



**Australian  
Human Rights  
Commission**  
*everyone, everywhere, everyday*

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# **Information concerning Australia and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)***

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Australian Human Rights Commission Submission  
to the ICERD Committee

8 July 2010

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## **1 Introduction**

1. This submission was prepared by Australian Human Rights Commission (formerly named the Human Rights and Equal Opportunity Commission)<sup>1</sup>. This submission provides information in relation to the Australian Government's combined 15th, 16th and 17th periodic report under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).
2. All of the material included in this document has been previously brought to the attention of the Australian Government through a range of Commission publications and submissions.

## **2 The Australian Human Rights Framework**

3. The Government released the Australian Human Rights Framework in 2010. It commits to human rights education for the community and public sector; developing a National Action Plan on Human Rights; establishing a federal parliamentary scrutiny committee on human rights requiring that all new federal legislation be accompanied by a statement of compatibility with Australia's human rights obligations; and developing a consolidated federal anti-discrimination law. These measures will contribute to improved protection of human rights in Australia. The Framework will address some, but not all, of the weaknesses in Australia's human rights protection system, such as guaranteed protection against racial discrimination.

## **3 The Social Inclusion Agenda as a national policy priority**

4. In 2009 the Australian Government launched the Social Inclusion Agenda, which is a whole-of-government policy. The Agenda is coordinated through the Department of the Prime Minister and Cabinet and the Department of Education, Employment and Workplace Relations.
5. The Australian Human Rights Commission welcomes the development of the Social Inclusion Agenda and the establishment of the Australian Government Social Inclusion Board.
6. The Australian Human Rights Commission notes the submission we provided to the Compendium of Social Inclusion Indicators feedback process in September 2009. This submission focused on the race and cultural diversity dimensions of social inclusion and how this could be properly measured.
7. The Australian Government's social inclusion priorities include:
  - supporting children at greatest risk of long term disadvantage
  - helping jobless families with children
  - focusing on the locations of greatest disadvantage
  - assisting in the employment of people with disability or mental illness
  - addressing the issue of homelessness
  - closing the gap for Indigenous Australians.

8. In the introduction section of the Compendium of Social Inclusion Indicators, discrimination is identified as one of the major causes of social exclusion. However, the document does not go on to include race-based discrimination as one of the categories of analysis relating to social inclusion. Nor does it identify race-based discrimination as an indicator for social inclusion or social exclusion.
9. The Compendium identifies people from non-English speaking backgrounds as being one of the groups most vulnerable on the: (1) persistent relative poverty assessment and the (2) vulnerable on the more stringent risk of poverty assessment.<sup>2</sup>
10. Though the Commission supports the list of Social Inclusion priorities, we are disappointed that there is no specific priority that expressly focuses on the disadvantage of ethnic minorities in Australia.
11. The Australian Government has committed to developing a National Action Plan on Social Inclusion.

**Recommendation 1: That the Australian Government Social Inclusion Board include in its list of priority areas (I) newly arrived migrants, (II) disadvantaged migrants and (III) people from refugee backgrounds in their list of priority areas.**

## **4 The domestic implementation of ICERD and the Durban Declaration and Program of Action (DDPA)**

### **4.1 *An implementation mechanism for ICERD in Australia***

12. There is currently no clear mechanism operating in Australia to consider, coordinate or enact the recommendations or the Concluding Observations of the ICERD Committee.

**Recommendation 2: That the proposed Joint Parliamentary Committee on Human Rights be empowered to make recommendations in relation to the implementation of ICERD Committee Concluding Observations.**

**Recommendation 3: That the Department of Foreign Affairs and Trade and the Australian Human Rights Commission co-chair an annual ICERD implementation meeting to (I) delegate responsibilities and (II) monitor progress.**

**Recommendation 4: That the Australian Government appoint a full time Commissioner exclusively dedicated to race discrimination.**

### **4.2 *Consolidated approach to research and data***

**Recommendation 5: That the Department of Immigration and Citizenship and the Department of Families, Housing, Community Services and Indigenous**

Affairs develop publicly available research frameworks that identify in respect of migrant communities and indigenous communities respectively (I) current research and data collection priorities and (II) research and data gaps relevant to migrant communities and Indigenous communities respectively.

**Recommendation 6:** That the Department of Immigration and Citizenship fund an independent biennial report on migrant disadvantage based on the Overcoming Indigenous Disadvantage report model.

**Recommendation 7:** That the Australian Government conduct a major national study on the experiences of temporary migrants in Australia (workplace experiences, safety, experiences of racism, social inclusion)

**Recommendation 8:** That the Australian Government conduct research on the international student population in Australia in the following key areas:

- income and expenditure
- living and working conditions
- experiences of discrimination
- strategies to support safe international student experiences.

**Recommendation 9:** That the Australian Bureau of Statistics work in partnership with state and territory police agencies to collect national data on racially motivated crime.

## **5 Positive developments**

### **5.1 Aboriginal and Torres Strait Islander communities**

13. Positive developments in addressing racism against Indigenous peoples and in the promotion and protection of Indigenous peoples' rights in Australia have included:
- the National Apology by the Prime Minister in the Australian Parliament to the Stolen Generations, for the past policies and practices of forcibly removing Indigenous children from their families on 13 February 2008.<sup>3</sup>
  - the formal endorsement by the Australian Government of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration) in April 2009.<sup>4</sup>
  - the affirmation by the Council of Australian Government (COAG) of the National Integrated Strategy for Closing the Gap in Indigenous Disadvantage, which identified six Closing the Gap targets in the areas of health, education and employment in July 2009. These targets have been supplemented by substantial budget commitments under the National Indigenous Reform Agreement and associated National Partnership Agreements.<sup>5</sup>

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- the formation of the Aboriginal and Torres Strait Islander Healing Foundation in October 2009. The Foundation will support Aboriginal and Torres Strait Islander healing initiatives at the community level, conduct health promotion and public education activities and undertake research and evaluation.<sup>6</sup>
- the formation of the National Congress of Australia's First Peoples, in November 2009. The Congress is a new national representative voice for Aboriginal and Torres Strait Islander peoples.
- The lifting of the suspension of the RDA for the NTER legislation in June 2010.

## **5.2 Migrants and people from culturally and linguistically diverse backgrounds**

14. There have been a number of positive developments in addressing racism against migrants and people from culturally and linguistically diverse backgrounds. These have included:
- the establishment of the Australian Multicultural Advisory Council in 2008. The Council provides advice to the Minister for Immigration and Citizenship and the Parliamentary Secretary for Multicultural Affairs and Settlement Services on cultural diversity and social cohesion.
  - the release of the Australian Multicultural Advisory Council's the *People of Australia Statement* in April 2010, which was welcomed by the Australian Human Rights Commission. In particular, the Commission supports recommendation three which calls for the development of a coordinated national anti-racism strategy.
  - funding of the Commission's Community Partnerships for Human Rights (CPHR) Program under the Australian Government's *National Action Plan to Build on Social Cohesion, Harmony and Security*. The Commission received \$ 4.1M funding over a four-year period from the Department of Immigration and Citizenship. The program aimed to increase social inclusion and counter discrimination and intolerance directed at Australia's Muslim communities. The program included eight projects, which focus on a range of areas including research, community education and participation and resource development.

## **5.3 Asylum seekers**

15. The Australian Human Rights Commission has welcomed positive reforms in the immigration area since the current Australian Government took office in late 2007. These have included:
- the closure of the Australia's offshore immigration detention centres in Nauru and Papua New Guinea

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- the abolition of the detention debt regime for most immigration detainees
  - the removal of the so-called '45 day rule' which restricted access to work rights for asylum seekers on bridging visas, and the introduction of a 'New Directions in Detention' policy.
16. The Commission particularly welcomed the abolition of the Temporary Protection Visa (TPV) system in 2008. In its 2005 Concluding Observations on Australia, the Committee raised concerns about the TPV system, under which people in respect of whom Australia had protection under the Refugee Convention were issued with three-year temporary visas with limited entitlements including no right to family reunion.<sup>7</sup>

## **6 Issues relating to Indigenous peoples (Aboriginal and Torres Strait Islander peoples)**

### **6.1 Constitutional protection against racial discrimination (ICERD Articles 1,2,5(a),6 and Declaration Article 2)**

17. The Australian Human Rights Commission is concerned that the rights of Indigenous peoples are neither recognised nor formally protected in the Australian Constitution.
18. Nor does the Australian Constitution proscribe the enactment of racially discriminatory laws, such as the *Native Title Amendment Act 1998* (Cth) and the Northern Territory Emergency Response legislation.
19. Further:
  - Section 25 of the *Constitution* contemplates the exclusion of voters on racial lines
  - The amended section 51(xxvi) of the Constitution, (the ‘racess power’) has been interpreted by the High Court to allow for the Commonwealth to make both beneficial and adverse laws for Aboriginal people.<sup>8</sup>
  - In the case *Kruger v Commonwealth* (FN: (1997) 190 CLR 1) the High Court has also interpreted section 122 of the Constitution (the ‘Territories power’), which provides for the Commonwealth Parliament to make laws for the government of territories, to be unfettered by a general requirement of equality before the law or any express or implied rights in the Constitution.<sup>9</sup>
20. A constitutional guarantee of equality before the law and freedom from discrimination would provide comprehensive protection against racial discrimination
21. Constitutional reform is also considered by many to be part of the unfinished business of reconciliation.<sup>10</sup> In particular, many consider that the first nations status of Indigenous peoples should be recognised in the preamble to the Constitution.

**Recommendation 10: That the Australian Government commence a constitutional process, with the active engagement of Indigenous peoples, for the recognition of Indigenous peoples in the preamble; removal of section 25 of the Constitution and its replacement with a clause guaranteeing equality before the law and non-discrimination.<sup>11</sup>**

### **6.2 Implementing the Declaration**

22. The Commission welcomed the Australian Government’s formal endorsement of the Declaration in April 2009. The Declaration has become increasingly

prominent in Australia's legal and policy landscape, with references to the Declaration being made in Parliament,<sup>12</sup> parliamentary committee reports,<sup>13</sup> court decisions<sup>14</sup> and in policies developed by Indigenous NGOs.<sup>15</sup>

23. However, the Government has yet to develop an action plan for the 'full realization of the provisions of [the] Declaration' (art 41). Such an action plan should be developed with the active participation of, and in full partnership with, Aboriginal and Torres Strait Islander peoples.
24. The Commission supports the use of the Declaration as a guide for interpreting Australia's obligations under the ICERD as they relate to Indigenous peoples. This is consistent with the interpretative mandate of the Committee outlined in the Vienna Convention on the Law of Treaties and the ICERD Committee's recommendation to the United States of America.<sup>16</sup>
25. Further, the Commission considers that the Declaration should be used to frame the Government's engagement with Indigenous peoples. In particular, the Commission considers that the Australian Government should consult and cooperate with Aboriginal and Torres Strait Islander peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

**Recommendation 11: That all legislation, policies and programs be reviewed for consistency with the rights affirmed by the Declaration.<sup>17</sup>**

### **6.3 Ratification of international human rights instruments**

**Recommendation 12: That the Australian the Government ratify the ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.<sup>18</sup>**

**Recommendation 13: That the Australian Government sign and ratify the Optional Protocol on Economic Social and Cultural Rights.<sup>19</sup>**

### **6.4 Indigenous disadvantage (ICERD Article 5 and Declaration Articles 3,4,19,21)**

26. There continues to be a significant gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous peoples in terms of the realisation of human rights and fundamental freedoms. Indigenous peoples face a comparative disadvantage and discrimination across a range of indicators including life expectancy and health, housing and homelessness, education, welfare, employment, incarceration rates and child abuse and family violence. See Annex 3 for indicators of Indigenous disadvantage.
27. As discussed above (para 13), the Government has set targets to address this disadvantage under the COAG National Integrated Strategy for Closing the Gap in Indigenous Disadvantage, supplemented by budget commitments under the National Indigenous Reform Agreement and associated National Partnership Agreements.<sup>20</sup>

28. However, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people ('Special Rapporteur on indigenous peoples') noted in his 2010 report on Australia that:

*Despite the Government's attention to indigenous issues, there is a continued need to develop new initiatives and reform existing ones, in consultation and in real partnership with indigenous peoples, to conform to international standards requiring genuine respect for cultural integrity and self-determination.<sup>21</sup>*

29. The Commission supports the recommendations of the Special Rapporteur on indigenous peoples that governments undertake greater consultation and engagement with Indigenous peoples concerning the design and delivery of government programs and services to address Indigenous disadvantage.<sup>22</sup>

### **6.5 Indigenous health (ICERD 5 and DRIP 24)**

30. The Commission has welcomed the substantial financial commitments for Indigenous health made under the COAG National Indigenous Reform Agreement and the COAG National Integrated Strategy for Closing the Gap in Indigenous Disadvantage. The Commission has also welcomed the establishment of a new peak body and the provision of additional funding for Aboriginal and Islander health workers, and the establishment of Pathways to Community Control under the Northern Territory Aboriginal Health Forum, which provides a road map for Governments and Aboriginal controlled health community organisations to work together as part of the long term vision of Closing the Gap.
31. The Commission notes the Government's positive progress towards the COAG target of halving the gap in mortality rates for Indigenous children under five years, within a decade. However, the Commission notes with concern the rising level of low birth weight babies which is clearly associated with under-five mortality and does not bode well for the future.
32. The Australian Government, the states of Victoria, Queensland, Western Australia and the Australian Capital Territory have signed the Close the Gap Statement of Intent. In doing so, they committed to develop a comprehensive, long-term plan of action to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-indigenous Australians by 2030. Other commitments include:
- ensuring primary health care services and health infrastructure for Aboriginal and Torres Strait Islander peoples, which are capable of bridging the gaps in health standards, by 2018
  - ensuring the full participation of Aboriginal and Torres Strait Islander peoples and their representative bodies in all aspects of addressing their health needs

- working collectively to systematically address the social determinants that impact on achieving health equality for Aboriginal and Torres Strait Islander peoples.
33. However, there is currently no national plan of action to implement these commitments. The National Indigenous Reform Agreement and the Integrated Strategy for Closing the Gap in Indigenous Disadvantage do not constitute a comprehensive national action plan on health. For instance, the national partnership agreements expire around 2015, which leaves a 15-year gap in planning until 2030.
34. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health observed that:

*Undivided support and implementation of the Close the Gap Campaign is crucial to ensuring capacity building and empowerment of [I]ndigenous communities to take a leadership role in realising the right to health for all Australians.<sup>23</sup>*

**Recommendation 14: That the Australian Government develop a comprehensive, long-term plan of action, that is targeted to need, evidence-based and capable of addressing the existing inequities 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.**

35. Aboriginal and Torres Strait Islander peoples experience disproportionately higher levels of hearing impairment and deafness when compared with the Australian community generally. This limits their rights to health, as well as related rights to education, livelihood and participation. Their exclusion can manifest in disadvantage and discrimination in the spheres of health, education, training, employment, the criminal justice system and social and cultural participation.
36. The Senate Community Affairs References Committee has recommended the Australian Government address the educational and employment needs of Indigenous peoples with hearing loss and provide adequate support within the criminal justice system.<sup>24</sup>

**Recommendation 15: That the Australian Government address the discrimination experienced by Aboriginal and Torres Strait Islander peoples with hearing impairment and deafness on the basis of their race and disability.**

## **6.6 Indigenous education and employment (ICERD Article 5 and Declaration Article 13, 14)**

37. Apart from some notable exceptions, most government and non-government schools in Australia provide a Western model of education.<sup>25</sup> Assimilation and the forces of mainstream culture mean that the revitalisation of Indigenous language and culture occurs at the margins of mainstream education, if at all.

