1986* (Vic), s 8(1); *Mental Health Act 1996* (WA), s 26; Victorian Department of Human Services, Review of the MHA, Consultation Paper, December 2008, p 52.)

⁹⁹ Mr Kracke's treatment was not reviewed for two years, breaching his right to a fair hearing: *Kracke v MHRB & Ors* (General) [2009] VCAT 646.

¹⁰⁰ Eg, in over 90% of hearings in Victoria the person deprived of their liberty and autonomy has no legal representation: Victorian Mental Health Review Board's *Annual Report 2010-2011*, p 11.

10. Article 8 - Freedom from slavery, servitude and forced labour

10.1 Trafficking and Severe Exploitation

Trafficking and severe exploitation in Australia takes many forms, including sexual servitude,¹⁰¹ debt bondage,¹⁰² forced labour,¹⁰³ forced and servile marriage as well as organ trafficking.¹⁰⁴ As instances of trafficking in Australia often go unreported the true extent of trafficking in Australia is unknown.¹⁰⁵

The most effective way to address human trafficking and severe exploitation is through a human rights framework that focuses on prevention of trafficking and which prioritises protection and reparations for victims, “regardless of their participation or otherwise in criminal proceedings against perpetrators”.¹⁰⁶

The Special Rapporteur on Trafficking in Persons recommended that Australia establish a comprehensive national compensation scheme for victims of trafficking.¹⁰⁷ Compensation schemes vary from state to state and there is no national framework providing a national scheme for victims of trafficking. The CEDAW 2010 Concluding Observations recommended complementary approaches to the current criminal justice approach; improved co-ordination among government agencies; formal review on the return and reintegration of trafficking victims; improving accommodation options.¹⁰⁸

While recognising the need to prioritise protection for victims of trafficking it is also important that policies reflect the distinction between victims of trafficking and sex workers choosing to work in the sex industry and do not negatively impact the rights of sex workers.

* 2009 Concluding Observations

The Committee recommended that Australia “strengthen its measures to prevent and eradicate trafficking in human beings, including by adopting a comprehensive strategy, and provide equal assistance and protection to all victims identified regardless of their participation or otherwise in criminal proceedings against perpetrators.” An effective compensation scheme has yet to be established.

See, CONC OBS 22.

Proposed Questions for List of Issues

→ **Q42.** What is the Australian Government doing to implement the recommendations by the Special Rapporteur on Trafficking in Persons on Australia, particularly the establishment of a comprehensive national compensation scheme for victims of trafficking?

→ **Q43.** What is the Australian Government doing to ensure all trafficked people have appropriate access to safe and sustainable accommodation and other support services irrespective of their participation in criminal proceedings against perpetrators?

¹⁰¹ Frances Simmons and Jennifer Burn, ‘Evaluating Australia’s Response to All Forms of Trafficking: Towards Rights-Centred Reform’ (2010) 84 *Australian Law Journal* 712–713.

¹⁰² Typically, a victim of trafficking incurs a debt of between \$35,000 - \$40,000 to come to Australia. See: Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Trafficking of Women for Sexual Servitude* (2004) at viii.

¹⁰³ The Government acknowledges forced labour in construction, hospitality, agriculture and domestic labour. See: The Hon Brendan O’Connor, The Government’s Response to Trafficking, Parliamentary Statement, *Hansard*, 24 November 2011.

¹⁰⁴ There has been one reported case of attempted organ trafficking in Australia. See, Yuko Narushima, ‘Police Investigate First Case of Organ Trafficking’, *The Sydney Morning Herald*, 28 July 2011.

¹⁰⁵ Eg. Fiona David, *Labour trafficking, Research and Public Policy Series 108*, Australian Institute of Criminology, 2010 at xii (14); *Report of the Special Rapporteur on trafficking in persons*, n3 at [43-44].

¹⁰⁶ UN HRCttee, *Concluding observations of the Human Rights Committee - Australia*, CCPR/C/AUS/CO/5, 7 May 2009 [22].

¹⁰⁷ *Report of the Special Rapporteur on trafficking in persons*, n3 at [82(g)].

¹⁰⁸ CEDAW Committee *Concluding Observations Australia* [31].

