
Australia's Compliance with its ICCPR Obligations

List of Issues Prior to Reporting

United Nations Human Rights Committee

12 July 2012

Table of Contents

Introduction	3
Recommended List of Issues for Australia	4
Specific information on the implementation of Articles 1 to 26 of the Covenant, including with regard to the Committee’s previous recommendations.....	4
Article 1 – Right to Self-Determination	4
Articles 2(1), 27 and 26– Non-discrimination and equality and the rights of minorities	5
Article 2(3) – Rights and remedies for breach of ICCPR rights.....	6
Article 7 – Freedom from torture and other inhuman or degrading treatment	7
Article 9 – Right to liberty and security of person	8
Article 10 – Treatment in detention	11
Article 12 – Liberty of movement.....	12
Article 13 – Expulsion of aliens	12
Article 14 – Right to a fair trial.....	12
Article 17 – Right to privacy	14
Article 22 – Freedom of association.....	14
Article 24 – Rights of children	15
Attachment A: Profile of the Law Council of Australia	16

Introduction

1. The Law Council of Australia is grateful for the opportunity to provide the following information to the United Nations Human Rights Committee (the Committee). This information is provided to assist the Committee in the development of the List of Issues Prior to Reporting (LOIPR), to be provided to Australia as part of its sixth periodic review of its obligations under the *International Covenant on Civil and Political Rights* (the Covenant).
2. The Law Council is the peak national body representing the legal profession in Australia. The Law Council has 17 constituent body members, comprising professional associations of lawyers from around Australia, and represents around 56,000 legal practitioners.¹
3. The Law Council of Australia's mission is to:
 - (a) represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues affecting the legal profession; and
 - (b) promote the administration of justice, access to justice and general improvement of the law.
4. The Law Council is respected in the Australian community as a source of expert legal advice on legislation and government policy as well as a commentator on contemporary legal issues occurring within Australia and overseas. The Law Council provided a detailed Shadow Report to the Committee in response to Australia's fifth periodic report in 2008.² The Council has also applied for Special Consultative Status with the United Nations and is currently awaiting the outcome of its application.
5. An important pillar of the Law Council's work is the promotion of adherence to the rule of law and observance of human rights - both in Australia and abroad. The Council regularly evaluates proposed laws for compliance with Australia's international human rights obligations and, through its members, receives feedback about how existing laws are operating in practice, and whether they are having an impact on the protection and promotion of human rights.
6. The following recommended issues for inclusion in the LOIPR for Australia reflect the focus and expertise of the Law Council and primarily concern legislative and policy developments occurring at the Federal level. On the basis of the feedback received from some of its constituent bodies, the Council has also drawn attention to particular issues of concern at the State and Territory level. The Law Council particularly acknowledges the contributions of the Law Institute of Victoria, the Law Society of New South Wales, the Queensland Law Society and the Law Society Northern Territory.
7. The Law Council notes that there are many other Australian non-government organisations who are also well placed to raise issues and concerns regarding Australia's compliance with the Covenant, such as those bodies representing Indigenous Australians, children and persons with a disability, and the Council urges

¹ Further information on the role, functions and membership of the Law Council can be found at www.lawcouncil.asn.au.

² A copy of this Shadow Report is available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5C22F5E8-005D-AA08-7133-503A96CBB3B1&siteName=lca

the Committee to carefully consider the issues proposed by these bodies when developing the LOIPR for Australia.

Recommended List of Issues for Australia

Specific information on the implementation of Articles 1 to 26 of the Covenant, including with regard to the Committee's previous recommendations