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38. Bilingual education is considered to be one way to keep Indigenous language and culture alive.<sup>26</sup> Of the 9 581 schools that exist in Australia today, nine schools are bilingual schools, instructing students in their first Indigenous language. Evidence from an Australian study demonstrates marginally better English literacy outcomes for students from bilingual schools at the end of primary school compared with students from non-bilingual schools with similar languages, demography and contact histories.<sup>27</sup>
39. In 2009 the Northern Territory Government implemented a policy which makes it mandatory for schools to begin each school day with four hours of English literacy. The policy is likely to dismantle bilingual education and potentially endanger some of the remaining Indigenous languages.

**Recommendation 16: That the Government take urgent action to support the reinstatement of bilingual education approaches in schools, and safeguard the future of bilingual education through binding agreements with state and territory governments and the provision of ongoing resources to support its implementation.<sup>28</sup>**

40. In 2007 COAG committed to halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade. In February 2009, COAG signed the National Partnership Agreement for Indigenous Economic Participation to significantly improve opportunities for Indigenous people to engage in private and public sector jobs.<sup>29</sup>
41. The Australian Government put in place reforms for the cessation of the Community Development Employment Projects (CDEP)<sup>30</sup> program in urban and major regional locations and the expansion of Structured Training Employment Projects brokerage services as an alternative as of 1 July 2009.<sup>31</sup> The Commission's concerns with these reforms have included:
- a number of productive community roles and projects may cease to continue where these cannot be transformed into mainstream employment opportunities
  - a risk that Indigenous peoples become permanently isolated from the labour market in urban and regional areas
  - a risk that overall unemployment rates among Indigenous peoples will increase.
42. The Commission's concerns appear to have been unfortunately borne out as the estimates for Indigenous unemployment between 2008 and 2009 increased by 30% rising from 27 100 to 35 400.<sup>32</sup>

## **6.7 Indigenous languages (ICERD Article 5 and Declaration Articles 13,14)**

43. The Commission has welcomed the Government adoption of a national policy for the preservation of Indigenous languages (*Indigenous Languages - A National Approach 2009*). However, the Commission notes three major challenges that need to be addressed to ensure the successful implementation of this policy:
- different levels of governments in Australia need to be held to a consistent position on Indigenous language policy and action.
  - coordinating intra-government activity and ensuring quality control because language preservation requires interaction between multiple portfolio areas, including early childhood development services, employment, school education, higher education and research services.
  - stretching the limited resources (\$9.3 million for the financial year 2008-09) to address a critical and complex language situation across the nation.

### **Recommendation 17: That the Australian Government:**

- Honour the commitment of *Indigenous Languages - A National Approach* to establish a national Indigenous languages body with functions and responsibilities similar to those of the Māori Language Commission.
- agree to resource an ongoing plan of action for the preservation and promotion of Indigenous languages as recommended by the national Indigenous languages body.
- Become a signatory to the *Convention for the Safeguarding of the Intangible Cultural Heritage (2003)*.
- through COAG, develop agreements to ensure consistency and compliance with Australia's *Indigenous Languages - A National Approach*.<sup>33</sup>

## **6.8 Indigenous housing and homelessness (ICERD Article 5 and Declaration Articles 21,23)**

44. According to the 2006 Census, 4116 Indigenous people were homeless on Census night.<sup>34</sup> In 2006, the Special Rapporteur on adequate housing identified that there was an Indigenous housing crisis in Australia, which is likely to worsen in coming years as a result of the rapid rate of population growth in Indigenous communities.<sup>35</sup>
45. The Commission has welcomed the Australian Government's response to make the reduction of homelessness a national priority<sup>36</sup> and the recommendation of the House of Representatives Standing Committee on

Family, Community, Housing and Youth that new housing legislation be enacted.<sup>37</sup> Further the COAG National Partnership Agreement on Remote Indigenous Housing aims to address: significant overcrowding, homelessness, poor housing conditions and the severe housing shortage in remote Indigenous communities.<sup>38</sup>

46. However, the Australian Government has made funding for housing under this COAG agreement conditional upon:
- secure land tenure being settled
  - the relevant state / territory government ensuring provision of standardised tenancy management and support for all Indigenous housing in remote areas consistent with public housing standards of tenancy management including through, where appropriate existing service providers
  - the relevant state / territory government developing and implementing land tenure arrangements to facilitate effective asset management, essential services and economic development opportunities.
47. These conditions risk reducing the capacity for Indigenous peoples and Indigenous organisations to be involved in the decision-making and management of Indigenous housing on Indigenous lands.
48. The Commission supports the Special Rapporteur on indigenous peoples' recommendation in relation to housing programs.<sup>39</sup>

**Recommendation 18: That housing programs should avoid imposing or promoting housing arrangements that would undermine Indigenous people's control over their lands; and should be administered by Indigenous community controlled institutions.<sup>40</sup>**

## **6.9 *Family violence and other race and gender issues relating to Indigenous women (ICERD Article 5 and Declaration Article 22)***

49. The Australian Government's National Plan to Reduce Violence Against Women and Children (the National Plan) identifies a number of measures specific to Indigenous communities.<sup>41</sup> The Government has agreed to:
- reduce overcrowding in Aboriginal and Torres Strait Islander Communities
  - fund healing centres for Indigenous communities.
50. Given the increasing levels of incarceration of Indigenous peoples generally, their over-representation in the criminal justice system and high level of recidivism, any sustained response to family violence should also provide culturally appropriate offender rehabilitation programs.

51. The Commission's report on *Ending Family violence and Abuse in Aboriginal and Torres Strait Islander Communities* also highlights the need to support Indigenous community initiatives and networks, human rights education, government action, and robust accountability and monitoring.<sup>42</sup>
52. During 2007 and 2008, the Commission designed and delivered a training program to prepare Community Legal Education workers for employment in Family Violence Prevention Legal Services. The training program focused on community development approaches to family violence prevention. Programs of this nature are an important means of strengthening the capacity of Indigenous workers to expand the education and understanding among Indigenous communities of the legal contexts of family violence. The Government has ceased funding the delivery of this training program.
53. Policies and programs aimed at preventing violence against Indigenous women and children must be designed and developed with the input of Indigenous women and children. Indigenous men also have a role in this process and should be engaged in addressing the causes of violence as well as the solutions. Prevention activity in the form of community development and education is critical to break the cycle of intergenerational violence that afflicts so many Indigenous communities.

**Recommendation 19: That the Australian Government continue to fund community education and community development programs aimed at preventing family violence in Indigenous communities.**

### ***6.10 Indigenous peoples and the criminal justice system***

54. High levels of Indigenous imprisonment have continued to occur since the 1991 Royal Commission into Aboriginal Deaths in Custody.<sup>43</sup> Since 1996 there has been a 48 percent increase in Indigenous imprisonment.<sup>44</sup>
55. Nationally, Indigenous adults are 13 times more likely to be imprisoned than non-Indigenous people and Indigenous juveniles are 28 times more likely to be placed in juvenile detention than their non-Indigenous counterparts.<sup>45</sup>
56. To address over-representation, the Social Justice Commissioner has advocated that governments adopt a criminal justice policy approach based on 'justice reinvestment'. Under this approach, money that would have been spent on imprisonment is reinvested in programs and services that address the underlying causes of crime in communities where there is a high concentration of offenders. Justice reinvestment still retains prison as a measure for dangerous and serious offenders but actively shifts the culture away from imprisonment and starts providing community services that prevent offending.
57. Results to date from overseas programs show promising results in terms of reductions in the prison population and prison expenditure, as well as significant investments in preventative and rehabilitative community based programs.

58. The Senate Legal and Constitutional Affairs Committee recommended governments develop and fund a justice reinvestment pilot program for the criminal justice system.<sup>46</sup> Similarly a review of juvenile justice in New South Wales recommended the government adopt a justice reinvestment approach in juvenile justice.<sup>47</sup>

**Recommendation 20: That:**

- **the Australian Government, through COAG, set criminal justice targets that are integrated into the Closing the Gap agenda.**
- **the Standing Committee of Attorneys General Working Party identify justice reinvestment as a priority issue under the National Indigenous Law and Justice Framework, with the aim of conducting pilot projects in targeted communities in the short term.**
- **all state and territory governments consider justice reinvestment in tandem with their plans to build new prisons.**
- **a percentage of funding that is targeted to increasing prison beds be diverted on a trial basis to communities where there are high rates of Indigenous offenders.**

59. Mandatory sentencing laws are still in place in Western Australia and the Northern Territory.<sup>48</sup> These laws have resulted in situations of injustice, with individuals receiving sentences that are disproportionate to the circumstances of their offending.<sup>49</sup> Such policies are not only ineffective in deterring crime and rehabilitating offenders, but also costly and manifestly unjust.<sup>50</sup>

60. The Social Justice Commissioner has called on the Western Australian Government to repeal its mandatory detention provisions and for the federal Parliament to exercise its responsibilities to ensure compliance by the WA Government with Australia's international human rights obligations by overriding the laws if necessary.<sup>51</sup>

**6.11 Northern Territory Emergency Response (NTER)(ICERD Articles 1,2 and Declaration Articles 2,3,21,23)**

61. The Commission has raised concerns about the Northern Territory National Emergency Response (NTER)<sup>52</sup> in a number of parliamentary submissions and in consultations with Australian Government representatives.<sup>53</sup> International human rights bodies and experts have similarly raised concerns with the suspension of the RDA and the lack of conformity with Australia's obligations under human rights treaties.<sup>54</sup>

62. In 2009 following consultations with the prescribed communities in the NT, the Australian Government introduced Bills to reinstate the RDA and re-design some of the NTER measures.<sup>55</sup> The Bills were reviewed in a Senate Inquiry which recommended the Bills be passed, although dissenting reports recommended a range of amendments to the Bills. The *Social Security and*

*Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2009 (the Act) was passed on 22 June 2010.*

63. Ways in which the Act improves the compliance of the NTER with human rights standards include:
- lifting of the suspension of the RDA for the NTER legislation
  - redesigning the income management measures so that they are not applied on a racially discriminatory basis.
  - enabling a shift from the blanket imposition of alcohol bans to restrictions that are tailored to the needs of communities.
64. However, the Commission has noted<sup>56</sup> that the Act still retains some practical limitations on the reinstatement of the RDA and full compliance with international human rights obligations. These limitations include:
- the absence of notwithstanding clauses in the Act. The effect of this, in conjunction with provisions relating to its retrospective application, is that any remaining discriminatory measure under the NTER cannot be challenged by the 'reinstatement' of the RDA because being the later legislation, the NTER legislation will prevail. As a result the Commission is concerned that the discriminatory compulsory grant of five-year leases are protected from challenge under the RDA.
  - The Government has indicated that it considers the existing and redesigned NTER measures to be 'special measures' in accordance with the RDA, but these may not be compliant with the requirements of a special measure under the RDA.

In November 2009, the Commission issued *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act (Draft Guidelines)*. The Draft Guidelines set out a practical approach to developing a special measure that is compliant with the RDA. Accordingly, the redesigned measures will not meet the requirements of a special measure where:

- the consultations do not meet the standard of consultation and consent of the affected group
- there is insufficient current and credible evidence which shows that the measure will be effective
- there are alternative means of achieving the objective that are not as restrictive of affected persons' human rights
- there are inadequate mechanisms for monitoring and evaluating the measure to ensure if it is working effectively and if its objective has been met.

The Commission is concerned that there has been a failure to require consent for measures that are intended to be ‘special measures’ for the purposes of the RDA and Australia’s human rights obligations. For example, the alcohol restrictions measure in the NTER have not been developed with adequate community consultation and do not meet the requirements of consent for a special measure. Also, to be consistent with the RDA, measures relating to the management of land must be taken with the consent of the landowners. The redesigned five-year leases therefore remain inconsistent with the RDA in this respect.<sup>57</sup>

In the Commission’s view, it is preferable that measures that may limit the rights of people of a particular racial group are designed so as to be non-discriminatory under the RDA, rather than justified as special measures. The Commission has **serious concerns about the inappropriate classification of State actions as ‘special measures’, particularly in relation to measures that intentionally discriminate on the basis of race and which are formulated without the participation and the acceptance of Indigenous peoples**

- The broad categories of ‘disadvantaged youth’ and ‘long-term welfare payment recipients’ are not sufficiently targeted to comply with a human rights based approach to income management. The Commission has noted that the preferred features for an income management measure that would make it consistent with international human rights standards include:
  - voluntary/ opt-in approaches - rather than automatic quarantining or an exemption approach
  - a last-resort approach for targeted risk areas such as child protection (that is supported by case management and support services), akin to the Family Responsibilities Commission model in Queensland - rather than automatic quarantining and
  - a defined period of income management, where the timeframe for compulsory quarantining is proportionate to the context.
- The Commission is concerned that Indigenous peoples will be more vulnerable to being subjected to income management under these categories than non-Indigenous peoples. This risk stems from the limited access to education, training and employment for Aboriginal people, particularly in remote communities in the Northern Territory, and the consequent high proportion of Aboriginal people accessing welfare payments for extended periods. There is also a large Aboriginal youth population in the Northern Territory, many of whom also have difficulties accessing education, training and employment.
- The Commission is also concerned that including domestic violence as a trigger for being income-managed as a ‘vulnerable welfare payment recipient’ under the redesigned income management scheme, could place women in situations of domestic violence at greater risk of harm. Centrelink Social Workers currently provide women who have experienced domestic violence with information on entitlements and

services available. Including domestic violence as a trigger for income management could discourage women experiencing domestic or family violence from seeking assistance from Centrelink and consequently place women at greater risk, and result in under-reporting of domestic violence.

- To justify the continuation of the NTER there would need to be clear evidence that the NTER is yielding results in terms of its stated objects. The Special Rapporteur on indigenous peoples has noted that ‘to date, the evidence in this respect is at best ambiguous... [and] even assuming there have been some improvements, there is no evidence that the rights-impairing discriminatory aspects of the NTER have been necessary’.<sup>58</sup> The Commission emphasises the need for the government to develop proper monitoring and evaluation systems to ensure adequate evidence is collated on the effectiveness of the NTER.<sup>59</sup>

**Recommendation 21: That, to bring the NTER into full compliance with human rights standards, the NTER be amended as follows:**

- **The categories of ‘disadvantaged youth’ and ‘long-term welfare payment recipients’ be reformulated to apply on a case-by-case basis .**
- **Domestic violence not be included as an indicator for ‘vulnerable welfare payment recipient’ under the redesigned income management scheme**
- **The capacity to compulsorily acquire any further five-year leases under Part 4 of the NTER Act be removed and the Government commit to obtaining the free, prior and informed consent of traditional owners to enter into voluntary lease arrangements for existing compulsory lease arrangements.**
- **The government move towards further amendments of the NTER to incorporate notwithstanding clauses in the legislation and ensure all measures that are intended to be special measures comply with the RDA.**

**Recommendation 22: That the Australian Government:**

- **supplement any income management scheme with additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy/budgeting skills.**
- **ensure the participation of Indigenous peoples in developing, implementing and monitoring alcohol management plans and ensure all alcohol management processes are consistent with the RDA. Alcohol restrictions should be supplemented by investment in infrastructure in the health and mental health sectors (including culturally appropriate detoxification facilities) and investment in culturally appropriate community education programs delivered by Indigenous staff.**

### **6.12 Native Title (ICERD Articles 2, 5 and Declaration Articles 3,10,11,20,25,26, 27,28,29,32)**

65. While the Commission welcomes the Government's commitment to improving the operation of the native title system, recent legislative reforms do not overcome the system's limitations.<sup>60</sup> For example, Indigenous peoples bear the burden of demonstrating continuity, from sovereignty to the present:
- of their society
  - in the observance of traditional laws and customs and
  - in the content of those laws and customs, to prove native title. This is despite the impact of colonisation.<sup>61</sup>
66. The Committee expressed several concerns about the native title system in its 2005 Concluding Observations on Australia.<sup>62</sup> The Government's Report does not sufficiently address the Committee's concerns that:
- the 1998 amendments to the *Native Title Act 1993* (Cth) rolled back protection of native title, and provide legal certainty for Government and third parties at the expense of native title
  - the burden of proof for Indigenous peoples in Australia continues to be a significant barrier to achieving a determination that native title exists.