10.2 The Stolen Generations and Stolen Wages

Despite past recommendations from numerous UN human rights treaty bodies, including the Human Rights Committee,¹⁰⁹ and acknowledgement of the trauma and harm that was caused, the Australian Government is still yet to secure the establishment of compensation schemes for victims of both the Stolen Generations and Stolen Wages.

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment and non-discrimination; Equality before the law & Rights of Minorities.**

* 2009 Concluding Observations

The Committee recommended that Australia “adopt a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the Stolen Generations policies.” An effective compensation scheme has yet to be established.

See, CONC OBS 15.

Proposed Questions for List of Issues

→ **Q44.** What commitments have been made to ensure the establishment of compensation schemes for the victims of the Stolen Generations and Stolen Wages, or where they have deceased, their descendants?

Under Articles 8 - Freedom from slavery, servitude and forced labour

See also:

Migrant Workers: Visa Holders and Undocumented Workers, p18

¹⁰⁹ UN HRCtee, *Concluding Observations*, 95th sess, [15] UN Doc CCPR/C/AUS/CO/5 (2009).

11. Articles 12 - Freedom of movement

Under Article 12 - Freedom of movement

See also:

Income Management, p13

Asylum Seekers, p27

People with Disability, p33

People with Psychosocial Disability, p34

12. Articles 13 - Procedural rights against expulsion

Under Article 13 - Procedural rights against expulsion

See also:

Asylum Seekers, p27

13. Article 14 - Right to a fair trial

13.1 Counter-terrorism Measures

Preventative Detention

Australian laws allow preventative detention for 14 days (but potentially indefinitely, since subsequent orders may be sought for 'different' potential acts) of a person whom police reasonably suspect is preparing to commit a terrorist act; or 'possesses a thing that is connected with the preparation for, or the engagement of the person in, a terrorist act'; or who 'has done an act in preparation for, or in planning, a terrorist act'.¹¹⁰ Preventative detention orders can be based on secret information that neither the detainee nor their lawyer can see.¹¹¹

ASIO detention

The Australian Security Intelligence Organisation (ASIO) has the power to detain a person for questioning for up to 7 days. A detainee need not be a terrorist suspect; they need only be in possession of information that will 'substantially assist the collection of intelligence' related to a terrorism offence. Detainees cannot refuse to answer ASIO's questions, nor disclose 'operational information' (including the fact of detention) for two years, and have fewer rights than people charged with serious offences.¹¹² These laws give automatic secrecy to actions of ASIO and the police, irrespective of whether the secrecy is needed, stopping the parties and their lawyers from objecting in public.

Control orders

Control orders under federal and state laws impose parole-like conditions under circumstances where no charges have been laid, for the purpose of protecting the public from a terrorist act. Orders can also be imposed on people who have been convicted and served their sentence in full. People subject to the orders may be denied access to evidence against them. Successive control orders, each for 12 months (3 months for people aged 16 or 17) may be imposed on the same person. Control orders can be used to permit indefinite house arrest without trial and to limit a person's choice of lawyer.

National Security Information (Criminal and Civil Proceedings) Act 2004

Under this Act, the Attorney-General may issue a certificate which prevents evidence being given in a legal proceeding if he or she considers that the evidence will disclose information which is likely to prejudice national security. A court may determine that the evidence may be given if prohibiting it would have a substantial effect on a defendant's right to a fair hearing, but must give greater weight to any risk to national security created by the disclosure.

Also relevant to **Article 4 - Derogations**. There is no national emergency. Therefore there is no justification for derogation of any rights under **Article 4**.

* 2009 Concluding Observations

The Committee recommended that Australia "ensure that its counter-terrorism legislation and practices are in full conformity with the covenant". Though some reforms have been passed, many exceptional powers and sanctions permitted under counter-terrorism measures remain incompatible with Covenant rights.

See, CONC OBS 11.

Proposed Questions for List of Issues

→ **Q45.** What steps, including legislative amendments, have been taken to ensure that all aspects of Australia's counter-terrorism measures are compatible with Australia's obligations under the covenant?

¹¹⁰ Division 105 of the *Criminal Code* (Cth).