Article 1 – Right to Self-Determination

8. In light of the recommendations previously made by this Committee that Australia establish an adequately resourced national Indigenous representative body,³ please provide information regarding the establishment of the National Congress of Australia's First Peoples, including its role, current composition, resources and activities to date. What impact has the Congress had on the realisation of the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development?
9. In light of the announcement by the Federal Government that it will hold a referendum in the current term of government, or at the next election, to amend the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples as the First Australians, what progress has been made to realise this commitment? In particular, please provide details of the Federal Government's response to the expert panel's report on the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution?
10. What steps have been undertaken to implement the recommendations of the United Nations Special Rapporteur on the rights of Indigenous people (the Indigenous People Special Rapporteur) after his visit in 2009?⁴
11. Given the Federal Government's commitment to observe the principles in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration), and the recommendations made during the 2011 Universal Periodic Review of Australia (the 2011 UPR),⁵ please explain how the principles contained in the Declaration have been incorporated into Australian laws and policies. Please provide examples of Federal, State and Territory programmes for Indigenous Australians that have been implemented in a manner consistent with the Declaration, which requires, for example, full consultation with and involvement of the affected Indigenous communities. What further efforts are currently being undertaken to give effect to the principles contained in the Declaration?
12. In light of the previous recommendations made by this Committee regarding the need for Australia to continue to improve the operation of the Native Title system,⁶ please provide details of any recent reforms. Please also provide information about

³ Human Rights Committee, *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Australia*, Human Rights Committee 95th session, Geneva, 16 March - 3 April 2009, CCPR/C/AUS/CO/5 (the '2009 Concluding Observations') at [13].

⁴ United Nations Special Rapporteur on the rights of Indigenous People, *Report on Australia*, 2009, available at <http://www.un.org.au/Special-Rapporteur-on-Indigenous--Australia-Report-news105.aspx>

⁵ Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review: Australia* Tenth session, Geneva, 24 January – 4 February 2011, A/HRC/WG.6/10/L. 8 (the '2011 UPR') at [86.24]

⁶ 2009 Concluding Observations at [16].

any steps being undertaken to address the imbalance in negotiating positions between native title claimants and respondent parties under the *Native Title Act 1993* (Cth).

Articles 2(1), 27 and 26– Non-discrimination and equality and the rights of minorities

13. Given the previous recommendations made by this Committee⁷ and during the 2011 UPR⁸ that Australia should adopt Federal legislation covering all grounds and areas of discrimination, please provide updated information regarding any efforts made to enhance legal protections against discrimination, including the proposed consolidation of Federal anti-discrimination laws. Please provide details of how this consolidation process will strengthen and enhance existing protections against discrimination at the Federal level. Please explain what resources will be available to the Australian Human Rights Commission (AHRC) to continue its important work in this area.
14. Please provide details of the outcome of the Australian Law Reform Commission's 2012 inquiry into age discrimination in the workplace.⁹ What measures does the Federal Government intend to take in response to this inquiry?
15. Please provide details of any recent reforms to anti-discrimination laws at the State and Territory levels, including any efforts to harmonise these laws across Australia. How have these developments strengthened and enhanced protections against discrimination in these jurisdictions? What features of these laws require further reform to give full effect to Australia's obligations under Articles 2(1) and 26 of the Convention? For example, what efforts are being undertaken to review the continued necessity of existing exemptions and exclusions from unlawful discrimination, such as the provisions of the *Anti-Discrimination Act 1977* (NSW) which exclude private education institutions from the prohibition against discrimination, and as a result, allow these institutions to refuse to employ persons or enrol students on the grounds of a protected attribute, such as their sexual orientation.
16. In light of the numerous recommendations made in the 2011 UPR,¹⁰ and the findings of the AHRC's 2007 *Same-Sex: Same Entitlements* Inquiry and 2009 Sex and gender diversity project,¹¹ what recent efforts are being made to ensure that Australia's laws and policies provide full protection against discrimination on the grounds of sexual orientation or gender identity? For example, please provide details of the relevant State and Territory laws relating to the recognition of same sex relationships. What efforts have been undertaken to ensure consistency and equality across these jurisdictions? In light of the 2011 change to the Australian Labor Party's official policy with respect to same sex marriage, please explain what efforts have been undertaken to implement this policy. Please provide information in relation to the status of the Bills introduced in the Federal Parliament that seek to amend the definition of marriage in the *Marriage Act 1961* (Cth) which currently excludes same sex couples.¹²

⁷ 2009 Concluding Observations at [12].