**Recommendation 23: That the Australian Government take immediate steps to review the native title system and to implement measures to address the above concerns. Such measures should include amendments to the Native Title Act to provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.<sup>63</sup>**

### **6.13 Homelands (ICERD Article 5 and Declaration Articles 3,11,12,20,21)**

67. Homelands are located on Aboriginal ancestral lands with cultural and spiritual significance to the Aboriginal people who live there. Homelands provide a healthy alternative living environment for Aboriginal people who want to avoid some of the problems that can be associated with living in larger regional centres.<sup>64</sup> Due to the relatively small populations of Homelands and their dispersal over large unpopulated regions homeland populations have been under-resourced and underfunded for many years.
68. Current government policy prioritises service delivery to 15-20 selected towns across the NT. This limits the delivery of services in homeland communities to existing homelands. No funding is being provided to construct housing on homelands, and most services are being made available through hub towns.<sup>65</sup> This could result in homeland communities being unable to access adequate housing, water, sanitation, power, education, and health

services within their homelands and having to move into larger cluster communities to access these services.

**Recommendation 24: That the Australian and Northern Territory governments commit to supporting homelands through:**

- reviewing, developing and implementing homeland policies with the active participation of representative leaders from homeland communities
- providing funding and support for homeland communities in all states and territories through the COAG National Indigenous Reform Agreement and associated National Partnership Agreements.<sup>66</sup>

**6.14 Stolen Generations (ICERD Article 6 and Declaration Article 8)**

69. The *Bringing them home* report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) document the experiences of the Stolen Generations, who were forcibly removed from their families under the guise of welfare and makes recommendations for reparation.<sup>67</sup>
70. Aside from the National Apology and the establishment of the Aboriginal and Torres Strait Islander Healing Foundation, many of the other recommendations for reparation remain largely outstanding, including the establishment of compensation payment schemes for the Stolen Generations and their families. The only compensation scheme established for the Stolen Generations to date has been in Tasmania.

**Recommendation 25: That the Commonwealth, through the Councils of Australian Governments, engage with State and Territory governments to develop a consistent approach with joint funding mechanisms in the provision of financial redress for the Stolen Generations.**

**6.15 Stolen Wages (ICERD Article 6 and Declaration Article 8)**

71. Schemes have been established in Queensland and New South Wales to compensate Indigenous peoples for the withholding, non-payment and underpayment of wages under the control of government. Such schemes have not been established in other states or territories.
72. In December 2006 the Senate Standing Committee on Legal and Constitutional Affairs recommended that governments provide unhindered access to archives for the purposes of researching the stolen wages issue as a matter of urgency. They also recommended that funding be made available for education and awareness in Indigenous communities, as well as for preliminary legal research, into stolen wages issues.<sup>68</sup> These recommendations have not been adopted or implemented.

**Recommendation 26: That Stolen Wages compensation schemes be established in other states and territories as appropriate.**

## **7 Issues relating to migrants and ethnic minorities**

### **7.1 National Multicultural Policy (ICERD Article 2)**

73. Respect for racial equality and diversity is a key element of robust multicultural democracies and the international human rights framework. Australia has a proud history of multiculturalism that has, in general terms, been managed with success in fostering a cohesive and inclusive society. However, as this report outlines, emerging and established ethnic communities in Australia still experience significant challenges in relation to their social and economic participation, safety and health and wellbeing.
74. An evidence based and properly resourced national multicultural policy is critical in regard to (I) guiding whole of government policy and program development (II) improving the access and equity of people from culturally and linguistically diverse backgrounds and (III) fostering a tolerant and cohesive society.
75. Australia's last national multicultural policy, *United in Diversity 2003-2006* expired in 2006. Though the current Australian Government committed to developing a new federal multicultural policy in 2007, progress has been markedly slow.

**Recommendation 27: That the Australian Government consider the following in the development of a national multicultural policy:**

- that it should be based on extensive community consultation
- that it should be properly linked with the Australian Human Rights Framework,<sup>69</sup> the Human Rights Action Plan and the Social Inclusion Agenda<sup>70</sup>
- that it adopts a broad definition of the 'multicultural community' in Australia that genuinely considers: newly arrived migrants, international students, temporary and seasonal migrant workers, people from refugee backgrounds and established ethnic communities
- that it addresses the issue of religious diversity and freedom of religion and belief
- that systems of auditing, benchmarking, compliance and evaluation are created.

### **7.2 Persistence of racist attitudes (ICERD Article 2)**

76. The Australian Human Rights Commission is a partner in the Challenging Racism Project.<sup>71</sup> The research began in 2007 and will be finalised in late 2010. The project is being led by Associate Professor Kevin Dunn, University of Western Sydney and research partners include: Macquarie

University, the University of Melbourne, the University of South Australia and Murdoch University.

77. The purpose of the national research project is to:
- map (1) racist attitudes and (2) experiences of racism at the local level across Australia
  - develop current typologies of racism across Australia
  - develop context sensitive anti-racism strategies to respond to local variations of racism and intolerance across Australia.
78. The research was conducted through national telephone surveys and some of the key findings were that:
- around 85 percent of respondents believe that racism is a current issue in Australia
  - around 20 percent of Australians had experienced forms of race-hate talk (verbal abuse, name-calling, racial slurs, offensive gestures etc)
  - around 11 percent of respondents identified as having experienced race-based exclusion from their workplaces and/or social activities
  - Seven percent of respondents identified as having experienced unfair treatment
  - Six percent of respondents reported that they had experienced physical attacks based on their race and/or traditional dress.
  - race typologies and racist behaviour varies across local government areas and requires context sensitive/specific responses.<sup>72</sup>
79. The *Mapping Cohesion Report* (Scanlon Foundation surveys) found that one in ten Australians experienced discrimination based on the grounds of ethnicity or religion during 2006-2007. The *Mapping Cohesion Report* 2009 found that one in ten Australians hold strongly negative views on cultural diversity and immigration.<sup>73</sup> Around six percent of respondents experienced discrimination on a continuing basis, that is, at least once per month.<sup>74</sup>
80. In the Scanlon Foundation local surveys over half of the respondents whose first language was Mandarin, Cantonese or Vietnamese report experience of discrimination periodically over the course of their lives.<sup>75</sup>
81. In 2008-2009 the Australian Human Rights Commission received 396 complaints under the RDA, including 50 racial hatred complaints.<sup>76</sup> This data cannot be considered as reliably indicative of people's experiences of racial discrimination in Australia.
82. The data emerging from the Challenging Racism Project and the findings from the Scanlon Foundation surveys is concerning given the significant

evidence links race-based discrimination and racism to ill health, reduced productivity, reduced life expectancy and morbidity.<sup>77</sup> Current evidence further suggests that race-based discrimination and exclusion impacts negatively on families and family life and local communities, with serious social and economic costs.<sup>78</sup>

**Recommendation 28: That the Australian Government develop a coordinated, national approach to anti-racism that is linked to the national multicultural policy framework. This recommendation is in accordance with the Durban Declaration and Program of Action, which calls on states to develop comprehensive national action plans to eradicate racism, racial discrimination, xenophobia and related intolerance.**

### **7.3 International student safety (ICERD Article 5)**

83. The Australian Human Rights Commission welcomes the Australian Government's review of the *Education Services for Overseas Students (ESOS) Act 2000* but notes its limited terms of reference focusing on the regulation of international education service providers.<sup>79</sup>
84. The Australian Human Rights Commission welcomes the Australian Government's commitment to developing a National International Student Strategy but is disappointed with (I) the slow progress that has been made and (II) the limited parameters of the strategy.
85. In recent months the Australian Human Rights Commission has expressed ongoing concerns regarding the safety of international students in Australia and the vulnerability factors that can cause them to experience violence.
86. On 31 March 2010, the Academy of the Social Sciences, the Australian Human Rights Commission and Universities Australia held the *Racism and the Student Experience Policy Research Workshop*. The purpose of the Workshop was to assess available data from social science research to assist with the prevention of racially motivated crimes against international students and improve international student safety.
87. The current international student population in Australia has grown rapidly in recent years. International student enrolments grew from under 188,000 in 2000 to 631,000 in 2009.<sup>80</sup> Australia has a higher proportion of international students (as part of its total tertiary student population) than any other country in the world.<sup>81</sup> The Workshop participants agreed that while the growth of international education has been a positive development for Australia, there needs to be a proportional investment in international student support services.
88. The Workshop participants agreed that segments of the international student population in Australia are at risk of experiencing multiple forms of discrimination. They also agreed that the international student population in Australia has a discernable set of human rights, including their rights to

security of person, non-discrimination, housing, employment discrimination and information.

89. Participating academics discussed the recent high profile attacks on international students in Australia. A clarification was made that not all attacks are on students and certainly not all attacks have been on overseas students. Many Australians of 'Indian' and 'Sri Lankan' 'appearance' have also been attacked. Participating academics noted that there is no official national data on racially motivated crime. There are also significant gaps in relevant national survey data, for example the Australian Bureau of Statistics *Household Survey* and the *Victims of Crime Survey*. When considering how to determine whether a crime is racially motivated, participants noted the following:
- incidents range across a spectrum
  - in some cases racism is a clear motivator for a particular crime
  - in some cases racism is not a clear motivator but still shapes a crime
  - in some cases racism can become an element of an existing dispute (use of racist language)
  - in some cases motivation is ambiguous
  - we don't understand enough about the perpetrators
  - we need reform around the collection of policing data.
90. Participants discussed the vulnerabilities that caused some people or groups of people to become subject to crime. Indian students on average tend to have less economic security than other international students and subsequently are exposed to high risk situations. Participants cited examples such as:
- living in overcrowded and low income housing, often in lower socio-economic areas
  - working in precarious employment situations, for example having limited employment security and working late night shifts
  - travelling to and from work late at night on public transport.
91. The Commission notes the findings from *Safety of International Students in Metropolitan Melbourne* study conducted by the Institute for Community, Ethnicity and Policy Alternatives, Victoria University.<sup>82</sup> The Institute surveyed one thousand domestic and international students and conducted in-depth interviews with student representative organisations, community police and other stakeholders. More than half of the international students surveyed identified that they found the city less safe than they had anticipated.<sup>83</sup> A number of factors were identified by students as safety threats including:
- lack of access to safe and affordable housing
  - high risk employment
  - poor transport options
  - racism (most frequently risk factor identified by the surveyed students)
  - sexual harassment experienced by female international students

92. The Commission also notes the findings from the *International Student Security Study* conducted by Professor Simon Marginson, University of Melbourne and Professor Chris Nyland, Monash University.<sup>84</sup> This research is the largest interview based study (same size 200) of international students in Australia and it found that:
- many of the respondents reported negative experiences in dealing with the Department of Immigration and Citizenship (time delays, non-transparent procedures and experiences of discrimination and hostile treatment)
  - just under two thirds of respondents experienced loneliness or isolation during their stay in Australia
  - nine out of ten respondents had friendships with other international students, while only 57 percent of respondents had even casual friendships with local students
  - fifty percent of respondents had experienced hostility or prejudice during their stay in Australia. Most frequently, respondents reported incidents of unprovoked abuse in public spaces such as on the street, in shopping centres or on public transport.

**Recommendation 29: That the Australian Government revisit the recommendations made in the Commissions Report of National Inquiry into Racist Violence in Australia in 1991.**<sup>85</sup>

**Recommendation 30: That the Australian Government: (I) broaden the parameters of the ESOS Act to include on campus student safety (II) language foundations (III) social support.**

**Recommendation 31: That the COAG International Student Strategy provides a regulatory framework that involves states, territories and local governments in addressing issues relating to safety, accommodation, transport and discrimination.**

**Recommendation 32: That the Australian Government compile national survey data on international students in Australia, particularly in relation to income and expenditure, housing experiences, employment discrimination and experiences of violence and sexual harassment.**

#### **7.4 African Australian communities (ICERD Articles 2,5)**

93. In 2007 the Australian Human Rights Commission designed a report focusing on the experiences of African Australians. The report, entitled *In Our Own Words*, has an accompanying compendium. This is the first piece of research that considers the everyday experiences from a national perspective within a human rights context.<sup>86</sup>

94. In 2006, a total of 248,699 people born in Africa were living in Australia.<sup>87</sup> This figure represents 5.6 percent of Australia's overseas born population and around one percent of the country's total population.
95. The majority of African Australians (72.6 percent) are from Southern and Eastern Africa, around 22.9 percent are from North Africa (including Sudan) and 4.5 percent are from Central and West Africa.<sup>88</sup> Around 100,000 people were born in South Africa and other large communities include Zimbabwe (8.1 percent), Sudan (7.7 percent), Mauritius (4 percent), Kenya (4 percent) and Ethiopia (2.3 percent).<sup>89</sup>
96. The aims of the project were to:
- identify what can help – and obstruct – the settlement and integration experiences of African Australians
  - suggest practical solutions to inform the development of policies, programs and services for African Australians
  - address some of the stereotypes about African Australians that have been raised in recent public debate and media reporting.
97. The *In Our Own Voices Report* is the result of a three year research project that engaged directly with African Australian communities, partner agencies and other stakeholders.
98. In the report, African Australian communities identified the following priority areas of action:
- racism and discrimination
  - child protection and family violence
  - increasing legal literacy in and around family law.
99. The Report also presents important findings in relation to employment and training, education, health, housing and engaging with the justice system and provides a number of best practice examples from around Australia.

**Recommendation 33: That the Department of Immigration and Citizenship and other government agencies consider the findings of the *In Our Own Voices Report* in (I) policy development processes (II) service delivery improvements and (III) settlement services improvements.**

## **7.5 Planning for population growth**

100. The Australian Human Rights Commission welcomes the Australian Government's recent appointment of a Minister for Sustainable Population.
101. In 2010, a number of Australia's human service agencies have been involved in discussions about immigration levels, population targets and ecological sustainability.