¹¹¹ See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Martin Scheinin), *Australia: Study on Human Rights Compliance While Countering Terrorism* (2006) UN Doc. A/HRC/4/26/Add.3, [32]. n314.

¹¹² *Australian Security and Intelligence Organisation Act 1979* (Cth), Div 3.

13.2 Funding of Legal Assistance Services

There is chronic under-funding of legal assistance services, including Aboriginal and Torres Strait Islander Legal Services, Aboriginal and Torres Strait Islander women's legal services, Family Violence Prevention Legal Services and community legal centres which significantly affects the right to legal assistance for the most disadvantaged peoples in Australia. Given the alarming rates of Aboriginal and Torres Strait Islander over-representation in the criminal justice system, the availability of culturally appropriate legal assistance services in particular is of critical importance. Adequate funding for family law and civil matters is also important.

There is a crisis in access to affordable legal services for disadvantaged people. An estimated half a million Australians a year miss out on legal help for financial reasons or lack of knowledge. 80% of people assisted by community legal centres earn under \$26,000 a year and 98% of legal aid recipients receive an income that can be considered to be below the poverty line.¹¹³ According to Community Law Australia, a coalition of community legal centres, the Australian Government needs to double its funding on legal assistance services to ensure all Australians can access a basic level of legal assistance.¹¹⁴

The limited availability and use of Aboriginal and Torres Strait Islander interpreters throughout Australia is equally concerning in terms of a person's right to a fair trial. Currently there are only two Aboriginal and Torres Strait Islander interpreting services in Australia, covering some parts of the Northern Territory and the Kimberley in Western Australia. Aboriginal and Torres Strait Islander interpreting services need to be expanded and made available throughout the whole of Australia. Being unable to communicate with one's lawyer, not understanding court proceedings or being misunderstood while giving evidence, can lead to gross miscarriages of justice. For example, evidence to a recent Government Inquiry reported that one Aboriginal and Torres Strait Islander man proceeded through the entire criminal justice system and was convicted of murder before someone realised that he was clinically deaf.¹¹⁵

Increased funding for the above mentioned services has been the subject of numerous UN human rights treaty body recommendations including those submitted by the Human Rights Committee during its previous review of Australia.¹¹⁶

* 2009 Concluding Observations

The Committee recommended that the Australian Government "provide adequate services to assist marginalized and disadvantaged people, including indigenous people and aliens." Under-funding of legal assistance services, including Aboriginal and Torres Strait Islander legal services and interpreters remains an issue.

See, CONC OBS 25.

Proposed Questions for List of Issues

→ **Q46.** What progress has been made to both significantly increase the funding of Aboriginal and Torres Strait Islander Legal Services, Aboriginal and Torres Strait Islander women's legal services, Family Violence Prevention Legal Services and community legal centres to ensure their long term maintenance?

→ **Q47.** What progress has been made to increase the availability of Aboriginal and Torres Strait Islander interpreters and establish a national framework of Aboriginal and Torres Strait Islander interpreters?

¹¹³ Community Law Australia, *Unaffordable and out of reach: The problem of access to the Australian Legal System*, July 2012, http://www.communitylawaustralia.org.au/wp-content/uploads/2012/07/CLA_Report_Final.pdf.

¹¹⁴ Dan Harrison, 'Lawyers call for legal aid increase', *The Age*, 17 July 2012:

<http://www.theage.com.au/national/lawyers-call-for-legal-aid-increase-20120716-226ry.html>

¹¹⁵ Evidence to Senate Community Affairs References Committee, Parliament of Australia, Alice Springs, 18 February 2010, 1 [Tristan Ray].

¹¹⁶ UN HRCtee, *Concluding Observations*, 95th sess, [25] UN Doc CCPR/C/AUS/CO/5 (2009).

13.3 Review of Criminal Cases

In Australia, once a person has been convicted and has had an unsuccessful appeal, there is no legal right to any further consideration of their case no matter how compelling subsequent evidence may be of a wrongful conviction. This is because appellate courts are unable to re-open appeals and the High Court of Australia is unable to hear fresh evidence.¹¹⁷ The only option left in such cases is to petition under the statutory procedure for the case to be referred back to the relevant appellate court. This process however, does not provide any legal right to an applicant either to a referral to the court or even to a fair reading of the petition. It is subject to the arbitrary and non-reviewable discretion of the Attorney-General. This situation is a clear breach of a person's rights to a fair trial and effective remedies when one's rights have been violated.¹¹⁸ It is also a serious denial of due process and principles of natural justice.