⁸ 2011 UPR at [86.23]

⁹ The ALRC is due to report on its findings by the end of March 2013. Further details of this Inquiry are available at <http://www.alrc.gov.au/inquiries/age-barriers-work>

¹⁰ 2011 UPR at [86.66]-[86.70]

¹¹ Further information about the AHRC's Same Sex Same Entitlements Inquiry and Sex and Gender Diversity Project is available at http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/report/index.html

¹² See *Marriage Amendment Bill 2012* and the *Marriage Equality Amendment Bill 2012*. Further information about these Bills, and the Parliamentary Inquiries undertaken in relation to these Bills, is available at

-
17. Following the strong recommendations made by the Indigenous Peoples Special Rapporteur,¹³ this Committee¹⁴ and during the 2011 UPR¹⁵ that Australia reinstate without qualification the *Racial Discrimination Act 1975* (Cth) (the RDA) into the arrangement under the Northern Territory Response Legislation¹⁶ and any subsequent arrangements, please explain the relationship between the RDA and the Stronger Futures legislation.¹⁷ Please explain how this package of legislation was developed and implemented, including details of consultation with and input from Indigenous Australians. Please explain on what basis the measures adopted under the Stronger Futures legislation constitute 'special measures' for the purpose of the RDA, and whether the legislation fully complies with the Declaration and Articles 2(1) and 26 of the Covenant. What mechanisms are in place to ensure regular review of the operation of these laws and the delivery of the programmes they support?
18. In light of the recommendations made by the Indigenous Peoples Special Rapporteur¹⁸ and the Committee Against Torture¹⁹, what efforts are being undertaken to address the overrepresentation of Indigenous persons in custody? Please provide updated information in relation to the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody,²⁰ the National Indigenous Law and Justice Framework²¹ and the Australian Senate's Access to Justice inquiry report.²²

Article 2(3) – Rights and remedies for breach of ICCPR rights

19. In light of the previous recommendations made by this Committee,²³ the Committee on the Rights of the Child²⁴ and the recommendations made following the National Consultation on Human Rights (the National Consultation),²⁵ please provide information on any further consideration by the Federal Government to adopt a Human Rights Act or other legislation to ensure comprehensive constitutional protection of basic rights. For example, will the enactment of specific human rights

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation/billhome/r4748%22>
and

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation/billhome/r4749%22>.

¹³ United Nations Special Rapporteur on the rights of Indigenous People, *Report on Australia*, 2009.

¹⁴ 2009 Concluding Observations at [14]

¹⁵ 2011 at UPR [86.24]-[86.26]

¹⁶ *Northern Territory National Emergency Response Act 2007* (Cth);

¹⁷ The Stronger Futures legislation comprises the following three Federal Acts: *Stronger Futures in the Northern Territory Act 2012*; *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*; *Social Security Legislation Amendment Act 2012*

¹⁸ United Nations Special Rapporteur on the rights of Indigenous People, *Report on Australia*, 2009.

¹⁹ Committee Against Torture, *Concluding observations of the Committee against Torture: Australia*, Fortieth session, 28 April – 16 May 2008, CAT/C/AUS/CO/1 at [11]

²⁰ A copy of the report of the Royal Commission into Aboriginal Deaths in Custody, released in 1991, is available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>

²¹ Details of the National Indigenous Law and Justice Framework, endorsed in November 2009 are available at <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/NationalIndigenousLawandJusticeFramework.aspx>

²² Parliament of Australia, *Senate Legal and Constitutional Affairs Committee's Access to Justice Report* (2009)

²³ 2009 Concluding Observations at [8]

²⁴ Committee on the Rights of the Child, *Concluding observations: Australia*, Sixtieth session, 29 May–15 June 2012, CRC/C/AUS/CO/4 (the '2012 CRC Concluding Observations') at [12].

²⁵ This Consultation took place during 2009. Details of the Consultation, including the report prepared by the Consultation Committee and the Federal Government's response is available at <http://www.ag.gov.au/Publications/Pages/NationalHumanRightsConsultationReport.aspx>

legislation be considered as part of the 2014 review of the Human Rights Framework²⁶?