**Recommendation 34: That the Minister for Sustainable Population establish an Interdepartmental Committee across human services and sustainability agencies to: (I) share research data, (II) coordinate policy, (III) develop integrated approaches and (IV) provide strategic advice around balancing immigration flows, population targets, workforce planning, infrastructure and ecological sustainability.**

## **7.6 Access to the labour market (ICERD Article 5)**

102. The 2007 *Labour Force Status and Other Characteristics of Recent Migrants Survey* found the following:<sup>90</sup>
- Almost four-fifths (79 percent) of recent migrants had a job at some time since arriving in Australia. Males were more likely to have had a job than females (89 percent compared to 70 percent).
  - Of the recent migrants who had found employment at some time since arriving in Australia, 36 percent reported having experienced difficulty finding their first job. Of those who experienced difficulty, the most commonly reported difficulties included: having a lack of Australian work experience or references (56 percent), language difficulties (35 percent) and having a lack of local contacts and networks (29 percent).
  - The overall labour force participation rate for recent migrants was 72 percent, with males (87 percent) having a higher rate than females (59 percent). In comparison, the participation rate for the Australian-born population was 69 percent. For males and females born in Australia, participation rates were 75 percent and 62 percent respectively. The Australian Human Rights Commission notes that the above data precedes the onset of the global financial crisis. According to the International Organisation for Migration, workers from migrant backgrounds are among the most vulnerable in relation to job losses and poor treatment in the workplace.<sup>91</sup>
  - Recent migrants who were born in main English-speaking countries had a higher participation rate than those born in other than main English-speaking countries (81 percent compared to 69 percent). The highest participation rate amongst recent migrants was for those who held skilled visas (83 percent).
103. The *Labour Force Status and Other Characteristics of Recent Migrants Survey* identifies language difficulties as a significant factor that impacts negatively on access to the Australian labour market. English language ability/language barriers should be included as an indicator under the lack of access to the job market section of the Compendium.
104. The process for the recognition of overseas gained skills and qualifications should similarly be recognised as a significant barrier in relation to accessing the Australian labour market. The 2003 *Review of Settlement Services for Migrants and Humanitarian Entrants* report noted that skills recognition

continues to be a major issue for newly arrived migrants/entrants. A number of more recent reports, including the *Economic Impacts of Migration and Population Growth*, identified the assessment process as requiring improvement to better enable the successful transition of migrants into the workforce.<sup>92</sup>

105. Fifty percent of complaints made under the *Racial Discrimination Act 1975* (the RDA) in 2008-2009 were in the area of employment.<sup>93</sup>

### ***7.7 Health and well being of people from culturally and linguistically diverse backgrounds (ICERD Articles 5,7)***

106. Good health is one of the core capabilities that people need to participate well in Australia's social and economic life.
107. The *Building on Our Strengths - A Framework to Reduce Race-Based Discrimination and Support Cultural Diversity in Victoria* provides a critical assessment of the health based impacts of racial discrimination and the health benefits of supporting cultural diversity.<sup>94</sup>
108. The Framework established links between self-reported race discrimination and poor health outcomes including: depression, psychological distress, stress and anxiety. The link between self-reported discrimination and depression/anxiety is significant because stress factors are identified as major contributors to disease burden. The framework also establishes probable links between self-reported race discrimination and poor health outcomes including: high blood pressure, heart disease, diabetes, obesity, alcohol misuse, substance misuse, peer violence and low birth weight.
109. The Australian Bureau of Statistics measure health literacy levels across the Australian population using the *Adult Literacy and Life Skills Survey*. The survey is an OECD measure and is also used in eleven other countries. The survey was administered most recently in Australia in 2006.
110. The 2006 data showed that<sup>95</sup>:
- approximately 40 percent of all Australians have 'adequate' levels of health literacy
  - 60 percent of all Australians have less than 'adequate' levels of health literacy
  - 6 percent of the Australian population enjoys high levels of health literacy
  - adequate levels of health literacy are enjoyed by 40.6 percent of 15-24 year olds in the Australian population. In comparison, 33.2 percent of people from culturally and linguistically diverse backgrounds aged between 15-24 years have adequate levels of health literacy
  - in the broader population 17.4 percent of 65-74 years olds have adequate health literacy levels in contrast to 3.4 percent of people from culturally

and linguistically diverse backgrounds have adequate health literacy levels.

111. There is an established relationship between literacy and poor health outcomes.<sup>96</sup> Good health literacy depends on at least basic reading and writing skills sufficient to enable everyday functionality.
112. Cultural beliefs or barriers can be strong determinants of who accesses health services. Culture is strongly linked with health and well being. Culture can define how health and illness are perceived, experienced, described and managed at an individual level.<sup>97</sup>
113. Poor English language proficiency is the most common barrier identified to accessing health information and services in Australia. People with limited English language ability may not access the health care system because they are not able to adequately explain their health complaint (or understand instructions provided by health care professionals).<sup>98</sup>
114. The Australian Human Rights Commission notes that English language difficulty is a critical issue for new and emerging communities in particular. The limited availability of interpreters has been a persistent issue for people from migrant and refugee backgrounds in Australia. Issues that can cause limited access to interpreters include:
  - lack of usage, or improper usage by health services
  - limited number of interpreters who are able to provide adequate assistance where a complex health issue presents
  - excessively long waiting periods.
115. Some women from migrant and refugee backgrounds experience compounding difficulties that may delay or prevent proper access to the health system. These compounding difficulties can include: a lack of English language competency, discrimination, limited mobility and limited income. Arabic women and women from other backgrounds may choose not to access health services or may access them less frequently because they are unable to see a female doctor.
116. For reasons outlined above, the cross-cultural competence of service providers and the availability/usage of interpreters should be considered in measuring (I) the accessibility of services and (II) service outcomes. Culturally appropriate health promotion/education strategies could also be used as a measure for both accessibility and inclusion. Cross-country comparisons (for example, comparative analysis with New Zealand) can provide useful benchmarks for accessibility and inclusion.

**Recommendation 35: That the Australian Government gives consideration to the adoption of the *Building on our Strengths Framework* as part of its broader national preventative health agenda.**

*Health impacts of experiences of racism in education settings*

117. The *Impact of Racism upon the Health and Wellbeing of Young Australians* study (2009) aimed to:<sup>99</sup>
- examine the experiences of racism for young people in Australia of mainstream, Indigenous, migrant and refugee backgrounds
  - investigate how young people in Australia report and respond to racism
  - explore the attitudes of mainstream youth in relation to key issues in contemporary race relations.
118. The sample population (823 participants from across 18 schools) reflected the ethnic demographic characteristics of the wider Australian population as set out in 2006 Australian Bureau of Statistics data.
119. The key findings in the report included the following:
- 70.1 percent of participants reported experiencing racism on an occasional basis (school as the main setting)
  - when experiences of racism were reported 52 percent alerted their teachers, 31.7 percent alerted school counsellors, 12 percent alerted police and 4.2 percent alerted a health professional
  - the majority of participants took no action to report incidences of racism or racist bullying
  - female students were identified as a group whose wellbeing was most affected by racism
  - over time, where students experience racism they consistently had lower health scores, decreased health/well being and poorer education outcomes.
120. In the *In Our Own Words* Report (2010) African Australian young people in every state and territory said that discrimination, prejudice and negative attitudes about their ability to succeed were a constant part of their education experience.
121. The report found that many young people from African Australian backgrounds, particularly girls, recounted being told by some teachers that they “shouldn’t aim too high” to avoid disappointment and were actively discouraged from pursuing further education.<sup>100</sup> They also felt unfairly targeted for not knowing class rules or how to behave in different social settings.
122. Another major concern for African Australian students was the lack of appropriate support available to them at school, including a lack of available support staff who could understand their backgrounds and culture.

123. The report found that the negative effects of these experiences on young African Australians can include low self esteem; reduced motivation; increased delinquency; depression and mental health problems particularly linked with reliance on substance misuse; and a greater likelihood of encountering problems with the law.

**Recommendation 36: That human rights education modules be incorporated into the National Curriculum for secondary schools and the Australian Government provide a comprehensive package of measures to address commitments under the *World Programme for Human Rights Education*.<sup>101</sup>**

## **7.8 Cyber racism (ICERD Article 2)**

124. The Australian Human Rights Commission notes that developing strategies to address contemporary forms and manifestations of racism (such as racist materials promoted through communication technologies) is outlined in paragraph 143 of the Durban Declaration.
125. The Australian Human Rights Commission is concerned about the increasing number of complaints (around 18 percent) received in relation to web based racist content in recent years.
126. On 27 April 2010, the Australian Human Rights Commission and Internet Industry Association hosted a one-day Summit to initiate a dialogue about the issue of cyber-racism and possible solutions.
127. More than 50 people from a wide range of sectors attended the session. This included representatives from federal government agencies, Internet service providers, social networking companies, NGOs, academics, social changers and young people.
128. This cross-sector event marks an important milestone in co-operation on an area of mutual concern to government, industry and the community. All participants benefited from a better understanding of the nature and prevalence of cyber racism, and contributed information, expertise, experiences and ideas about how these issues are currently being handled.
129. Nine themes emerged during the Summit:
- While all recognise the positive power of the Internet, it is clear that it can be used inappropriately to convey racist messages which can do harm. This is an important human rights issue and community issue.
  - While cyber-safety is now on the radar of a wide range of groups in our community – including the groups that participated in the Summit – cyber-racism has gathered less attention. The challenge is to incorporate cyber-racism within broader cyber-safety strategies and (II) develop new initiatives focussing on cyber-racism itself.

- There is a need to better recognise, showcase and share the strategies and initiatives which are already working and find ways to adapt and develop them.
- Any strategy to address cyber-racism should include a wide range of measures to reach and empower different categories of people involved in cyber-racism (including instigators of racism, participants in racist online groups, observers to those web pages and people harmed by the racism).
- Traditional regulatory responses alone will not solve the issue of cyber-racism - the problem is too big and fast moving for regulation to be effective.
- One of the most powerful ways to start addressing cyber-racism is to harness the positive potential of the Internet, social media and social marketing to educate the community about racism and empower them to participate in positive social change.
- Any strategy to address cyber-racism needs to focus on young people - the biggest users of Internet tools. Within that strategy there is a need to find ways to empower young people to create their own solutions.
- There is a need for better communication and co-operation amongst all the parties who engage in cyber space – including the representatives that participated in the Summit.
- There are gaps in the research around cyber-racism, and most definitely gaps in understanding about the issue of cyber-racism. In the Commission's view, this needs to be linked to human rights education and strategies to address systemic racism.

**Recommendation 37: That evidence based strategies to address cyber-racism be included as part of a coordinated, national approach to anti-racism/national action plan to address racism.**

## **7.9 Counter-terrorism laws**

130. The Australian Government has introduced more than 50 new counter-terrorism laws since 2001, often without adequate consideration of their potential impacts on human rights.<sup>102</sup> Some aspects of these new laws have eroded common law protections of fundamental rights and freedoms.<sup>103</sup> For example, these laws have enabled: detention without charge for 12 days;<sup>104</sup> secret searching of Australian homes and planting of surveillance devices, restricting movement through control orders issued by courts; and special powers of detention for the Australian Security Intelligence Organisation.<sup>105</sup>
131. The Commission recognises the recent reviews of the National Security Legislation by the Attorney-General; the Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in 2006; Inquiry into the proscription of 'terrorist

organisations' under the Australian Criminal Code by the Parliamentary Joint Committee on Intelligence and Security (September 2007).

**Recommendation 38: The Commission recommends that all counter-terrorism laws be rigorously monitored and amended to ensure they comply with Australia's human rights obligations.<sup>106</sup>**

### **7.10 Exploitation of migrant workers (ICERD Articles 2,5,7)**

132. The Commission remains concerned about cases of forced labour and exploitation of migrant workers on business (long stay) visas subclass 457 and seasonal work visas.<sup>107</sup>
133. In particular the Commission has learned of a number of cases where workers on 457 visas have been denied access to the Commonwealth's General Employee Entitlements and Redundancy Scheme. The Scheme precludes persons not permanently resident in Australia from receiving basic employee entitlements (such as unpaid wages and redundancy pay) from the Commonwealth if their employer becomes insolvent.
134. The Pacific Islander Seasonal Worker Scheme is a three-year pilot project that was introduced in 2008. The Pilot will allow up to 2500 seasonal workers from Kiribati, Papua New Guinea, Tonga and Vanuatu to work in the horticultural industry in regional Australia for up to seven months each year. The Department of Education, Employment and Workplace Relations are responsible for administering and monitoring the scheme.
135. Under the pilot scheme workers will:
- be allowed to work in Australia for seven months in any twelve months
  - be permitted multiple entries to Australia during this period
  - be able to return to work in future years, if they comply with visa conditions
  - need to maintain private health insurance during their stay
  - not be permitted to apply for another visa while in Australia
  - need to pay for half their international travel, living expenses, and other incidentals
  - be limited to working with approved employers
  - not be able to bring dependents with them.

**Recommendation 39: That the Australian Government provide a detailed report on what measures it has undertaken to strengthen the integrity of the temporary skilled migration (Subclass 457 visa) program since the Deegan Review in 2008.**

**Recommendation 40: That the Australian Government consider making the Commonwealth's General Employee Entitlements and Redundancy Scheme accessible to 457 visas holders.**

**Recommendation 41: That the Australian Government provide interim reports on (i) the monitoring and inspection frameworks designed for the seasonal**

**worker scheme and (II) employer compliance with the working conditions and standards protecting vulnerable migrant workers from exploitation.**

**Recommendation 42: That the Australian Government routinely provide targeted information about the rights of migrant workers, including options to lodge complaints and seek remedy without intimidation.**

**Recommendation 43: That the Australian Government ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.**

### **7.11 Freedom of Religion and Belief (ICERD Article 5)**

136. The Commission is concerned by the limited protection of the right to freedom of religion and belief under Australia's existing equality framework. The Commission's 1998 report, *Article 18*, thoroughly reviewed the protection of the right to freedom of religion and belief under Australian Commonwealth, State and Territory law. It found that the Commonwealth Constitution does not provide a complete guarantee of protection for the right to freedom of religion and belief. Section 116 restricts only the legislative powers of the Commonwealth and falls far short of providing positive protection to the rights of the individual to freedom of religion and belief. The report also noted that:

*Some Australians are protected from discrimination on the basis of religion and belief by State and Territory laws but many others are not. Laws providing protection from discrimination on the basis of religion and belief are patchwork across Australia (p 105).*

137. In a submission to the Commission for the UPR, the Australian Bahá'í Community note that:

*While members of our own community report only occasional and isolated incidents of religious discrimination in Australia, we recognise that for some other communities, such discrimination has become more frequent and widespread in recent years, despite the changes in some State and Territory legislation that have occurred in the past decade. Accordingly, we support the Commission's previous conclusion (in the Article 18 report) that "to comply with international human rights commitments Australia should enact federal legislation to make unlawful in Australia discrimination on the basis of religion and belief" (p 105).*

138. The ICERD Committee has expressed this concern regarding this issue on several occasions. See further: UN Committee on the Elimination of Racial Discrimination: Concluding observations: Australia (2005), paragraph 9; UN Committee on the Elimination of Racial Discrimination: Concluding observations: Australia (2000), (paragraphs 6-10).

139. The Article 18 Report is available online at:  
[http://www.humanrights.gov.au/human\\_rights/religion/index.html](http://www.humanrights.gov.au/human_rights/religion/index.html).

**Recommendation 44: That the Australian Government consider making discrimination on the basis of religion and belief unlawful in the consolidation of its federal anti-discrimination laws.**

## **8 Issues relating to asylum seekers**

### **8.1 Detention of ‘unlawful non-citizens’**

140. In its 2005 Concluding Observations on Australia, the Committee raised concerns about the mandatory detention of asylum seekers and other unlawful non-citizens, in particular women, children, unaccompanied minors and stateless persons. The Committee was particularly concerned about the length of time many people were spending in immigration detention. The Committee recommended that Australia review the ‘mandatory, automatic and indeterminate character’ of its immigration detention system, and requested statistical data, disaggregated by nationality and length of detention, including in relation to people held in offshore detention centres.<sup>108</sup>

### **8.2 Mandatory detention**

141. Despite significant positive reforms, the legal architecture of Australia’s mandatory detention system remains. Under the *Migration Act 1958* (Cth) (Migration Act), it is mandatory for any non-citizen in Australia (other than in an excised offshore place<sup>109</sup>) without a valid visa to be detained.<sup>110</sup> These persons, called ‘unlawful non-citizens’, may only be released from detention if they are granted a visa or removed from Australia.<sup>111</sup>

142. In July 2008 the Commission welcomed the government’s announcement of ‘New Directions’ for Australia’s immigration detention system.<sup>112</sup> The New Directions include seven key immigration values, as follows:

- 1) Mandatory detention is an essential component of strong border control.
- 2) To support the integrity of Australia’s immigration program, three groups will be subject to mandatory detention:
  - a) all unauthorised arrivals, for management of health, identity and security risks to the community
  - b) unlawful non-citizens who present unacceptable risks to the community and
  - c) unlawful non-citizens who have repeatedly refused to comply with their visa conditions.
- 3) Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre.
- 4) Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, would be subject to regular review.
- 5) Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
- 6) People in detention will be treated fairly and reasonably within the law.
- 7) Conditions of detention will ensure the inherent dignity of the human person.