Proposed Question for List of Issues

→ **Q48.** Is the Government prepared to ensure that individuals have access to appropriate mechanisms to seek review of their case in light of fresh evidence? Specifically, will the Government commit to the establishment of a Criminal Cases Review Commission accessible by people of all Australian jurisdictions?

Under Article 14 - Right to a fair trial

See also:

Asylum Seekers, p27

¹¹⁷ Bibi Sangha and Bob Moles, *Australia's criminal appeal procedures - in breach of international human rights obligations - and unconstitutional*, Australian Institute of Judicial Administration Conference, Sydney NSW 7-9 September 2011.

¹¹⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 2, 9, 14 (entered into force 23 March 1976).

14. Article 16 - Right to recognition as a person before the law

Under Article 16 - Right to recognition as a person before the law

See also:

Asylum Seekers, p27

Right to Vote of People with Disability, p48

15. Articles 17 - Right to privacy

Under Article 17 - Right to privacy

See also:

Income Management, p13

Homelessness, p24

People with Disability, p33

People with Psychosocial Disability, p34

16. Article 23 - Protection of the family

16.1 Equality in Marriage and Parenting laws regardless of Sex, Sexual Orientation or Gender identity

Recent government reforms have improved the legal recognition of children of same-sex parents and helped to ensure equal financial and workplace benefits for same-sex couples. However, there are still areas of the law where unmarried, same-sex and mixed-sex couples are not able to access the same rights as opposite-sex couples. For instance not all Australian states recognise or allow the registration of both same-sex parents on a child's birth certificate.¹¹⁹ Queensland's new LNP government has announced it will remove the right of same sex couples to have a baby by altruistic surrogacy; single people and de facto couples of less than two years will also be excluded.¹²⁰

The Australian Government continues to discriminate against same-sex couples by denying them the right to marry.¹²¹ Two marriage equality bills, which will come before parliament this year are expected to be defeated. In addition, married transgender people who wish to legally register a change of sex after sex affirmation surgery must first divorce their partner.¹²²

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities.**

Proposed Questions for List of Issues

→ **Q49.** How is the Government ensuring that each state and territory has laws which ensure equal access to the law for same sex couples and their children and in financial and workplace benefits?

→ **Q50.** What is the Australian Government doing, together with state and territory governments, to develop a nationally consistent approach to equal relationship recognition, including for same-sex and mixed-sex couples? In particular please provide information on the status of the *Marriage Equality Amendment Bill 2012* and the *Marriage Amendment Bill 2012*.

Under Article 23 - Protection of the family

See also:

Coronial Reform, p25

Protection of the Rights of Vulnerable Children, p44

¹¹⁹ *Artificial Conception Act 1985* (WA) s 6A; *Status of Children Act 1979* (NT) s 5DA; *Parentage Act 2004* (ACT) s 8.

¹²⁰ 'No more surrogacy for same sex couples in Qld' ABC News June 22, 2012.

<http://www.abc.net.au/news/2012-06-22/no-more-surrogacy-for-same-sex-couples-in-qld/4086064>

¹²¹ See, *Marriage Amendment Act 2004* (Cth).

¹²² Attorney-General's department. Same-sex Reforms. 2011.

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/SameSexReforms.aspx>

17. Article 24 - Rights of the child

17.1 Protection of the Rights of Vulnerable Children

Despite the introduction of the National Framework for Protecting Australia's Children 2009-2020 and the Government's recent commitment to establish a National Children's Commissioner, greater effort is needed to reduce high levels of disadvantage, abuse and neglect, particularly amongst vulnerable groups of children and young people.¹²³ Effort should also be made at all levels of government to include the views of children and young people on matters directly affecting them.¹²⁴

Over-representation of Aboriginal and Torres Strait Islander Children in the Child Protection System