20. Please provide information on any progress made towards the incorporation of international human rights treaties into domestic law. Is Australia considering any other ways in which international human rights instruments may be given greater weight in Australian law, for example by amending the *Acts Interpretation Act 1901* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to incorporate a specific reference to human rights?
21. Please provide an update on the steps taken to implement the Human Rights Framework announced by the Government in 2010²⁷ and the other recommendations made following the National Consultation. In particular, please provide updated details regarding:
- (a) the scrutiny function performed by the Joint Parliamentary Committee on Human Rights and the impact of the introduction of the requirement to introduce Bills with Statements of Compatibility with human rights. Is the Federal Government considering any changes to the mandate or powers of the Joint Parliamentary Committee, such as investing it with the mandate to follow-up on recommendations made by United Nations human rights treaty bodies?
 - (b) the steps undertaken to identify and review Federal legislation for compliance with Australia's obligations under the Covenant;
 - (c) the efforts made to fully integrate human rights concepts and obligations into the Australian Public Services Values and the National Curriculum;
 - (d) the current status of Australia's National Human Rights Action Plan.
22. Please provide information in relation to the specific human rights legislation currently in force in Victoria²⁸ and the Australian Capital Territory,²⁹ including any parliamentary reviews of these Acts, proposed reforms to these Acts, and any relevant judicial decisions. What impact have these Acts had on the development of legislation, the delivery of public services, advocacy and litigation, and generating a culture of respect for human rights? Have these Acts been evaluated in terms of their effectiveness at protecting and promoting human rights, and if so, what changes have been recommended to improve their effectiveness?

Article 7 – Freedom from torture and other inhuman or degrading treatment

23. Given the Federal Government's commitment to ratifying and implementing the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the OPCAT) and the recommendation by the Joint Standing Committee on Treaties that Australia take binding treaty action in respect of the OPCAT,³⁰ please provide information as to the current status of the

²⁶ Details of the Australia's Human Rights Framework, announced by the Federal Government in April 2010, are available at <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx>. The framework includes a provision that it will be reviewed in 2014.

²⁷ *ibid*

²⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic)

²⁹ *Human Rights Act 2004* (ACT)

³⁰ This recommendation was made following the Joint Standing Committee on Treaties' inquiry into the OPCAT in 2012. Details of this inquiry, including the report, can be found at

OPCAT in Australia. In particular, please explain what steps have been undertaken to facilitate visits from the Subcommittee on Prevention to all places of detention in Australia, and what legislative efforts have been commenced to establish a national preventive mechanism and ensure that such a mechanism can adequately perform its monitoring role under the Protocol. If such a mechanism has been established, please provide information regarding its resources and activities to date.

24. Please provide information regarding Australia's response to the list of issues and concluding observations made by the most recent Committee Against Torture's review of Australia's compliance with its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

Article 9 – Right to liberty and security of person

Statutory Limits on Detention

25. Please provide information regarding any measures taken to guarantee by law a maximum length of custody and pre-trial detention at the Federal, State and Territory level which is in compliance with international human rights standards. Are any efforts underway to consider introducing a statutory time period before which arrested persons must be brought before a judge?

Immigration Detention

26. In light of the repeated recommendations made by a large number of UN bodies urging Australian to abolish its mandatory immigration detention policy, including this Committee,³¹ the Committee Against Torture,³² the Committee on the Rights of the Child³³ and the 2011 UPR³⁴ please provide information on steps taken by Australia to abolish its mandatory detention system for irregular maritime arrivals or to otherwise address the arbitrary and punitive features of this policy. Please provide details of:

- (a) any legislative reforms to the relevant provisions in the *Migration Act 1958* (Cth) (the Migration Act) and any relevant judicial decisions regarding the operation of these provisions. For example, does the Federal Government intend to re-table the *Migration Amendment (Immigration Detention Reform) Bill 2009* (Cth) or introduce any other reforms designed to ensure adequate legal safeguards are incorporated into the Migration Act, such as the right to prompt judicial review of detention orders and of decisions to continue detention?
- (b) the use of excised offshore places to process irregular maritime arrivals, and the safeguards that exist to protect the rights of persons detained in these places, including the freedom from arbitrary detention and the right to prompt review of detention;
- (c) the legislative, administrative and other measures undertaken to ensure effective implementation, in Australian detention centres and detention centres in places excised from Australia's migration zone of the 2008 *'New Directions*

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsc/28february2012/report.htm

³¹ 2009 Concluding Observations at [23]

³² Committee Against Torture, *Concluding observations of the Committee against Torture: Australia*, Fortieth session, 28 April – 16 May 2008, CAT/C/AUS/CO/1 at [11]

³³ 2012 CRC Concluding Observations at [80]

³⁴ 2011 UPR, for example, at [86.120] –[86.135]

in Detention' policy,³⁵ in particular the policy that "detention is only to be used as a last resort and for the shortest practicable time as possible";