143. The Commission welcomes values 3 to 7, and expressed the need for them to be translated into policy, practice and legislative change as soon as possible. Since then, some positive policy changes have been introduced. However, there remains significant progress to be made. In particular, the values have not been implemented in legislation. In June 2009 the Australian Government introduced the Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) into Parliament. The Commission welcomed the Bill as a positive step, but expressed concern that it did not go far enough towards implementing the New Directions, including some of the values.<sup>113</sup> As of May 2010, the Bill had not been passed.
144. The Commission has consistently called for the repeal of the mandatory detention system because it leads to breaches of Australia's international human rights obligations. The Commission has recommended that:
- the Migration Act be amended so that immigration detention occurs only when necessary. This should be the exception, not the norm. It should be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the aims outlined in international law. These limited grounds for detention should be clearly prescribed in the Migration Act.
  - the Migration Act should be amended so that the decision to detain a person is subject to prompt review by a court, in accordance with international law
  - the Migration Act should be amended to include periodic independent reviews of the ongoing need to detain an individual, and a maximum time limit for detention.<sup>114</sup>

### **8.3 *Detainee numbers, nationalities and length of detention***

145. As reflected in the Australian Government report to the Committee, until 2008 there had been a decline in the number of people in immigration detention.<sup>115</sup> The Commission welcomed this.<sup>116</sup> However, since that time the number of detainees has increased significantly. As of 2 April 2010, there were 2686 people in immigration detention, including 272 children.<sup>117</sup>
146. The nationalities of these people were listed as follows: 1059 from Afghanistan; 660 from Sri Lanka; 209 from Iraq; 123 from Indonesia; 120 from the People's Republic of China; 116 from Iran; 36 from Burma; 15 from Vietnam; 14 from the Palestinian Authority; 12 from Nigeria; and 322 other nationalities.<sup>118</sup>
147. There has been some progress made by the current Australian Government in reducing the length of time people spend in immigration detention – particularly the very long-term cases. In June 2008, there were 52 people who had been detained for more than two years.<sup>119</sup> As of April 2010, this had decreased to 18 people.<sup>120</sup> However, the Commission remains concerned that many people still spend prolonged periods in detention.

148. As of 2 April 2010, of the 2686 people in immigration detention:

- 24 had been detained for 18 months or more
- 25 had been detained for 12 to 18 months
- 377 had been detained for 6 to 12 months
- 387 had been detained for 3 to 6 months
- the remainder (1873) had been detained for up to 3 months.<sup>121</sup>

#### **8.4 Conditions of detention**

149. The Commission has repeatedly raised concerns about the lack of transparent and enforceable standards for conditions in immigration detention, and has called for minimum standards to be codified in legislation.<sup>122</sup> Since the Australian Government prepared its report to the Committee, a new detention service provider (Serco) has taken over operation of immigration detention facilities. It is not clear what standards Serco is required to comply with. According to the Department of Immigration and Citizenship (DIAC), the contract with Serco 'encompasses a stronger focus on the rights and well-being of people in detention'.<sup>123</sup> However, while the Commission was consulted early in the tender documentation development, the Commission has not been provided with a copy of the final contract or the standards contained within it.

150. As noted in the Australian Government report, the Commission undertakes visits to immigration detention facilities in order to monitor whether conditions meet internationally accepted human rights standards.<sup>124</sup> The Commission releases public reports of these visits, which make recommendations to the Australian Government.<sup>125</sup> The Commission's 2008 Immigration detention report has been submitted to the Committee.<sup>126</sup> It should be noted that the Commission does not have the power to enforce the recommendations it makes in these reports.

151. In the Commission's view there is a need for a more comprehensive monitoring mechanism to ensure that conditions in immigration detention meet human rights standards. This mechanism should consist of an independent body with a statutory power to enter detention facilities, and a human rights-based mandate. The Australian Government should be legally required to consider and respond to its recommendations. One means of achieving this would be through the Australian Government ratifying the Optional Protocol to the Convention against Torture (OPCAT).<sup>127</sup>

152. As a party to OPCAT, the Australian Government would be required to establish an independent National Preventive Mechanism to conduct regular inspections of all places of detention, including immigration detention.<sup>128</sup>

153. The Australian Government report also notes that, under the Australian Human Rights Commission Act (1986) (Cth) (AHRC Act), the Commission can investigate complaints from individuals about alleged breaches of human rights in immigration detention.<sup>129</sup> Where the President of the Commission determines that a human rights breach has occurred, the President can prepare a report including recommended remedies. The Attorney-General

must table the report in Parliament.<sup>130</sup> However, unlike breaches of the RDA, breaches of human rights under the AHRC Act are not unlawful. As such, complaints of human rights breaches in immigration detention can be investigated and conciliated by the Commission, but there is no legally enforceable remedy.

**Recommendation 45: That the Australian Government ratify the *Optional Protocol to the Convention against Torture (OPCAT)*.<sup>131</sup>**

## **8.5 Detention of families and children**

154. In 2004, the Commission's report of its *National Inquiry into Children in Immigration Detention, A last resort?*, found that Australia's mandatory detention system was fundamentally inconsistent with the Convention on the Rights of the Child.<sup>132</sup> Since that time, there have been some significant developments. In 2005 most children and their family members were released from Australia's immigration detention centres, and the *Migration Act* was amended to affirm 'as a principle' that a minor should only be detained as a measure of last resort.<sup>133</sup> In 2008, the current Australian Government made a commitment that children, and where possible, their families will not be detained in an immigration detention centre.<sup>134</sup> The Commission has welcomed these developments.
155. However, the Commission has significant ongoing concerns.<sup>135</sup> In particular, while children are no longer detained in Australia's high security immigration detention centres, they are still detained in other types of immigration detention facilities including immigration residential housing, immigration transit accommodation and alternative places of detention such as the 'construction camp' detention facility on Christmas Island.<sup>136</sup>
156. As of 2 April 2010, there were 272 children in immigration detention – 163 on Christmas Island and 109 on the mainland.<sup>137</sup> Of these 272 children, the vast majority (244 children) were in an immigration detention facility.<sup>138</sup> Only nine were in community detention.<sup>139</sup> The remaining 19 children were in alternative places of detention on the mainland – this may include temporary detention arrangements such as hotels and foster care placements.<sup>140</sup>
157. The Commission has significant concerns about the practice of holding families with children and unaccompanied minors in immigration detention facilities. While the physical environment is generally preferable to the immigration detention centres, the effects of depriving children of their liberty can nevertheless be similar. In the Commission's view, families with children and unaccompanied minors should not be held in detention facilities for anything other than the briefest of periods. Rather, they should be issued with bridging visas to reside in the community while their immigration status is resolved, or placed in community detention.

**Recommendation 46: That the Australian Government implement the remaining recommendations of *A last resort?* in order to address ongoing concerns about the situation of children under Australia's immigration detention system.<sup>141</sup>**

## **8.6 Detention and offshore processing on Christmas Island**

158. The Commission has raised significant concerns about the mandatory detention of asylum seekers on Christmas Island, a remote territory of Australia in the Indian Ocean. As of 26 March 2010, there were 2068 people in immigration detention on Christmas Island, including 163 children.<sup>142</sup> The remote location and small size of the island limit detainees' access to appropriate services and support networks, and the location makes their detention arrangements less visible and transparent to the Australian public.
159. The Commission has also raised concerns about the excision regime, under which asylum seekers who arrive in excised offshore places such as Christmas Island are barred from the refugee status determination system that applies under the Migration Act.<sup>143</sup> Instead, they go through a non-statutory refugee status assessment process governed by policy guidelines.
160. The Commission's concerns are set out in full in its 2009 report, *Immigration detention and offshore processing on Christmas Island*.<sup>144</sup> This report has been submitted to the Committee.

**Recommendation 47: That the Australian Government cease the practice of holding people in immigration detention on Christmas Island, and repeal the provisions of the Migration Act relating to excised offshore places.<sup>145</sup>**

## **8.7 The suspension of processing of some asylum claims**

161. On 9 April 2010, the Australian Government announced that it was suspending processing of new refugee claims by asylum seekers from Sri Lanka and Afghanistan.<sup>146</sup> The suspension came into effect on the same day. It will impact any asylum seeker from Sri Lanka or Afghanistan who is intercepted at sea or who arrives in an excised offshore place (including Christmas Island) on or after that date, and any asylum seeker from Sri Lanka or Afghanistan who applies for refugee status on the Australian mainland on or after that date.<sup>147</sup>
162. Asylum seekers from Sri Lanka or Afghanistan who arrive by boat on or after 9 April 2010 will be subjected to mandatory immigration detention for the duration of the suspension. The Australian Government has indicated that it will review the suspension in three months time in the case of asylum seekers from Sri Lanka, and in six months time in the case of asylum seekers from Afghanistan. However, there is no guarantee that the suspension will be lifted at those reviews.
163. The Commission has expressed serious concerns about the suspension decision.<sup>148</sup> In particular, the Commission is concerned that it could lead to

the prolonged or indefinite detention of asylum seekers. This is a particular concern in the case of unaccompanied minors and families with children.

164. The Commission is also concerned that the suspension decision may be inconsistent with Australia's obligations under ICERD. While the Convention permits distinctions between citizens and non-citizens,<sup>149</sup> the Committee has stated that State Parties should 'ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin'.<sup>150</sup>
165. The Commission is concerned that the suspension may constitute indirect racial discrimination under ICERD. The Committee has confirmed that the definition of racial discrimination in article 1 extends 'beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect'.<sup>151</sup> In considering whether an action will have an effect contrary to the Convention, the Committee will look to see whether that action has disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin; and if so, whether the impact is justified.<sup>152</sup>
166. The Australian Government has decided to suspend the processing of new refugee claims from asylum seekers who are nationals of Sri Lanka or Afghanistan. The Commission recognises that this distinction is on the basis of nationality. However, the impact of this policy clearly has a disproportionate effect on people of Sri Lankan and Afghan national origin.
167. The suspension decision potentially limits the right of Sri Lankan and Afghan nationals to equality before the law including equal treatment before tribunals and other organs administering justice (protected under article 5 of ICERD), and the right to freedom from arbitrary detention (protected under article 9 of the International Covenant on Civil and Political Rights).
168. The Commission is concerned that these potential restrictions on fundamental human rights have not been adequately justified. The rationale given by the Australian Government for the suspension decision is that the circumstances in Sri Lanka and Afghanistan are improving, and it is likely that those who may now be found to be refugees would not be so in the future. However, it seems that conditions in countries that have been unstable are by definition always changing. The government has provided no evidence to suggest that conditions in Sri Lanka and Afghanistan are certain to markedly improve within a very short timeframe such that its suspension is justified.

**Recommendation 48: That the Australian Government promptly lift the suspension on new refugee claims by asylum seekers from Sri Lanka and Afghanistan.**

## 9 Appendix One: List of acronyms

The following acronyms are used throughout the submission:

<b>ATSIS</b>	Aboriginal and Torres Strait Islander Services
<b>COAG</b>	Council of Australian Governments
<b>DIAC</b>	Department of Immigration and Citizenship
<b>DDPA</b>	Durban Declaration and Program of Action
<b>AHRC Act</b>	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
<b>ICERD</b>	<i>International Convention on the Elimination of All forms of Racial Discrimination (1965)</i>
<b>NT</b>	Northern Territory
<b>NTA</b>	<i>Native Title Act 1993 (Cth)</i>
<b>NTER</b>	Northern Territory Emergency Response
<b>RCIADIC</b>	Royal Commission into Aboriginal Deaths in Custody
<b>RDA</b>	<i>Racial Discrimination Act 1975 (Cth)</i>
<b>UPR</b>	Universal Periodic Review

## **10 Appendix Two: List of recommendations**

Recommendation 1: That the Australian Government Social Inclusion Board includes (I) newly arrived migrants, (II) disadvantaged migrants and (III) people from refugee backgrounds in their list of priority areas.

Recommendation 2: That the proposed Joint Parliamentary Committee on Human Rights should be empowered to make recommendations in relation to the implementation ICERD Committee Concluding Observations.

Recommendation 3: That the Department of Foreign Affairs and Trade and the Australian Human Rights Commission co-chair an annual CERD implementation meeting to (I) delegate responsibilities and (II) monitor progress.

Recommendation 4: That the Australian Government fund a full time Race Discrimination Commissioner at the Commission.

Recommendation 5: That the Department of Immigration and Citizenship and the Department of Families, Housing, Community Services and develop publicly available research frameworks that identify (I) current research and data collection priorities and (II) research and data gaps relevant to migrant communities and Indigenous communities respectively.

Recommendation 6: That the Department of Immigration and Citizenship fund an independent biennial report on migrant disadvantage based on the Overcoming Indigenous Disadvantage report model.

Recommendation 7: That the Australian Government conduct a major national study on the experiences of temporary migrants in Australia (workplace experiences, safety, experiences of racism, social inclusion)

Recommendation 8: That the Australian Government conduct research on the international student population in Australia in the following key areas:

- income and expenditure data
- living and working conditions
- experiences of discrimination
- strategies to support safe international student experiences.

Recommendation 9: that the Australian Bureau of Statistics work in partnership with state and territory police agencies to collect national data on racially motivated crime.

Recommendation 10: That the Australian Government commence a constitutional process, with the active engagement of Indigenous peoples, for the recognition of Indigenous peoples in the preamble; removal of section 25 of the Constitution and its replacement with a clause guaranteeing equality before the law and non-discrimination.<sup>153</sup>

Recommendation 11: That all legislation, policies and programs be reviewed for consistency with the rights affirmed by the Declaration.<sup>154</sup>

Recommendation 12: That the Australian the Government ratify the ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.<sup>155</sup>

Recommendation 13: That the Australian Government sign and ratify the Optional Protocol on Economic Social and Cultural Rights.<sup>156</sup>

Recommendation 14: That the Australian Government develop a comprehensive, long-term plan of action, that is targeted to need, evidence-based and capable of addressing the existing inequities 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.

Recommendation 15: The Commission recommends the Australian Government address the discrimination faced by Aboriginal and Torres Strait Islander peoples with hearing impairment and deafness on the basis of their race and disability.

Recommendation 16: The Commission strongly recommends that the Government take urgent action to support the reinstatement of bilingual education approaches in schools, and safeguard the future of bilingual education through binding agreements with state and territory governments and ongoing resources to support its implementation.<sup>157</sup>

Recommendation 17: That the Australian Government:

- establish a national Indigenous languages body with functions and responsibilities similar to those of the Māori Language Commission as per the commitment of Indigenous Languages - A National Approach.
- agree to resource an ongoing plan of action for the preservation and promotion of Indigenous languages as recommended by the national Indigenous languages body.
- Become a signatory to the *Convention for the Safeguarding of the Intangible Cultural Heritage (2003)*.
- through COAG, develop agreements to ensure consistency and compliance with Australia's Indigenous Languages - A National Approach.<sup>158</sup>

Recommendation 18: That housing programs should avoid imposing or promoting housing arrangements that would undermine Indigenous people's control over their lands; and should be administered by Indigenous community controlled institutions.<sup>159</sup>

Recommendation 19: That the Australian Government continue to fund community education and community development programs aimed at preventing family violence in Indigenous communities.

Recommendation 20: The Commission recommends that:

- the Australian Government, through COAG, set criminal justice targets that are integrated into the Closing the Gap agenda.
- the Standing Committee of Attorneys General Working Party identify justice reinvestment as a priority issue under the National Indigenous Law and Justice Framework, with the aim of conducting pilot projects in targeted communities in the short term.
- all state and territory governments consider justice reinvestment in tandem with their plans to build new prisons.
- a percentage of funding that is targeted to prison beds be diverted to trial communities where there are high rates of Indigenous offenders.