Aboriginal and Torres Strait Islander children experience abuse and family violence at unacceptably high levels and are significantly over-represented in the child protection system. For example, Aboriginal and Torres Strait Islander children are 8 times more likely to be the subject of substantiated child abuse and neglect and 10 times more likely to be subject to out-of-home care.¹²⁵ It is no surprise that with Aboriginal and Torres Strait Islander children rating as the most disadvantaged children in Australia, particularly when it comes to standard of living and access to basic services, the most common catalyst for their involvement in the child protection system is neglect. Most recently, the Committee on the Rights of the Child deemed the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care as a result of serious and widespread discrimination.¹²⁶

Of equal concern is that more than 30% children in out-of-home care are still placed with non-Aboriginal and Torres Strait Islander families outside of their community¹²⁷ reflecting poor compliance with the Aboriginal and Torres Strait Islander Child Placement Principle.¹²⁸ In addition, Cultural Support Plans which are meant to be put in place for Aboriginal and Torres Strait Islander children are often of low quality, bereft of any meaningful information and unenforceable. This significantly undermines children's right to maintain their culture and language. The lack of genuine Aboriginal and Torres Strait Islander participation in child protection decision-making is a major factor behind these issues, also recently recognised by the UN Committee on the Rights of the Child.¹²⁹

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities.**

¹²³ Addendum to *Listen to Children: Child Rights NGO Report Australia*, 2011, at http://www.childrights.org.au/__data/assets/pdf_file/0009/14787/Addendum_report_May_2012-_final-2.pdf

¹²⁴ Addendum to *Listen to Children: Child Rights NGO Report Australia*, 2011, at http://www.childrights.org.au/__data/assets/pdf_file/0009/14787/Addendum_report_May_2012-_final-2.pdf

¹²⁵ Australian Institute of Health and Welfare, *Child Welfare Series no 53 Child Protection Australia 2010-11* (2012).

¹²⁶ CRC, *Concluding Observations*, 60th sess, [29 (a)] UN Doc CRC/C/AUS/CO/4 (2012).

¹²⁷ Australian Institute of Health and Welfare, *Child Welfare Series no 53 Child Protection Australia 2010-11* (2012).

¹²⁸ In 2011 child protection workers in Queensland could only demonstrate consideration of the hierarchy of placement options in 26% of cases; and consultation of Aboriginal and Torres Strait Islander agencies in only 62% of cases, despite legislative requirement: Commission for Children and Young People and Child Guardian, 2012, *Indigenous Child Placement Audit Report 2010/11*. In many other state jurisdictions there is lack of data to even identify compliance.

¹²⁹ CRC, *Concluding Observations*, 60th sess, [29 (a)] UN Doc CRC/C/AUS/CO/4 (2012).

Children and the Criminal Justice System

The age of criminal responsibility in Australia is 10 years old. The Government has been urged to raise this to an internationally accepted standard, most recently by the Committee on the Rights of the Child.¹³⁰

Mandatory sentencing laws have not been repealed in Western Australia and Victoria is soon to introduce minimum sentencing laws. Such legislation serves to exacerbate the numbers of juveniles being placed in detention. In some police lock up and detention facilities, juveniles are not separated from adults, placing them at risk of abuse.

Children with disabilities are overrepresented in the juvenile justice system with up to 40% exhibiting symptoms consistent with clinical psychological disorders. Aboriginal children and youth aged 10-17 are 24 times more likely to be jailed than non-Aboriginal children.¹³¹ Overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system is also noted under **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination.**

Children in Immigration Detention

As of May 2012, there were 516 children in immigration detention and 537 children in community detention.¹³² Key concerns for these children are:

- the lack of policies providing for independent guardianship/support institution for the 254 unaccompanied minors in immigration detention facilities and 130 in community detention;
- the detention of children and young people in remote isolated areas, particularly those with special needs or complex medical conditions,
- the inadequate provision of education within the immigration detention program;
- children born in immigration detention do not have the right to a visa for permanent residence or Australian citizenship unless they satisfy criteria the Australian Human Rights Commission has argued are inconsistent with international law.¹³³

Children and mandatory detention, indefinite detention and offshore processing are discussed under **Articles 7, 9 & 10 - Prohibition of torture and cruel, inhuman or degrading treatment; Freedom from Arbitrary Detention; Conditions of Detention.**

Education for Children with disability

A reported 63% of children with a disability experience difficulties at school.¹³⁴ In its 2012 Concluding Observations the Committee on the Rights of the Child noted its “concern that a significant disparity remains between educational attainments for children with disabilities compared to children without disabilities.”¹³⁵ The Government’s failure to provide an effective and inclusive education system sustains

* 2009 Concluding Observations

The Committee expressed concern about the “situation of children in detention” and “held in immigration detention facilities”, it called on the Australian Government to “ensure that children in conflict with the law, including those in detention, are treated in consistence with the Covenant and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.” Notable gaps still exist in the protection of children in the criminal justice system and immigration detention facilities.