- (d) any measures being considered to protect the rights of stateless persons detained in immigration detention;
 - (e) the Federal Government's response to the recommendations made by the Joint Standing Committee on Australia's Immigration Detention Network;³⁶ and
 - (f) the provision of adequate legal representation to ensure that all persons detained in immigration detention can understand and exercise their legal rights, including their right to judicial review of decisions relating to the determination of their visa status.
27. Please provide information regarding the current procedures for processing irregular -maritime arrivals whether arriving in Australia or in places excised from Australia's migration zone onshore or offshore, and their access to independent review of decisions relating to their visa status. Please also provide information regarding the development and use of visa options to ensure that "unlawful non-citizens" can lawfully resolve their immigration status while in the community rather than in immigration detention.
28. Please explain the current process of undertaking security assessments of persons found to be refugees, including the manner in which the Australian Security and Intelligence Organisation (ASIO) conducts such assessments, the average time frames for undertaking such assessments and the consequences for a person who receives an adverse security assessment. Please explain what options are available for a person to obtain reasons for an adverse security assessment or to challenge such an assessment. Please explain whether this system, which appears to have resulted in a number of refugees being detained for prolonged and potentially indefinite periods in immigration detention, complies with Australia's human rights obligations, including Article 9 of the Covenant. Please provide details of any efforts to introduce mechanisms to enable meaningful review of adverse security assessments. Please also provide details of any judicial decisions concerning the legal validity of the detention of refugees or other persons subject to adverse security assessments.

Counter Terrorism Laws

29. In light of the recommendations made by this Committee³⁷ and during the 2011 UPR³⁸ that Australia ensure that its counter-terrorism laws are in full conformity with the Covenant, please provide information regarding any recent steps undertaken to review these laws, and the Federal Government's response to any recommendations to repeal or reform these laws. In particular, please provide information regarding the status of the Council of Australian Government's (COAG) review of counter terrorism laws and the work of the Independent National Security Legislation Monitor. Please explain whether these reviews considered the continued necessity and effectiveness of the following features of Australia's

³⁵ This policy was announced by the Rudd Government in 2008, details available at <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>

³⁶ Joint Standing Committee on Australia's Immigration Detention Network's Report was released in March 2012 and is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_ctte/immigration_detention/index.htm

³⁷ 2009 Concluding Observations at [11]

³⁸ 2011 UPR at [86.135]-[86.140]

counter- terrorism laws, which currently restrict the right to liberty of person in Article 9 and also infringe other rights protected in the Covenant:

- (a) control orders and preventative detention orders, such as those contained in Divisions 104 and 105 of the *Criminal Code Act 1995 (Cth)* which restrict the movement of persons who have not been charged with or convicted of any offence.
- (b) the powers of the Australian Federal Police (AFP) to arrest and detain a person who has not been charged with a criminal offence in Part 1C of the *Crimes Act 1914 (Cth)*;
- (c) the powers of the Australian Security Intelligence Organisation (ASIO) to detain suspects under a questioning warrant for renewable periods of up to seven days without access to a lawyer under Division 3 of the *ASIO Act 1979 (Cth)*.

Mandatory Sentencing

30. What efforts are being made at the Federal, State and Territory level to review and reform or repeal mandatory sentencing provisions and consider alternatives that permit a degree of judicial discretion in sentencing? What forms of scrutiny are currently being applied to proposed laws that seek to introduce mandatory minimum penalties for certain criminal offences? Please provide information as to what steps are being made to develop and implement alternatives to mandatory minimum sentences for certain people smuggling offences in section 236B of the Migration Act, in light of recommendations made by the Senate Committee on Legal and Constitutional Affairs.³⁹

Post sentence Detention

31. In light of the findings and recommendations made by this Committee in *Tillman v Australia* and *Fardon v Australia*⁴⁰ that the post-sentence detention allowed by the *Crimes (Serious Sex Offenders) Act 2006 (NSW)* and the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* is incompatible with the prohibitions against arbitrary detention under Article 9(1) of the Covenant, please explain what efforts have been taken to review and reform these provisions. Please provide information about any other cases in which these and similar provisions have been used, and whether alternatives to the use of these provisions are currently being considered.