Recommendation 21: To bring the NTER into full compliance with human rights standards the Commission recommends the NTER be amended as follows:

- The categories of 'disadvantaged youth' and 'long-term welfare payment recipients' be reformulated to apply on a case-by-case basis .
- Domestic violence not be included as an indicator for 'vulnerable welfare payment recipient' under the redesigned income management scheme
- The capacity to compulsorily acquire any further five-year leases under Part 4 of the NTER Act be removed and the Government commit to obtaining the free, prior and informed consent of traditional owners to enter into voluntary lease arrangements for existing compulsory lease arrangements.
- The government move towards further amendments of the NTER to incorporate notwithstanding clauses in the legislation and ensure all measures that are intended to be special measures comply with the RDA.

Recommendation 22: The Commission also recommends that the Australian Government:

- supplement any income management scheme with additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy/budgeting skills.
- ensure the participation of Indigenous peoples in developing, implementing and monitoring alcohol management plans and ensure all alcohol management processes are consistent with the RDA. Alcohol restrictions should be supplemented by investment in infrastructure in the health and mental health sectors (including culturally appropriate detoxification facilities) and investment in culturally appropriate community education programs delivered by Indigenous staff.

Recommendation 23: That the Australian Government take immediate steps to review the native title system and to implement measures to address the above concerns. Such measures should include amendments to the Native Title Act to

provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.<sup>160</sup>

Recommendation 24: The Commission recommends that the Australian and Northern Territory governments commit to supporting homelands through:

- reviewing, developing and implementing homeland policies with the active participation of representative leaders from homeland communities
- providing funding and support for homeland communities in all states and territories through the COAG National Indigenous Reform Agreement and associated National Partnership Agreements.<sup>161</sup>

Recommendation 25: The Commission recommends that the Commonwealth, through the Councils of Australian Governments, engage with State and Territory governments to develop a consistent approach with joint funding mechanisms in the provision of financial redress for the Stolen Generations.

Recommendation 26: The Commission recommends that Stolen Wages compensation schemes be established in other states and territories as appropriate.

Recommendation 27: That the Australian Government consider the following in the development of a national multicultural policy:

- that it should be based on extensive community consultation
- that it should be properly linked with the Australian Human Rights Framework, the Human Rights Action Plan and the Social Inclusion Agenda
- that it adopts a broad definition of the 'multicultural community' in Australia that genuinely considers: newly arrived migrants, international students, temporary and seasonal migrant workers, people from refugee backgrounds and established ethnic communities
- that it addresses the issue of religious diversity and freedom of religion and belief
- that systems of auditing, benchmarking, compliance and evaluation are created.

Recommendation 28: That the Australian Government develop a coordinated, national approach to anti-racism that is linked to the national multicultural policy framework. This recommendation is in accordance with the Durban Declaration and Program of Action, which calls on states to develop comprehensive national action plans to eradicate racism, racial discrimination, xenophobia and related intolerance.

Recommendation 29: That the Australian Government revisit the recommendations made in the Commissions Report of National Inquiry into Racist Violence in Australia in 1991.

Recommendation 30: That the Australian Government: (I) broaden the parameters of the ESOS Act to include on campus student safety (II) language foundations (III) social support.

Recommendation 31: That the COAG International Student Strategy provides a regulation framework that involves states, territories and local governments in addressing issues relating to safety, accommodation, transport and discrimination.

Recommendation 32: That the Australian Government compile national survey data on international students in Australia, particularly in relation to income and expenditure, housing experiences, employment discrimination and experiences of violence.

Recommendation 33: That the Department of Immigration and Citizenship and other government agencies consider the findings of the *In Our Own Voices Report* in (I) policy development processes (II) service delivery improvements and (III) settlement services improvements.

Recommendation 34: That the Minister for Sustainable Population establish an Interdepartmental Committee across human services and sustainability agencies to: (I) share research data, (II) coordinate policy, (III) develop integrated approaches and (IV) provide strategic advice around balancing immigration flows, population targets, workforce planning and ecological sustainability.

Recommendation 35: That the Australian Government provides consideration to the adoption of the *Building on our Strengths Framework* as part of its broader national preventative health agenda.

Recommendation 36: That human rights education modules be incorporated into the National Curriculum for secondary schools and the Australian Government provide a comprehensive package of measures to address commitments under the *World Programme for Human Rights Education*.<sup>162</sup>

Recommendation 37: That evidence based strategies to address cyber-racism should be included as part of a coordinated, national approach to anti-racism/national action plan to address racism.

Recommendation 38: The Commission recommends that all counter-terrorism laws be rigorously monitored and amended to ensure they comply with Australia's human rights obligations.<sup>163</sup>

Recommendation 39: That the Australian Government provide a detailed report on what measures it has undertaken to strengthen the integrity of the temporary skilled migration (Subclass 457 visa) program since the Deegan Review in 2008.

Recommendation 40: That the Australian Government consider making the Commonwealth's General Employee Entitlements and Redundancy Scheme accessible to 457 visas holders.

Recommendation 41: That the Australian Government provide interim reports on (I) the monitoring and inspection frameworks designed for the seasonal worker scheme

and (II) employer compliance with the working conditions and standards protecting vulnerable migrant workers from exploitation.

Recommendation 42: That the Australian Government routinely provide targeted information about the rights of migrant workers, including options to lodge complaints and seek remedy without intimidation.

Recommendation 43: That the Australian Government ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

Recommendation 44: That the Australian Government consider making discrimination on the basis of religion and belief unlawful in the consolidation of its federal anti-discrimination laws.

Recommendation 45: That the Australian Government ratify the *Optional Protocol to the Convention against Torture (OPCAT)*.<sup>164</sup>

Recommendation 46: That the Australian Government implement the remaining recommendations of *A last resort?* in order to address ongoing concerns about the situation of children under Australia's immigration detention system.<sup>165</sup>

Recommendation 47: That the Australian Government cease the practice of holding people in immigration detention on Christmas Island, and repeal the provisions of the Migration Act relating to excised offshore places.<sup>166</sup>

Recommendation 48: That the Australian Government promptly lift the suspension on new refugee claims by asylum seekers from Sri Lanka and Afghanistan.

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<sup>1</sup> The Commission officially changed its name in August 2009 to distinguish us from state and territory commissions and other National Human Rights Institutions.

<sup>2</sup> Australian Social Inclusion Board, *Compendium of Social Inclusion Indicators*, pxii. At <http://www.socialinclusion.gov.au/AusGov/Board/Documents/Compendium.pdf> (viewed at 10 September 2009).

<sup>3</sup> House of Representatives, Official Hansard No.1 , Forty second Parliament, First Session, First Period (13 February 2008), p167. At <http://www.aph.gov.au/hansard/reps/dailys/dr130208.pdf> (viewed 10 June 2008).

<sup>4</sup> J Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, Parliament House, Canberra (3 April 2009). At [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un\\_declaration\\_03apr09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm) (viewed 18 May 2010).

<sup>5</sup> The six Closing the Gap targets include:

- Close the gap in life expectancy within a generation;
- Halve the gap in mortality rates for Indigenous children under five within a decade;
- Halve the gap for Indigenous students in reading, writing and numeracy within a decade;
- At least halve the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020;

- Halve the gap in employment outcomes between Indigenous and non Indigenous Australians within a decade;
- Ensure all four-year-olds, including those in remote communities, have access to early childhood education, within five years.

For further information on COAG's National Agreements and National Partnership Agreements for meeting COAG's objectives see the COAG website. At <http://www.coag.gov.au/>.

<sup>6</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Aboriginal and Torres Strait Islander Healing Foundation*. At

<http://www.fahcsia.gov.au/sa/indigenous/pubs/healing/Pages/default.aspx> (viewed 18 May 2010).

<sup>7</sup> United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc. CERD/C/AUS/CO/14 (14 April 2005), para 24. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.AUS.CO.14.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.AUS.CO.14.En?Opendocument) (viewed 3 May 2010).

<sup>8</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 411

<sup>9</sup> *Kruger v Commonwealth* (1997) 190 CLR 1. The High Court has since held that the acquisition of property pursuant to laws made under s122 are subject to the guarantee of just terms compensation as required by s51(xxxi) (*Wurridjal v The Commonwealth of Australia* (2009) HCA 2).

<sup>10</sup> See, eg, Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000). At

<http://www.austlii.edu.au/au/other/IndigLRes/car/2000/10/pg3.htm> (viewed 18 May 2010). See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, (2000) ch 4; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, (2008), ch 2.

<sup>11</sup> The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has made similar recommendations (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people *Addendum: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/ (2010). At

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)).

<sup>12</sup> Commonwealth, *Parliamentary Debates*, House of Representatives (8 February 2010) p 97 (The Hon Tony Abbot, Leader of the Opposition).

<sup>13</sup> Legal and Constitutional Affairs Committee, Parliament of Australia, *Native Title Amendment Bill (No.2) 2009 [Provisions]* (2010), para 357.

<sup>14</sup> *Aurukun Shire Council & Anor v. CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37 (1 March 2010), para 33.

<sup>15</sup> Northern Australian Indigenous Land and Sea Management Alliance, *A Policy Statement on Northern Australian Indigenous Water Rights*, (2009) at

[http://www.nailsma.org.au/projects/water\\_policy.html](http://www.nailsma.org.au/projects/water_policy.html) (viewed 26 March 2010); Goldfields Land and Sea Council, *Mining Policy: Our Land is Our Future*, (2008) at <http://www.glc.com.au/> (viewed 26 March 2010).

<sup>16</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations on United States of America*, UN Doc CERD/C/USA/CO/6 (2008) para 29.

<sup>17</sup> This was also a recommendation made by Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in his 2010 report on Australia (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/ (2010). At

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)).

<sup>18</sup> This has also been recommended by: the Aboriginal and Torres Strait Islander Social Justice Commissioner (Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2008), ch 4; the Committee on Economic Social and Cultural Rights, (Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. E/C.12/AUS/CO/4 (June 2009) at

<http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm> (viewed 18 May 2010)); and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15, p 30 at

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)).

<sup>19</sup> This was also a recommendation of the Committee on Economic Social and Cultural Rights, (Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. E/C.12/AUS/CO/4 (June 2009). At <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm> (viewed 18 May 2010)).

<sup>20</sup> The six Closing the Gap targets include:

- Close the gap in life expectancy within a generation;
- Halve the gap in mortality rates for Indigenous children under five within a decade;
- Halve the gap for Indigenous students in reading, writing and numeracy within a decade;
- At least halve the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020;
- Halve the gap in employment outcomes between Indigenous and non Indigenous Australians within a decade;
- Ensure all four-year-olds, including those in remote communities, have access to early childhood education, within five years.

For further information on COAG's National Agreements and National Partnership Agreements for meeting COAG's objectives see the COAG website. At <http://www.coag.gov.au/>.

<sup>21</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/, 2010, para 72-73. At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm>.

<sup>22</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15, paras 91-93. At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm>.

<sup>23</sup> United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr Anand Grover, *Preliminary Observations and Recommendations*, Canberra, (4 December 2009), p 5. At <http://www2.ohchr.org/english/issues/health/right/docs/PressStatementAustralia041209.doc> (viewed 18 May 2010).

<sup>24</sup> Senate Community Affairs Committee, *Hear Us: Inquiry into Hearing Health in Australia* (2010). At [http://www.aph.gov.au/senate/committee/clac\\_ctte/hearing\\_health/report/index.htm](http://www.aph.gov.au/senate/committee/clac_ctte/hearing_health/report/index.htm).

<sup>25</sup> Human Rights and Equal Opportunity Commission, *Education Access, National Inquiry into Rural and Remote Education* (2000), p. 70.

<sup>26</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education* (2008), UN Doc A/HRC/EMRIP/2009/2. At <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/2nd/index.htm> (viewed 18 May 2010).

<sup>27</sup> Department of Employment, Education and Training, Northern Territory Government, *Indigenous Languages and Culture in Northern Territory Schools Report 2004 – 2005*, (2004) pp. 34-37.

<sup>28</sup> The Committee on Economic, Social and Cultural Rights has recommended the Australian Government preserve and promote bilingual education at schools. Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 Of The Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights*, Forty-second session Geneva, 4 to 22 May 2009, para 33. At <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 12 June 2009). Similar recommendations were also made by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15 at <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)) and the Permanent Forum on Indigenous Issues (Economic and Social Council, Permanent Forum on Indigenous Issues 9<sup>th</sup> Session, *Draft Report* (2010), UN Doc E/C.19/2010/L.2)..

<sup>29</sup> Department of Education, Employment and Workplace Relations, *Indigenous Employment and Business*, <http://www.deewr.gov.au/Indigenous/Employment/Pages/default.aspx> (viewed 20 July 2009).

<sup>30</sup> CDEP was created under the Fraser government in 1977 as a form of community engagement in the job creation market. Essentially, the CDEP scheme is predicated upon the use of block grants (that total the equivalent of the unemployment benefits that would otherwise be available to Aboriginal people within certain communities) being made available to community controlled organisations. These organisations then have the capacity to manage their own projects and finances in line with the aspirations and skills of the community in which they operate. The CDEP scheme has enabled many Indigenous communities to develop valuable community services e.g. night patrol services; childcare centres; cultural and natural heritage programs and garbage removal services (Unpublished, *Job Futures response to government discussion paper: Indigenous Potential Meets Economic Opportunity*, (2006), p2. Response provided by Job Futures to the Aboriginal and Torres Strait Islander Social Justice Commissioner.). However, the CDEP scheme has also been criticised by Indigenous peoples and governments for reasons such as limiting the engagement of Indigenous peoples in mainstream employment opportunities that earn 'real wages'.

<sup>31</sup> CDEP participants in remote areas are able to access CDEP wages until 30 June 2011 to support their transition to the new arrangements.

<sup>32</sup> Australian Bureau of Statistics, 6287.0 - *Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians, Estimates from the Labour Force Survey 2009*, At <http://www.abs.gov.au/ausstats/abs@.nsf/Products/6287.0~2009~Chapter~Unemployment> (viewed 25 June 2010)

<sup>33</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2009), ch 3. At [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport09/chap3.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/chap3.html) (viewed 18 May 2010).

<sup>34</sup> Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008*, ABS cat no 4704.0 (2008) p46.

<sup>35</sup> Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Addendum - Mission to Australia* (31 July to 15 August 2006), U.N. Doc. A/HRC/4/18/Add.2, (2007), para 80. At <http://daccessdds.un.org/doc/UNDOC/GEN/G07/125/72/PDF/G0712572.pdf?OpenElement> (viewed 18 May 2010).

<sup>36</sup> See Human Rights and Equal Opportunity Commission, *Submission on the Green Paper: Which Way Home?* (2008). At [http://humanrights.gov.au/legal/submissions/2008/20080704\\_homelessness.html](http://humanrights.gov.au/legal/submissions/2008/20080704_homelessness.html) (viewed 18 May 2010).

<sup>37</sup> The House of Representatives Standing Committee on Family, Community, Housing and Youth report, *Housing the Homeless: Report on the Inquiry into homelessness legislation* recommends that new housing legislation specify the right of all Australians to adequate housing, which should include appropriate reference to Australia's international human rights obligations, a definition of adequate housing and explicit recognition that the right to adequate housing will be progressively realised. House of Representatives Standing Committee on Family, Community, Housing and Youth, *Housing the Homeless: Report on the Inquiry into homelessness legislation* (2009). At <http://www.aph.gov.au/house/committee/fchy/homelessness/report/fullreport%20as%20at%2025%20Nov.pdf> (viewed 18 May 2010).

<sup>38</sup> COAG has also agreed to a National Affordable Housing Agreement, a National Partnership Agreement on Social Housing and a National Partnership Agreement on Homelessness, which also address elements of Indigenous housing and homelessness. These are available on the COAG website at <http://www.coag.gov.au/>.

<sup>39</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15, para 74. At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010).

<sup>40</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15, para 74. At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010).

