

Freedom Respect Equality Dignity: Action

NGO Submission to the UN Committee on the Elimination of
Racial Discrimination Australia



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Contents

Contents	i
Introduction	4
List of Contributors	7
List of Supporting Organisations	8
Executive Summary	9
A. LEGAL FRAMEWORK AND GENERAL POLICIES (ARTICLES 1 & 2)	19
A.1 Discrimination Law	19
A.2 Special Measures.....	21
A.3 Australian Human Rights Commission	22
A.4 Regulating Australian Corporations Overseas.....	24
A.5 Multicultural Policy	28
A.6 The Durban Review	29
A.7 Discrimination against Non-Citizens	30
(a) Citizenship Test	31
B. LEGAL AND POLICY FRAMEWORK FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (ARTICLES 1 & 2).....	32
B.1 The Northern Territory Intervention.....	32
(a) Justification and Reactions to the Northern Territory Intervention	33
(b) Northern Territory Intervention Review	34
(c) Consultation with Affected Communities	35
(d) Proposed Amendments to the Northern Territory Intervention	36
(e) Special Measures	37
(f) Proposed Reinstatement of the Racial Discrimination Act	38
B.2 Aboriginal Representative Body.....	39
B.3 Australia’s Conduct in Intergovernmental Financial Institutions	42
B.4 Close the Gap Policies.....	43
C. RACIAL SEGREGATION (ARTICLE 3).....	45
C.1 Aboriginal and Torres Strait Islander Peoples	45
(a) Basics Card	46
D. OFFENCES OF RACIAL HATRED (ARTICLE 4).....	48
D.1 Australia’s Reservations to Article 4(a)	48
(a) Acts of Racial Hatred	48
(b) Inciting Acts of Racial or Religious Hatred	50
D.2 Vilification of African Communities.....	53
D.3 Cyber-Racism.....	54
E. EQUAL TREATMENT IN THE ADMINISTRATION OF JUSTICE (ARTICLE 5(a)).....	56
E.1 Establishing Race Discrimination in Courts	56
E.2 Aboriginal and Torres Strait Islander Peoples	57
(a) Policing	57
(b) Aboriginal Legal Assistance	60
(c) Interpreting Services	61
(d) Transport to Court in Remote Northern Territory Communities	62
E.3 Policing African Communities	64

E.4	Counter-Terrorism Measures	66
E.5	Migrant and Culturally and Linguistically Diverse Communities	68
F.	OTHER CIVIL AND POLITICAL RIGHTS (ARTICLE 5(b) – (d))	70
F.1	Aboriginal and Torres Strait Islander Peoples	70
	(a) Imprisonment	70
	(b) Aboriginal Women in Prison	72
	(c) Deaths in Custody	73
	(d) Mandatory Sentencing	75
	(e) Juvenile Justice	77
	(f) Native Title	78
	(g) Participation in Political Life	79
	(h) Freedom of Movement	79
	(i) Property Rights	80
	(j) Nuclear Waste Sites	81
F.2	Indian Communities	85
F.3	International Students	86
F.4	Asylum Seekers, Refugees and Non-Citizens	88
	(a) Mandatory Immigration Detention	89
	(b) Excision from the Migration Zone	91
	(c) Suspension of Asylum Claims	93
	(d) Refoulement of Non-Citizens	96
	(e) Stateless People	99
	(f) Deportation of Long Term Residents	101
F.5	Counter-Terrorism.....	104
	(a) Border Security and the Right to Privacy	104
	(b) Proscription of Organisations and Freedom of Association	105
F.6	Muslim Women.....	107
G.	ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ARTICLE 5(e))	110
G.1	Aboriginal and Torres Strait Islander Peoples	110
	(a) Education	110
	(b) Health	112
	(c) Access to Water	116
	(d) Access to Food	116
	(e) Social Security	117
	(f) Housing and Homelessness	117
	(g) Work Rights	120
	(h) Stolen Wages	122
G.2	International Students	125
	(a) Employment	126
	(b) Housing	127
	(c) Education	128
G.3	African Communities – Employment.....	129
G.4	Refugees and Asylum Seekers.....	130
	(a) Health in Immigration Detention	130
	(b) Work Rights	131
	(c) Social Security	132