Bail

32. In light of the recommendations made by this Committee relating to the need to limit obstacles to release on bail,⁴¹ please provide information about any Federal, State or Territory provisions that remove the presumption in favour of bail and any efforts to review or reform these provisions. For example, please provide information regarding the New South Wales (NSW) Government's response to the NSW Law Reform Commission's review of the *Bail Act 1978 (NSW)*.⁴²

³⁹ See Senate Committee on Legal and Constitutional Affairs inquiry into the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, Report released 4 April 2012, available at http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/migration_amendment_2012/index.htm

⁴⁰ *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007 and *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007

⁴¹ 2009 Concluding Observations [11]

⁴² Details of this review are available at http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_r133toc

Prolonged Detention of Persons Unfit to Stand Trial

33. Please provide information as to what alternative measures are being pursued in the Northern Territory and other jurisdictions to ensure that persons with acute mental health needs who have been found unfit to stand trial and have not been found guilty of an offence are not detained in prison facilities.⁴³

Article 10 – Treatment in detention

34. In light of recommendations made by this Committee,⁴⁴ the Committee on the Rights of the Child⁴⁵ and the Committee Against Torture,⁴⁶ please provide information regarding the steps being taken to ensure that minors are not held in detention with adults. In particular, what efforts have been undertaken to ensure that:
- (a) children in conflict with the law, including those in immigration detention, are treated in accordance with the UN Rules for Protection of Juveniles Deprived of their Liberty;
 - (b) minors suspected of involvement in people smuggling activities are not held in detention with adults;
 - (c) all persons under 18 who are in conflict with the law are only deprived of liberty as a last resort and are tried and detained separately from adults. In particular, what efforts have been undertaken to review and reform the policy of treating 17 year old offenders as adults in the Queensland criminal justice system?
35. Given the repeated recommendations made by this Committee⁴⁷ other UN bodies and the AHRC,⁴⁸ and the recommendations of the Joint Parliamentary Committee on Australia's Immigration Detention Network, what efforts are being taken to ensure that immigration detention facilities adhere to Australia's human rights obligations, including those contained in Article 10 of the Covenant? Please provide information on steps taken to:
- (a) guarantee by law a maximum length of immigration detention;
 - (b) ensure prompt access to independent and regular monitoring of all immigration detention facilities, including by the national preventative mechanism established in compliance with the OPCAT;
 - (c) ensure prompt access to health care, including adequate mental health care services;

⁴³ There have been media reports that at least two Indigenous men who have been found unfit to plead in respect of charges of criminal conduct on the basis of their mental illness have been detained for lengthy periods in prison facilities in the Northern Territory (NT). See for example ABC News Online, *Outrage grows over jailing of mentally ill*, (26 June 2012), available at <http://www.abc.net.au/news/2012-06-26/mentally-ill-in-jail-outrage-grows/4093818>

⁴⁴ 2009 Concluding Observations at [24]

⁴⁵ 2012 CRC Concluding Observations at [82]

⁴⁶ Committee Against Torture, *Concluding observations of the Committee against Torture: Australia*, Fortieth session, 28 April – 16 May 2008, CAT/C/AUS/CO/1 at [11]

⁴⁷ See for example 2009 Concluding Observations at [23]

⁴⁸ The AHRC's publications and submissions to the Australian Parliament and UN human rights bodies in relation to Australia's immigration detention system and asylum seekers can be found at http://www.hreoc.gov.au/human_rights/immigration/index.html

-
- (d) ensure adequate detention conditions, particularly in light of reports on overcrowding;
 - (e) ensure that unaccompanied minors, families with children and other vulnerable persons are not detained in Immigration Detention Centres held detention facilities.

36. Please provide information on any steps taken to ensure, in law and in practice, independent monitoring of, and inspection mechanisms for, places where persons are deprived of their liberty at the Federal, State and Territory level, including in detention centres in places excised from Australia's migration zone. In particular, please provide information on any progress towards ratification of the OPCAT and on steps underway to designate an effective national preventive mechanism.