<sup>41</sup> National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (2009). At

[http://www.fahcsia.gov.au/sa/women/pubs/violence/np\\_time\\_for\\_action/national\\_plan/Documents/The\\_Plan.pdf](http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/national_plan/Documents/The_Plan.pdf) (viewed 20 July 2009).

<sup>42</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues* (2006), pp 5-6. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, pp 194-95.

<sup>43</sup> National Indigenous Drug and Alcohol Committee, *Bridges and barriers: addressing Indigenous incarceration and health* (2009). At

[http://www.nidac.org.au/publications/pdf/nidac\\_bridges\\_and\\_barriers.pdf](http://www.nidac.org.au/publications/pdf/nidac_bridges_and_barriers.pdf) (viewed 20 July 2009).

<sup>44</sup> Australian Bureau of Statistics, *Prisoners in Australia 2006*. At

<http://abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02006?OpenDocument> (viewed 24 July 2009).

<sup>45</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, p 9.

<sup>46</sup> Senate Legal and Constitutional Affairs Committee, *Access to Justice* (2009). At

[http://www.aph.gov.au/senate/committee/legcon\\_ctte/access\\_to\\_justice/report/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/access_to_justice/report/index.htm) (viewed 18 May 2010).

<sup>47</sup> Noetics Solutions, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* (2010), p ix. At [http://www.djj.nsw.gov.au/strategic\\_review.htm](http://www.djj.nsw.gov.au/strategic_review.htm) (viewed 18 May 2010).

<sup>48</sup> See *Criminal Code* (WA), s 282 and *Sentencing Act 1995* (NT), ss 78BA, 78BB. Although the Northern Territory Parliament made changes to the 'mandatory sentencing' laws for property offences effective from 2001, the *Sentencing Act 1995* (NT) still contains forms of mandatory sentencing in cases such as offences of violence.

<sup>49</sup> See further Australian Human Rights Commission, *Submission to the Human Rights Committee*. At: [http://www.hreoc.gov.au/pdf/social\\_justice/submissions\\_un\\_hr\\_committee/5\\_mandatory\\_sentencing.pdf](http://www.hreoc.gov.au/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf) (viewed 23 September 2008).

<sup>50</sup> See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, available at: [http://www.hreoc.gov.au/social\\_justice/sjreport\\_01/index.html](http://www.hreoc.gov.au/social_justice/sjreport_01/index.html) (viewed 23 September 2008).

<sup>51</sup> See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, available at: [http://www.hreoc.gov.au/social\\_justice/sjreport\\_01/index.html](http://www.hreoc.gov.au/social_justice/sjreport_01/index.html) (viewed 23 September 2008).

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<sup>53</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/chap3.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html) (viewed 18 May 2010). Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Northern Territory National Emergency Response Legislation* (2007). At

[http://www.humanrights.gov.au/legal/submissions/2007/NTNER\\_Measures20070810.html](http://www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html) (viewed 18 May 2010). Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Emergency Response Review Board* (2008). At

[http://humanrights.gov.au/legal/submissions/2008/20080815\\_nt\\_response.html](http://humanrights.gov.au/legal/submissions/2008/20080815_nt_response.html) (viewed 18 May 2010).

Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* (2009). At

[http://www.humanrights.gov.au/racial\\_discrimination/publications/RDA\\_income\\_management2009\\_draft.html](http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html) (viewed 18 May 2010).

<sup>54</sup> Committee on the Elimination of Racial Discrimination, 'Correspondence to the Australian Government following up on the Early Warning and Urgent Action Procedure on the issues raised before the Committee in relation to the Northern Territory Emergency Response' (28 September 2009), at [http://www2.ohchr.org/english/bodies/cerd/docs/early\\_warning/Australia28092009.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf) (viewed 20 January 2010); Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/ (2010) at <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010); Special Rapporteur on the situation of human rights and fundamental

freedoms of Indigenous people, the Special Rapporteur on violence against women, its causes and consequences, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *Correspondence to Australian Government regarding the Northern Territory Emergency response* (10 October 2007); Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009), para 15 at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 20 January 2010); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), para 14, at <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc> (viewed 20 January 2010). The ICERD Committee requested the government to provide information in its report for the Australia's forthcoming review on its efforts to bring the NTER measures into full compliance with CERD. Committee on the Elimination of Racial Discrimination, 'Correspondence to the Australian Government following up on the Early Warning and Urgent Action Procedure on the issues raised before the Committee in relation to the Northern Territory Emergency Response' (28 September 2009), at [http://www2.ohchr.org/english/bodies/cerd/docs/early\\_warning/Australia28092009.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf) (viewed 20 January 2010).

<sup>55</sup> Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009.

<sup>56</sup> Australian Human Rights Commission, *Submission to the Senate Committee on Community Affairs Inquiry on Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010). At [http://humanrights.gov.au/legal/submissions/sj\\_submissions/2010\\_welfare\\_reform.html](http://humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html) (viewed 18 May 2010).

<sup>57</sup> The RDA explicitly excludes from the 'special measures' exemption laws that authorise management of property without the consent of Aboriginal and Torres Strait Islander people or prevent them from terminating management by another of land owned by them (see ss 8(1), 10(3), RDA).

<sup>58</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15, para 27. At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010).

<sup>59</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15. At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010).

<sup>60</sup> See *Native Title Amendment Act 2007* (Cth) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth). For further information, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (2008), pp 24-27.

<sup>61</sup> *Yorta Yorta v Victoria* (2002) 214 CLR 422. See also H McRae et al, *Indigenous Legal Issues* (4th ed, 2009), p 348.

<sup>62</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), paras 16-18. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.AUS.CO.14.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.AUS.CO.14.En?Opendocument) (viewed 4 May 2010).

<sup>63</sup> See also the recommendations on native title by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people *Addendum: Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15 (2010). At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010).

<sup>64</sup> K G Rowley, K O'Dea, I Anderson, R McDermott, K Saraswati, R Tilmouth, I Roberts, J Fitz, Z Wang, A Jenkins, J D Best, Z Wang and A Brown, *Lower than expected morbidity and mortality for an Australian Aboriginal population: 10-year follow-up in a decentralised community* (2007).

<sup>65</sup> In September 2007 a Memorandum of Understanding was signed between the Australian Government and the Northern Territory (NT) Government, assigning responsibility for the delivery of municipal and essential services to Territory outstations to the NT Government, starting 1 July 2008. In response, the NT Government released its 'Outstations/homelands policy' in May 2009 (Northern Territory Government, *Working Future – fresh ideas / real results: Outstations/ Homelands Policy*

(2009). At [http://www.workingfuture.nt.gov.au/download/Headline\\_Policy\\_Statement.pdf](http://www.workingfuture.nt.gov.au/download/Headline_Policy_Statement.pdf) (viewed 20 July 2009)). The COAG's 'National Partnership Agreement on Remote Service Delivery' has similarly identified 15 priority locations in the Northern Territory to receive for the delivery of services. (Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery* (2009). At [http://www.federalfinancialrelations.gov.au/content/national\\_partnership\\_agreements/OT003/remote\\_service\\_delivery\\_np.rtf](http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/OT003/remote_service_delivery_np.rtf) (viewed 20 July 2009)).

<sup>66</sup> Similar recommendations were also made for supporting homelands by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15. At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)).

<sup>67</sup> Australian Human Rights Commission, *Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997). At: [http://www.hreoc.gov.au/social\\_justice/bth\\_report/report/index.html](http://www.hreoc.gov.au/social_justice/bth_report/report/index.html) (viewed 23 September 2008).

<sup>68</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Unfinished business: Indigenous stolen wages* (2006). At [http://www.aph.gov.au/senate/committee/legcon\\_ctte/stolen\\_wages/report/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/report/index.htm) (viewed 23 September 2008).

<sup>69</sup> Attorney-General's Department, *Australia's Human Rights Framework* (2010).

<sup>70</sup> Department of Prime Minister and Cabinet, *Social inclusion in Australia: how Australia is faring*, (2010)

<sup>71</sup> K Dunn, *Challenging Racism: The Anti-Racism Research Project*. At [http://www.uws.edu.au/social\\_sciences/soss/research/challenging\\_racism](http://www.uws.edu.au/social_sciences/soss/research/challenging_racism) (viewed 10 September 2009).

<sup>72</sup> K Dunn, *Constructing Regionally Appropriate Anti-Racism Strategies Project*. At [http://www.uws.edu.au/social\\_sciences/soss/research/challenging\\_racism/surveys](http://www.uws.edu.au/social_sciences/soss/research/challenging_racism/surveys) (viewed 10 September 2009).

<sup>73</sup> A Markus, *Mapping Social Cohesion Report*, Scanlon Foundation (2009), p3 [http://www.globalmovements.monash.edu.au/news/documents/Social%20Cohesion%20Report%2009\\_final.pdf](http://www.globalmovements.monash.edu.au/news/documents/Social%20Cohesion%20Report%2009_final.pdf)

<sup>74</sup> A Markus, *Mapping Social Cohesion Report*, Scanlon Foundation (2007). At <http://www.globalmovements.monash.edu.au/Mapping%20Social%20Cohesion.pdf> (Viewed at 10 September 2009).

<sup>75</sup> A Markus, *Mapping Social Cohesion Report*, Scanlon Foundation (2007). At <http://www.globalmovements.monash.edu.au/Mapping%20Social%20Cohesion.pdf> (Viewed at 10 September 2009).

<sup>76</sup> Australian Human Rights Commission, *Annual Report 2008-2009*, (2009), p67, 70

<sup>77</sup> Y Paradies, 'A systematic review of empirical research on self reported racism and health' (2006) *International Journal of Epidemiology*, p 1.

<sup>78</sup> VicHealth and the Victorian Office of Multicultural Affairs, *More than tolerance: embracing diversity for health*, (2006) p1. At <http://www.vichealth.vic.gov.au/~media/ProgramsandProjects/MentalHealthandWellBeing/DiscriminationandViolence/MoreThanTolerance/DCASv2%204%20%20FINAL%20060907.ashx> (viewed at 10 September 2009).

<sup>79</sup> B Baird, *Stronger, simpler, smarter ESOS: supporting international students* (Review of the Education Services for Overseas Students (ESOS) Act 2000, February 2010). At <http://www.aei.gov.au/AEI/GovernmentActivities/InternationalStudentsTaskforce/ReviewESOSAct.htm>

<sup>80</sup> Australian Education International, *2009 Annual International Student Statistics*. At [http://aei.gov.au/AEI/MIP/Statistics/StudentEnrolmentAndVisaStatistics/2009/2009\\_Annual.htm](http://aei.gov.au/AEI/MIP/Statistics/StudentEnrolmentAndVisaStatistics/2009/2009_Annual.htm)

<sup>81</sup> Organisation for Economic Cooperation and Development, *Education at a Glance 2009*, (2009). At [http://www.oecd.org/document/62/0,3343,en\\_2649\\_39263238\\_43586328\\_1\\_1\\_1\\_1,00.html#4](http://www.oecd.org/document/62/0,3343,en_2649_39263238_43586328_1_1_1_1,00.html#4)

<sup>82</sup> H Babacan, J Pyke, A Bhathal, G Gill, M Grossman and S Bertone, *The Community Safety of International Students in Melbourne: A Scoping Study*, Institute for Community, Ethnicity and Policy Alternatives (2010). At

<http://www.vu.edu.au/sites/default/files/icepa/pdf/The%20Community%20Safety%20of%20International%20Students%20in%20Melb%20A%20Scoping%20Study.pdf>

<sup>83</sup> *The Community Safety of International Students in Melbourne: A Scoping Study*, p3

<sup>84</sup> S Marginson, C Nyland, E Sawir and H Forbes-Mewett, *International Student Security* (2010)

<sup>85</sup> Human Rights and Equal Opportunity Commission, *Racist violence: report of national enquiry into racist violence in Australia* (1991).

<sup>86</sup> Australian Human Rights Commission, *In Our Own Words: African Australians: A review of human rights and social inclusion issues*, (2010). At <http://www.hreoc.gov.au/africanaus/index.html>

<sup>87</sup> Australian Bureau of Statistics, *Country of Birth (Region) of Person by year of Arrival in Australia* (2006 census table, Cat. No. 2068.0).

<sup>88</sup> Australian Bureau of Statistics, *Country of Birth (Region) of Person by year of Arrival in Australia*

<sup>89</sup> Department of Immigration and Citizenship, *The people of Australia: statistics from the 2006 census*, (2008), p3-7

<sup>90</sup> Australian Bureau of Statistics, *Labour force status and other characteristics of recent migrants*, (Cat. No. 6250.0, November 2007). At

[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/7A12ECFE4A0E12D5CA2574560014CD36/\\$File/62500\\_nov%202007.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/7A12ECFE4A0E12D5CA2574560014CD36/$File/62500_nov%202007.pdf)

<sup>91</sup> International Organisation for Migration, *The impact of the global financial crisis on migration and migrant workers* (March 2009). At

<http://www.egypt.iom.int/Doc/IOM%20Policy%20Brief%20Financial%20Crisis.pdf> (viewed 10 September 2009).

<sup>92</sup> Productivity Commission, *Economic Impacts of Migration and Population Growth* (2006) At <http://www.pc.gov.au/projects/study/migrationandpopulation/docs/finalreport> (viewed 10 September 2009).

<sup>93</sup> Australian Human Rights Commission, *Annual Report 2008-2009*, (2009), p70

<sup>94</sup> Y Paradies, L Chandrakumar, N Klocker, M Frere, K Webster, M Burrell and P McLean, *Building on our strengths: a framework to reduce race-based discrimination and support diversity in Victoria*, Victorian Health Promotion Foundation, (2009)

<sup>95</sup> Australian Bureau of Statistics. *Adult Literacy and Life Skills Survey* (2008) Catalogue No. 4228.0. p. 2.

<sup>96</sup> R Rudd, I Kirsch and K Yamamoto, *Literacy and health in America* (Educational Testing Service Policy Information Report, April 2004).

<sup>97</sup> M Eisenbruch and C Gershevitch, *Building a Culturally Competent Workforce* (2003) 4, *Australian Mosaic*, p. 20-22.

<sup>98</sup> E Felner, *A New Frontier in Economic and Social Rights Advocacy?* Centre for Economic and Social Rights, (2009) p15. At

<http://www.cesr.org/downloads/A%20new%20frontier%20in%20ESC%20advocacy.pdf> (viewed at 10 September 2009).

<sup>99</sup> F Mansouri, L Jenkins, L Morgan, and M Taouk, *The Impact of Racism upon the Health and Wellbeing of Young Australians*, Foundation for Young Australians, Foundation for Young Australians, (2009), p40. At [http://www.fya.org.au/wpcontent/uploads/2009/11/Impact\\_of\\_Racism\\_FYA\\_report.pdf](http://www.fya.org.au/wpcontent/uploads/2009/11/Impact_of_Racism_FYA_report.pdf)

<sup>100</sup> Australian Human Rights Commission, *In Our Own Words: African Australians: A review of human rights and social inclusion issues*, (2010), p14.

<sup>101</sup> The first phase of the World Programme focuses on primary and secondary level schooling.

<sup>102</sup> For an overview of these laws as at 2008 see:

[http://www.cla.asn.au/Article/070604\\_Alford\\_Report.pdf](http://www.cla.asn.au/Article/070604_Alford_Report.pdf). In a submission to the Commission for the UPR, the Human Rights Law Resource Centre notes the significant impact of counter-terrorism laws on particular communities such as Somalis, Tamils, Kurds and Muslim people more generally.

<sup>103</sup> Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws*, (2009). At [http://www.humanrights.gov.au/legal/publications/counter\\_terrorism\\_laws.html](http://www.humanrights.gov.au/legal/publications/counter_terrorism_laws.html).

<sup>104</sup> J Clarke, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008). At: <http://www.haneefcaseinquiry.gov.au/> (viewed 5 May 2010).