See, CONC OBS 24.

¹³⁰ CRC, *Concluding Observations*, 60th sess, [81 (a)] UN Doc CRC/C/AUS/CO/4 (2012).

¹³¹ *Listen to Children: Child Rights NGO Report Australia*, 2011.

¹³² Department of Immigration and Citizenship, Australia Government, ‘Immigration Detention Statistics Summary’ (Factsheet, May 2012) p7.

¹³³ *Listen to Children: Child Rights NGO Report Australia*, 2011.

¹³⁴ ‘Children with a Disability factsheet’, *Listen to Children: Child Rights NGO Report Australia*, 2011.

¹³⁵ CRC, *Concluding Observations*, 60th sess, [56] UN Doc CRC/C/AUS/CO/4 (2012).

a demand for segregated special schools and limits the rights of children with disability to a quality, mainstream education.¹³⁶

Forced sterilisation of girls with disability is discussed under **Articles 7, 9 & 10 - Prohibition of torture and cruel, inhuman or degrading treatment; Freedom from Arbitrary Detention; Conditions of Detention**. Domestic and family violence is discussed under **Article 3 - Equal rights of men and women**.

Proposed Questions for List of Issues

- **Q51.** What is the Australian Government doing to reduce the over-representation of Aboriginal and Torres Strait Islander children in the child protection system? In particular, what prevention and early intervention mechanisms are being used to prevent separation?
- **Q52.** What mechanisms are in place to ensure that Aboriginal and Torres Strait Islander children's rights to their culture and language are protected and maintained once they are in out-of-home care, and how is the quality of Cultural Support Plans ensured?
- **Q53.** What is the Australian Government doing to reduce the number of children and young people in the juvenile justice system? In particular
 - What is the Australian Government's response to calls to change the age of criminal responsibility and repeal mandatory sentencing laws?
 - What is the Australian Government doing to reduce the over-representation of children with disabilities and Aboriginal and Torres Strait Islander Children in the juvenile justice system?
- **Q54.** What has the Australian Government been doing to address the concerns previously expressed by the Committee about children and juveniles being held in immigration detention facilities?
- **Q55.** What is the Australian Government doing to develop a national disability education action plan which specifically identifies current inadequacies in funding and resources, sets appropriate benchmarks, targets and goals and allocates sufficient funding so that the educational rights of children with a disability are adequately met?

Under Articles 24 - Rights of the child

See also:

Over-representation of Aboriginal and Torres Strait Islander Peoples within the Criminal Justice System, p17
 Violence Against Women, p20
 Progress towards Close the Gap Targets in Health Standards and Life Expectancy, p23
 Asylum Seekers, p27
 People with Disability, p33
 People with Psychosocial Disability, p34

¹³⁶ *Australian Civil Society Shadow and Baseline Report to the UN Committee on the Rights of Persons with Disabilities*, compiled by Disability Representative, Advocacy, Legal and Human Rights Organisations, June 2012.

18. Article 25 - Participation in public life

18.1 Increased Participation of Aboriginal and Torres Strait Islander Women in Public and Political Life

The Australian Government has committed to gender equality principles to increase the numbers of women in public and political life. However, they have not adopted temporary special measures or focussed sufficiently on Aboriginal and Torres Strait Islander women in spite of the recommendations from various United Nations human rights monitoring bodies.¹³⁷ There are no substantial long-term commitments from the Australian Government to increase the participation of Aboriginal and Torres Strait Islander women in public and political life.