Article 12 – Liberty of movement

37. What steps are being undertaken to examine the effectiveness and necessity of control orders which restrict the movement of persons who have not been charged with or convicted of any offence, such as those contained in Division 104 of the *Criminal Code Act 1995* (Cth), designed to be used in respect of persons suspected of involvement in terrorist activity, and those introduced by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) designed to be used in respect of persons who are members of or associate with organised criminal organisations?
38. What efforts have been undertaken to review these provisions, and similar provisions introduced at the State and Territory level, to ensure that they include appropriate legal safeguards and constitute necessary and proportionate restrictions of the liberty of movement?

Article 13 – Expulsion of aliens

39. Article 13 includes an obligation to ensure that a person who is lawfully expelled from a country be allowed to submit the reasons against his or her expulsion and to have his or her case reviewed by a competent authority, except where compelling reasons of national security otherwise require. What mechanisms are currently in place or are being considered to ensure that persons subject to adverse security assessments by ASIO, who have also been found to be refugees and owed non-refoulement obligations by Australia, have access to meaningful review of these decisions?

Article 14 – Right to a fair trial

Counter Terrorism Laws

40. In light of the recommendations made by this Committee⁴⁹ and during the 2011 UPR Process⁵⁰ please provide information on any recent steps taken to review and reform counter-terrorism legislation at the Federal, State and Territory level to ensure that such legislation complies with Article 14 of the Covenant.
41. Please explain whether the reviews being conducted by COAG and the Independent National Security Legislation Monitor will include a particular focus on whether the laws limit the fair trial rights contained in Article 14 and whether any limitation of

⁴⁹ 2009 Concluding Observation [23]

⁵⁰ 2011 UPR [86.137]-[86.140]

these rights continues to be necessary and proportionate. In particular, please provide information on the continued necessity and effectiveness of the following features of Australia's counter terrorism laws, which currently restrict the rights contained in Article 14:

- (a) the control order and preventative detention order regime which allow for the pre-emptive deprivation or restriction of liberty of persons who have not been charged with or convicted of a criminal offence and who have not been given a fair opportunity to understand the basis for nor to challenge the order made against them;⁵¹
 - (b) the erosion of the right to silence and privilege against self-incrimination as a result of coercive information gathering powers vested in law enforcement and intelligence agencies;⁵²
 - (c) the limiting of access to independent legal representation by effectively requiring lawyers to be issued with a security clearance before participating in cases involving classified or security sensitive information;⁵³ and
 - (d) Ministerial determination that the disclosure of certain evidence may be prejudicial to national security, in a manner that has the potential to impact on the right to a public trial.⁵⁴
42. Please provide information on any steps being undertaken to consider the continued necessity and effectiveness of extraordinary police powers introduced to response to the threat of terrorism at the State and Territory level, such as Part 3 of the *Terrorism (Police Powers) Act 2002* (NSW) which allows for covert search warrants which may involve searches of premises occupied by people who are unconnected with any allegation of criminality, without their knowledge, up to six months after the issue of a warrant.

Coercive Powers in the Building and Construction Industry

43. Given the obligation in Article 14 not to be compelled to testify against oneself or to confess guilt, please explain how the features of the *Building and Construction Industry Improvement Act 2005* (Cth), which allow the Building and Construction Industry Commissioner or any member of his staff to interrogate people on matters relevant to an investigation and to impose criminal sanctions on persons who refuse to answer a question, complies with this obligation.

Access to Justice

44. Given the obligations in Article 14, which include the obligation to provide appropriate legal representation in legal proceedings that result in criminal sanction or other deprivation of liberty, and in light of this Committee's past recommendations,⁵⁵ what steps are currently being undertaken to improve access to legal representation for marginalised and disadvantaged people, including Indigenous people and non-citizens? For example:

⁵¹ See Divisions 104 and 105 of the *Criminal Code Act 1995* (Cth).

⁵² For example see Part III Division 3 of the *Australian Security and Intelligence Organisation Act 1979* (Cth); Part 1C of the *Crimes Act 1915* (Cth).