<sup>105</sup> The UN Human Rights Committee and the Committee against Torture have both raised concerns that some provisions of Australia's counter-terrorism laws are incompatible with fundamental rights. UN Human Rights Committee, *Concluding Observations: Australia* (2009), para 3 - 4. See also Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering*

Terrorism, UN Doc A/HRC/4/26/Add.3 (2006) at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement>; UN Committee against Torture, *Concluding Observations: Australia* (2008), para 3.

The Law Council of Australia has also expressed concern at the enactment of non-association provisions in criminal legislation. These provisions, modelled on pre-existing provisions directed at terrorist organisations, seek to extend the traditional boundaries of criminal liability to capture conduct which is not linked to the commission or planned commission of any specific offence, but which is alleged to facilitate criminal activity on a broader level.

The Law Council of Australia notes:

In shifting the focus of criminal liability from a person's conduct to their associations, offences of this type unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial or community connections, may be exposed to the risk of criminal sanction.

These non-association provisions, recently incorporated into State and Territory criminal laws and the Commonwealth Criminal Code, have been justified by the need to address serious and organised crime, and in some jurisdictions, specifically directed at motorcycle gangs. Often the non-association provisions have been accompanied by powers for law enforcement officers or the courts to make 'control orders' restricting the liberty of persons who are members of or associated with criminal organisations.

<sup>106</sup> A submission to the Commission for the UPR notes that "the Australian Government refuses to independently investigate the torture and ill treatment of both David Hicks and Mamdouh Habib whilst rendered and illegally detained in Guantanamo Bay. David Hicks is still living under a suspended sentence due to an unlawful conviction (the charges were retrospective and not even legitimate war crimes, not to mention the plea was signed under duress). David Hicks was placed on a gag order and provisions that are outlined in the plea agreement interfere directly with his freedom of expression. He was placed on a control order which severely impinged on his human rights (freedom of expression, movement, association etc)." It urges that "the Australian Government undertake an independent, thorough and binding investigation into the allegations of torture and ill treatment made by the Australians rendered and illegally detained at Guantanamo Bay, the Government's involvement in the treatment, and the subsequent legality of the conviction of David Hicks and their involvement in the process."

<sup>107</sup> There have been positive developments in addressing these issues, such as recent changes to the *People Trafficking Visa Framework* and the *Support for Victims of People Trafficking Program* but the Commission is concerned that trafficking in person and related offences do not comprehensively reflect Australia's international legal obligations in this area, or that there are always effective remedies available.

See further: Sex Discrimination Commissioner, Elizabeth Broderick, 'For trafficked people, Government changes put human rights first', media release (17 June 2009), [http://www.hreoc.gov.au/about/media/media\\_releases/2009/50\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html) (viewed 21 April 2010). The Commission also acknowledges the Government's 2008 publication of 'Guidelines for NGOs working with trafficked people' and an accompanying two-page 'Know Your Rights' fact sheet. See: [http://www.hreoc.gov.au/sex\\_discrimination/publication/traffic\\_NGO/index.html](http://www.hreoc.gov.au/sex_discrimination/publication/traffic_NGO/index.html) (viewed 19 April 2010). The Commission is only aware of one award of compensation to a person who was trafficked to Australia, see: N Craig, 'Sex slave victim wins abuse claim – EXCLUSIVE - 'It still hurts to talk about it ... I have been depressed'', *The Age*, (29 May 2007).

For discussion of another effort to obtain compensation in a trafficking case see J Lewis, 'Out of the Shadows', *Law Society Journal* (February 2007) 17; and E Broderick and B Byrnes, *Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?* (Speech delivered at Workshop on Legal and Criminal Justice Responses Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University, 9 November 2009).

There have been limited legal actions to address trafficking in Australia. See further: A Scholenhardt, G Beirne and T Corsbie, 'Human Trafficking and Sexual Servitude in Australia' (2009), 32(1) *UNSW Law Journal*, 27.

<sup>108</sup> United Nations Committee on the Elimination of Racial Discrimination, note, para 23.

<sup>109</sup> In 2001, the Migration Act was amended to designate a number of islands as 'excised offshore places'. A person who becomes an unlawful non-citizen (a non-citizen without a valid visa) by entering Australia at such

a place is referred to as an 'offshore entry person'. The purpose of these amendments was to bar offshore entry persons from being able to apply for a visa, unless the Minister for Immigration determines that it is in the public interest to allow them to do so. See *Migration Act 1958* (Cth), ss 5(1), 46A. Under sections 189(3) and 189(4) of the Migration Act, unlawful non-citizens in excised offshore places *may* be detained. The current policy of the Australian Government is that all unauthorised boat arrivals in excised offshore places will be subject to mandatory detention on Christmas Island.

<sup>110</sup> *Migration Act 1958* (Cth), ss 189 (1), 189(2).

<sup>111</sup> *Migration Act 1958* (Cth), s 196(1).

<sup>112</sup> C Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008). At <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (viewed 14 April 2010).

<sup>113</sup> Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Migration Amendment (Immigration Detention Reform) Bill 2009* (2009). At [http://humanrights.gov.au/legal/submissions/2009/20090731\\_migration.html](http://humanrights.gov.au/legal/submissions/2009/20090731_migration.html) (viewed 14 April 2010).

<sup>114</sup> See, for example Australian Human Rights Commission, *2008 Immigration detention report. Summary of observations following visits to Australia's immigration detention facilities* (2009). At [http://humanrights.gov.au/human\\_rights/immigration/idc2008.html](http://humanrights.gov.au/human_rights/immigration/idc2008.html) (viewed 5 May 2010).

<sup>115</sup> Commonwealth of Australia, *Combined Fifteenth, Sixteenth and Seventeenth Periodic Reports of the Government of Australia under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination* (2009), para 278.

<sup>116</sup> Australian Human Rights Commission, *2008 Immigration detention report*, note 114, section 7.

<sup>117</sup> Department of Immigration and Citizenship, Community and Detention Services Division, *Immigration Detention Statistics Summary* (2 April 2010). At <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 6 May 2010).

<sup>118</sup> As above.

<sup>119</sup> Commonwealth of Australia, note 115, p114.

<sup>120</sup> Department of Immigration and Citizenship, note 117.

<sup>121</sup> Department of Immigration and Citizenship, note 117.

<sup>122</sup> See, for example Australian Human Rights Commission, *2008 Immigration detention report*, note 114, section 6; Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island* (2009), section 10, at

[http://humanrights.gov.au/human\\_rights/immigration/idc2009\\_xmas\\_island.html](http://humanrights.gov.au/human_rights/immigration/idc2009_xmas_island.html) (viewed 5 May 2010).

<sup>123</sup> Department of Immigration and Citizenship, 'Immigration detention services contract signed' (Media Release, 29 June 2009). At [http://www.newsroom.immi.gov.au/media\\_releases/726](http://www.newsroom.immi.gov.au/media_releases/726) (viewed 4 May 2010).

<sup>124</sup> Commonwealth of Australia, note 115, pp 66-67. For further information about the Commission's inspections, see [http://humanrights.gov.au/human\\_rights/immigration/detention\\_rights.html#9\\_3](http://humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3).

<sup>125</sup> The Commission's immigration detention inspection reports are available at [http://humanrights.gov.au/human\\_rights/immigration/detention\\_rights.html#9\\_4](http://humanrights.gov.au/human_rights/immigration/detention_rights.html#9_4).

<sup>126</sup> Australian Human Rights Commission, *2008 Immigration detention report*, note 116.

<sup>127</sup> *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2002) (OPCAT). At <http://www2.ohchr.org/english/law/cat-one.htm> (viewed 4 May 2010). The Australian Government has signed OPCAT, but has not yet ratified it.

<sup>128</sup> In 2008, the Commission released a report of research it commissioned into options for implementing OPCAT in Australia. The report suggests a mixed National Preventive Mechanism (NPM) model, with separate NPMs in each state and territory and a national coordinating NPM. The report suggests that the Commission should be the national coordinating NPM. See Report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan, Centre for Law and Public Policy, The University of Western Australia, *Implementing the Optional Protocol to the Convention against Torture: Options for Australia* (2008). At [http://www.humanrights.gov.au/human\\_rights/publications/opcat/index.html](http://www.humanrights.gov.au/human_rights/publications/opcat/index.html) (viewed 4 May 2010).

<sup>129</sup> See Commonwealth of Australia, note 115, p 67; *Australian Human Rights Commission Act* (1986) (Cth), s 11(1)(f).

<sup>130</sup> *Australian Human Rights Commission Act* (1986) (Cth), s 46.

<sup>131</sup> *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2002) (OPCAT). At <http://www2.ohchr.org/english/law/cat-one.htm> (viewed 4 May 2010). The Australian Government has signed OPCAT, but has not yet ratified it.

<sup>132</sup> Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004). At [http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/index.html](http://www.humanrights.gov.au/human_rights/children_detention_report/index.html) (viewed 4 May 2010).

<sup>133</sup> *Migration Act 1958* (Cth), s4AA.

<sup>134</sup> See C Evans, note 112.

<sup>135</sup> The Commission's concerns are set out in further detail in the following: Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island* (2009), note 122, section 11; Australian Human Rights Commission, *2008 Immigration detention report*, note 114, section 14; Australian Human Rights Commission, *Information provided to the OHCHR study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration* (2010), at [http://humanrights.gov.au/legal/submissions/2010/201004\\_OHCHR\\_child\\_migration.html](http://humanrights.gov.au/legal/submissions/2010/201004_OHCHR_child_migration.html) (viewed 5 May 2010).

<sup>136</sup> For further details, see Australian Human Rights Commission, *2008 Immigration detention report*, note 114, section 14; Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 122, section 11.

<sup>137</sup> Department of Immigration and Citizenship, note 117.

<sup>138</sup> On the mainland there were 70 children in immigration transit accommodation and 14 children in immigration residential housing. On Christmas Island there were 160 children in the 'construction camp' immigration detention facility. These facilities have a much lower level of security than the high security immigration detention centres, and in that sense they are preferable. However, people detained in these facilities remain in immigration detention – they are not free to come and go.

<sup>139</sup> In 2005, the Minister for Immigration was granted the power to issue a 'residence determination' permitting an immigration detainee to live at a specified residence in the community instead of in an immigration detention facility. This is known as 'community detention'. People in community detention are still immigration detainees in a legal sense, but they are not under physical supervision. They are generally free to come and go, subject to meeting conditions such as living at a specified address, reporting to DIAC on a regular basis, and refraining from engaging in paid work or a formal course of study.

<sup>140</sup> Department of Immigration and Citizenship, note 117.

<sup>141</sup> See A last resort, note 132.

<sup>142</sup> Department of Immigration and Citizenship, note 117.

<sup>143</sup> The Migration Act was amended in 2001 to designate a number of islands as excised offshore places. A person who becomes an unlawful non-citizen by entering Australia at such a place is referred to as an offshore entry person. The purpose of these amendments was to bar offshore entry persons from being able to apply for a visa (including a protection visa) unless the Minister for Immigration determines that it is in the public interest to allow them to do so. See *Migration Act 1958* (Cth), ss 5(1), 46A.

<sup>144</sup> Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 122.

<sup>145</sup> See Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 122, section 3; Australian Human Rights Commission, *2008 Immigration detention report*, note 114, section 13.

<sup>146</sup> Minister for Immigration and Citizenship, 'Changes to Australia's Immigration Processing System' (Joint Media Release with Minister for Foreign Affairs and Minister for Home Affairs, 9 April 2010). At <http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm> (viewed 15 April 2010).

<sup>147</sup> According to information provided by the Department of Immigration and Citizenship on 12 April 2010, the suspension will be applied as follows. In the case of asylum seekers from Sri Lanka or Afghanistan who are intercepted at sea or who arrive in an excised offshore place on or after 9 April 2010, all processing relating to their asylum claims will be suspended. In the case of asylum seekers from Sri Lanka or Afghanistan who apply for refugee status on the Australian mainland on or after 9 April 2010, the processing of their applications will be accorded the lowest processing priority.

<sup>148</sup> Australian Human Rights Commission, 'Suspension of processing asylum seekers raises serious concerns' (Media Release, 9 April 2010). At [http://humanrights.gov.au/about/media/media\\_releases/2010/29\\_10.html](http://humanrights.gov.au/about/media/media_releases/2010/29_10.html) (viewed 15 April 2010).

<sup>149</sup> ICERD article 1.2.

<sup>150</sup> United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination Against Non Citizens*, UN Doc 01/10/2004, (2004), para 9.

<sup>151</sup> United Nations Committee on the Elimination of Racial Discrimination, *Opinion of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination: Communication No. 31/2003 : Slovakia*, UN Doc CERD/C/66/D/31/2003 (2005), para 10.4.

<sup>152</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of Discrimination (Art. 1, par. 1)*, UN Doc 22/03/93 (1993).

<sup>153</sup> The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has made similar recommendations (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people *Addendum: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/ (2010). At

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)).

<sup>154</sup> This was also a recommendation made by Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in his 2010 report on Australia (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/ (2010). At

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)).

<sup>155</sup> This has also been recommended by: the Aboriginal and Torres Strait Islander Social Justice Commissioner (Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2008), ch 4; the Committee on Economic Social and Cultural Rights, (Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. E/C.12/AUS/CO/4 (June 2009) at

<http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm> (viewed 18 May 2010)); and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15, p 30 at <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)).

<sup>156</sup> This was also a recommendation of the Committee on Economic Social and Cultural Rights, (Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. E/C.12/AUS/CO/4 (June 2009). At <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm> (viewed 18 May 2010)).

<sup>157</sup> The Committee on Economic, Social and Cultural Rights has recommended the Australian Government preserve and promote bilingual education at schools. Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 Of The Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights*, Forty-second session Geneva, 4 to 22 May 2009, para 33. At <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 12 June 2009). Similar recommendations were also made by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15 at

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)) and the Permanent Forum on Indigenous Issues (Economic and Social Council, Permanent Forum on Indigenous Issues 9<sup>th</sup> Session, *Draft Report* (2010), UN Doc E/C.19/2010/L.2)..

<sup>158</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2009), ch 3. At [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport09/chap3.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/chap3.html) (viewed 18 May 2010).

<sup>159</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15, para 74. At <http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010).

<sup>160</sup> See also the recommendations on native title by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people *Addendum: Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15 (2010). At

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010).

<sup>161</sup> Similar recommendations were also made for supporting homelands by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Situation of Indigenous Peoples in Australia* (2010), UN Doc A/HRC/15. At

<http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm> (viewed 18 May 2010)).

<sup>162</sup> The first phase of the World Programme focuses on primary and secondary level schooling.

<sup>163</sup> A submission to the Commission for the UPR notes that “the Australian Government refuses to independently investigate the torture and ill treatment of both David Hicks and Mamdouh Habib whilst rendered and illegally detained in Guantanamo Bay. David Hicks is still living under a suspended sentence due to an unlawful conviction (the charges were retrospective and not even legitimate war crimes, not to mention the plea was signed under duress). David Hicks was placed on a gag order and provisions that are outlined in the plea agreement interfere directly with his freedom of expression. He was placed on a control order which severely impinged on his human rights (freedom of expression, movement, association etc).” It urges that “the Australian Government undertake an independent, thorough and binding investigation into the allegations of torture and ill treatment made by the Australians rendered and illegally detained at Guantanamo Bay, the Government’s involvement in the treatment, and the subsequent legality of the conviction of David Hicks and their involvement in the process.”

<sup>164</sup> *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2002) (OPCAT). At <http://www2.ohchr.org/english/law/cat-one.htm> (viewed 4 May 2010). The Australian Government has signed OPCAT, but has not yet ratified it.

<sup>165</sup> See A last resort, note 132.

<sup>166</sup> See Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island*, note 122, section 3; Australian Human Rights Commission, *2008 Immigration detention report*, note 114, section 13.