There has never been an Aboriginal and Torres Strait Islander female member of Australia's Federal Parliament and few members in state or territory parliaments. Some political parties have policies that target the selection of women but none has an affirmative action strategy for the inclusion and increase in representation of Aboriginal and Torres Strait Islander peoples. Similarly, government strategies to increase the representation of women on boards and committees, especially for the top 200 companies in Australia, do not specifically target Aboriginal and Torres Strait Islander women and have not resulted in an increase in their representation.

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities** and **Article 4 - Derogations**.

Proposed Questions for List of Issues

- **Q56.** What steps will the Australian Government take to resource opportunities for Aboriginal and Torres Strait islander women, specifically in relation to participation on top 200 company boards and within the federal parliament?
- **Q57.** Will the Government make substantial long term investment in the participation of women in public and political life? If so please provide information on the impact this will have for Aboriginal and Torres Strait Islander women.

18.2 Participatory Rights for a Clean and Healthy Environment

The right to participate in public life is particularly important in the context of environmental protection.¹³⁸ Federal and state environmental legislation could go much further in ensuring that decisions are made in a transparent, accountable and participatory manner. For instance, better resourced organisations (generally business and other interest groups) retain the upper hand over community groups in influencing decisions that affect the environment. This could be addressed through:

- better access to justice for people seeking to protect the environment in the public interest, through enhanced legal aid, funding of EDOs and the introduction of public interest costs orders;
- the development of legislation in all states and territories that prevents litigation being commenced for an improper purpose, sometimes referred to as “strategic litigation against public participation”, or “SLAPP suits”;

¹³⁷ See, UN CEDAW *Concluding Observations - Australia*, CEDAW/C/AUS/CO/7, 30 July 2010 at [34]-[35].

¹³⁸ In particular disseminating information, providing opportunities to participate in decision-making processes and providing effective access to judicial and administrative proceedings. See, Principles 10, 20 and 22 of *The 1992 Declaration on Environment and Development* (Rio Declaration).

- ratification and implementation of the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention).

Proposed Questions for List of Issues

- **Q58.** What steps is the Australian Government taking, together with state and territory governments, to better secure access to justice in environmental matters, and particularly to extend Commonwealth legal aid for public interest environmental matters, and to introduce public interest costs orders in all jurisdictions, to avoid the risks of adverse costs orders in litigation brought in the public interest?
- **Q59.** What steps is the Australian Government taking, together with state and territory governments, to implement comprehensive “anti-SLAPP” legislation to strengthen protection of public participation?
- **Q60.** What steps is the Australian Government taking to ratify the Aarhus Convention?

18.3 Right to Vote of People with Disability

People with disability, particularly people with psychosocial and/or intellectual disability are denied their right to take part in public affairs through voting. Section 93(8)(a) of the *Electoral Act 1918* (Cth) states that a person “of unsound mind” who is “incapable of understanding the nature and significance of voting and enrolment” is ineligible to vote. 4,812 people were denied the opportunity to have their citizenship recognised by being on the electoral roll and to exercise their right to vote in the 2007 Federal Elections.¹³⁹ In 2011-12, “5,445 people were removed from the roll by objection on the grounds of unsound mind”, the figure represents an increase of almost 1000 people since 2007.¹⁴⁰ This legislation is discriminatory under Articles 2, 12 and 29 of the Convention on the Rights of Persons with Disabilities (CRPD) as it does not recognise that all people have legal capacity on an equal basis as others and therefore also have the right to vote on an equal basis. Despite pressure from civil society organisations to remove this provision following the Government’s publication of the Electoral Reform Green Paper in 2007, the Government has failed to take steps to cease the continued violation of the rights of people with disability in this regard.

Also relevant to **Article 2, 26 & 27 - Treaty entrenchment, Non-discrimination; Equality before the law and Rights of Minorities** and **Article 4 - Derogations**.

Proposed Questions for List of Issues

- **Q61.** What is the Australian Government doing to ensure that people with disabilities can realise their right to participate fully in public life, including by exercising their right to vote on an equal basis?

Under Articles 25 - Participation in public life

See also:

People with Disability, p33

People with Psychosocial Disability, p34

¹³⁹ Australian Government Electoral Reform Green Paper, page 42, [4.54].

¹⁴⁰ Australian Electoral Commission Submission to the JSCEM Inquiry into the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012.