⁵³ See for example *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth)

⁵⁴ *Ibid.*

⁵⁵ 2009 Concluding Observations at [25]

-
- (a) Please provide details regarding the provision of legal assistance to irregular maritime arrivals, and in particular those arriving in places excised from Australia's migration zone. What mechanisms are in place to regularly review whether this level of assistance is adequate and available to all irregular maritime arrivals at all stages of their visa determination process, including judicial review/ What other steps, including the appointment of additional magistrates and investment in court facilities, have been undertaken to ensure access to justice for those seeking judicial review of decisions relating to visa status?
 - (b) Please provide details of any recent efforts to ensure that Indigenous Australians can give effect to their legal rights under the measures introduced as part of the Stronger Futures legislation.⁵⁶ In particular, please explain how those affected by this legislation can seek legal advice about their circumstances.
 - (c) Please outline the resources currently applied to the provision of legal assistance for persons facing criminal charges or immigration detention. What efforts have been undertaken to ensure that these resources are meeting the needs of the most vulnerable members of the Australian community?

Article 17 – Right to privacy

45. In light of the extensive powers invested in law enforcement and intelligence agencies to intercept telecommunications when investigating criminal offences or matters relating to national security,⁵⁷ what safeguards currently exist to protect against unjustified intrusion into personal privacy? To what extent has the requirement to consider individual privacy in the telecommunications interception regime⁵⁸ provided adequate protection for privacy rights contained in article 17? Please provide details of any instances where telecommunication interception warrants have been refused on the grounds of privacy considerations. Does the Commonwealth Government intend to review telecommunication interception laws that have an intrusive impact on the privacy rights of citizens to ensure they comply with Australia's obligations under Article 17?

Article 22 – Freedom of association

46. Please provide details about the laws outlawing criminal organisations and criminalising association with such organisations at the Federal level,⁵⁹ and at the State and Territory level.⁶⁰ Please explain whether these laws have been subject to independent review or scrutiny for their compliance with Australia's obligations under Article 22 of the Covenant. Please provide information about any declarations or prosecutions made under these laws. What mechanisms currently exist to review the necessity and effectiveness of these laws?
47. Please provide information about the 'conspiring' laws introduced at the State and Territory level, such as the *Crimes Amendment (Conspiring and Organised Crime) Act 2012* (NSW), including any prosecutions brought under these laws and the

⁵⁶ *Stronger Futures in the Northern Territory Act 2012*; *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* ("Consequential Provisions Bill") and the *Social Security Legislation Amendment Bill 2011*

⁵⁷ See for example, *Telecommunications (Interception) Act 1979* (Cth), enacted in 1979.

⁵⁸ *Ibid.*

⁵⁹ *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth)

⁶⁰ For example see *Serious and Organised Crime (Control) Act 2008* (SA); *Crimes (Criminal Organisations) Control Act 2009* (NSW); *Criminal Organisation Act 2009* (Qld); *Serious Crime Control Act 2009* (NT).

nature of any penalties imposed. Please explain whether these laws comply with Australia's obligations under Article 22, and whether they are necessary and effective in light of the many other offence provisions and law enforcement powers designed to address criminal conduct undertaken by organised groups.

48. Please provide information about the use of Federal provisions designed to specify certain organisations as terrorist organisations and criminalise certain interactions with such organisations,⁶¹ including any prosecutions brought under these laws and the nature of any penalties imposed. Given the broad discretion invested in the Minister to declare an organisation a terrorist organisation and the serious legal consequences that derive from such a declaration, please explain what safeguards exist to protect against undue interference with a person's rights under the Covenant, and in particular, the freedom of association protected by Article 22. What mechanisms are in place to ensure that these provisions are and continue to be a necessary and proportionate response to the threat of harm posed by terrorist organisations in Australia?

Article 24 – Rights of children

49. Please provide details of Australia's response to the recent recommendations made by the Committee on the Rights of the Child.⁶² In particular:
- (a) What efforts are being employed to address the conflict of interest that arises from the Minister for Immigration's role as guardian of unaccompanied minors in immigration detention under the *Immigration (Guardianship of Children) Act 1946* and his role as decision maker in relation to applications by such minors under the Migration Act?
 - (b) Please provide details of the establishment and operation of the National Children's Commissioner, including the Commissioner's powers and resources and any reports or recommendations made. Is the Federal Government considering an expanded role for the Commissioner that would include a specific responsibility for children detained in immigration detention facilities or community detention arrangements? Please provide details of any relevant reforms to child protection laws at the State and Territory level.

⁶¹ See Division 102 of the *Criminal Code Act 1995* (Cth).

⁶² See 2012 CRC Concluding Observations, in particular observations at paras [18] and [80(c)]

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.