G.5	Migrant and Culturally and Linguistically Diverse Communities	133
(a)	Aged Care Services	133
(b)	Young People	134
A.	ACCESS TO PUBLIC SPACES (ARTICLE 5(f))	136
A.1	Aboriginal and Torres Strait Islander Peoples	136
A.2	African Communities	139
B.	EFFECTIVE REMEDIES (ARTICLE 6).....	141
B.1	Aboriginal and Torres Strait Islander Peoples	141
(a)	Northern Territory Intervention	141
(b)	Stolen Generations	141
(c)	Stolen Wages	142
(d)	Native Title	142
B.2	Australian Human Rights Commission	143
C.	EDUCATION TO COMBAT PREJUDICES AND PROMOTE TOLERANCE AND UNDERSTANDING (ARTICLE 7).....	144
C.1	Primary and Secondary Human Rights Education.....	144
D.	DOMESTIC IMPLEMENTATION OF CERD VIEWS AND RECOMMENDATIONS (ARTICLE 14).....	147
Glossary	149

Introduction

ABOUT THIS SUBMISSION

1. This submission to the United Nations Committee on the Elimination of Racial Discrimination (the **CERD Committee**) has been prepared by a coalition of non-government organisations (**NGOs**) from across Australia. The principal authors of this submission are Emily Howie of the Human Rights Law Resource Centre¹ and Louise Edwards of the National Association of Community Legal Centres.²
2. The submission was prepared with substantial input and guidance from a high-level NGO Strategy Group, comprising:
 - Pino Migliorino and Victoria Erlichster – Federation of Ethnic Communities' Councils of Australia
 - Les Malezer – Foundation for Aboriginal and Islander Research Action
 - Ikebal Patel – Federation of Islamic Councils
 - Joumanah El Matrah – Islamic Women's Welfare Council of Victoria
 - Soo-Lin Quek – Centre for Multicultural Youth
 - Graeme Thom – Amnesty International Australia
 - Jane Brock – Immigrant Women's Speakout Association
3. The authors would like to acknowledge the many NGOs and individuals listed on page 7 of this report who contributed to the content and provided expert guidance on issues. The authors would also like to acknowledge the support provided by the Australian Human Rights Commission (**AHRC**) in hosting meetings of the Strategy Group.
4. This submission is supported, in whole or in part, by the NGOs set out on page 8 of this submission.

SOCIAL AND POLITICAL CONTEXT OF SUBMISSION

5. Australia's Combined Fifteenth, Sixteenth and Seventeenth Periodic Reports under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination (the **Government's CERD report**) was lodged with the CERD Committee on 7 January 2010.
6. The former Liberal/National Coalition Government (**former Australian Government**) held federal office from 1996 to November 2007. In November 2007, there was a general election

¹ The Human Rights Law Resource Centre is a national specialist human rights legal service. It aims to promote and protect human rights, particularly the human rights of people who are disadvantaged or living in poverty, through the practice of law.

² The National Association of Community Legal Centres is the peak body for more than 200 community legal services across Australia. Each year, community legal centres in Australia provide free legal services, information and advice to over 250,000 disadvantaged people.

at which a Labor Government was elected (**current Australian Government**). This reporting period and this submission therefore covers actual or proposed changes in relevant Australian law, practice and policy before and since November 2007.

7. It is disappointing that despite the extensive guidance provided in the CERD Reporting Guidelines, the Australian Government did not provide its CERD-specific report in a structure that followed the articles of the Covenant. Instead, the Government chose to provide a report on thematic issues. This serves to make a constructive dialogue between the CERD Committee and the Australian Government more difficult.
8. It is also disappointing that many issues raised by the CERD Committee's Concluding Observations on Australia in April 2005 persist in Australia today and have not been the subject of legislative or policy change. Periodic reports to UN treaty bodies should be used by Australian Governments to monitor progress in the enjoyment of fundamental human rights and to audit and develop policies to fully implement the rights contained in the treaties.

'ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES' AND 'ABORIGINAL PEOPLES'

9. Throughout this report, Aboriginal and Torres Strait Islander peoples are referred to as 'Aboriginal peoples'. The authors acknowledge the diversity in culture, language, kinship structures and ways of life within Aboriginal and Aboriginal and Torres Strait Islander peoples, and recognise that Aboriginal peoples and Torres Strait Islander peoples retain their distinct cultures irrespective of whether they live in urban, rural, regional or remote parts of the country. The use of the word 'peoples' also acknowledges that Aboriginal peoples and Torres Strait Islander peoples have a 'collective, rather than purely individual dimension to their livelihoods'.³

OVERVIEW OF HUMAN RIGHTS FRAMEWORK IN AUSTRALIA

10. Australia does not have any federal law that comprehensively protects human rights; there is no overarching human rights legislation and no comprehensive protection of human rights in the Australian Constitution.
11. In 2009, a national consultation was held on the protection and promotion of human rights in Australia (the **National Human Rights Consultation**). The Consultation Committee received a record 35,000 submissions and ultimately recommended that Australia adopt a Human Rights Act, a key recommendation supported by over 87% of submissions that addressed the issue.⁴ However, in April 2010 the Government announced that it does not intend to introduce a Human Rights Act.
12. In response to the National Human Rights Consultation, the Government announced a new framework for the protection of human rights in Australia, which contains some significant

³ AHRC, *Social Justice Report 2009* (2009) page 6, available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/index.html.

⁴ See *Report of the National Human Rights Consultation* (2009) page 264 and Recommendation 18.

commitments to strengthen the promotion and protection of human rights in Australia, including:⁵

- (a) establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations;
 - (b) requiring that each new bill introduced into Federal Parliament is accompanied by a statement that explains the bill's compatibility with Australia's international human rights obligations, including CERD;
 - (c) reviewing legislation, policies and practice for compliance with the seven core international human rights treaties to which Australia is party;
 - (d) investing more than \$12 million over four years in various education initiatives to promote a greater understanding of human rights across the community;
 - (e) developing a new National Action Plan on Human Rights to 'outline future action for the promotion and protection of human rights';
 - (f) consolidating and harmonising federal anti-discrimination laws into a single Act; and
 - (g) creating a 'Human Rights Forum' to enable whole-of-government engagement with non-government organisations on an annual basis.
13. Australia's obligations under CERD are primarily incorporated into Australian law through the *Racial Discrimination Act 1975* (Cth) (the **RDA**). There is also anti-discrimination legislation in each state and territory that provides protection from racial discrimination.
14. However, the right to equality and non-discrimination is not protected in the Australian Constitution, which means that the Commonwealth parliament can pass a law that is racially discriminatory. (This is discussed in more detail in **X**). Furthermore, the RDA fails to criminalise racial vilification or require the Australian Government to take an approach to discrimination that addresses both substantive equality and systemic discrimination.
15. Remedies for racial discrimination are available first in the AHRC and then in the federal courts or alternatively through state courts.

⁵ See Attorney-General's Department, Australian Government, *Australia's Human Rights Framework* (2010), available at <http://www.ag.gov.au/humanrightsframework>.

List of Contributors

The following organisations and individuals contributed to or advised on this submission:

<u>Amnesty International Australia</u>	<u>Multicultural Youth South Australia Inc</u>
<u>Aboriginal Legal Service Western Australia</u>	<u>National Association of Community Legal Centres</u>
<u>Australian Conservation Foundation</u>	<u>National Multicultural Youth Advocacy Network</u>
<u>Castan Centre for Human Rights Law</u>	<u>National Welfare Rights Network</u>
<u>Community Legal Centres NSW</u>	<u>Rachel Nicolson</u>
<u>Emily Gerrard</u>	<u>North Australian Aboriginal Justice Agency</u>
<u>Environment Defenders Office NT</u>	<u>Northern Territory Legal Aid Commission</u>
<u>Environment Defenders Office NSW</u>	<u>Oxfam Australia</u>
<u>Flemington Kensington Community Legal Centre</u>	<u>Refugee and Immigration Legal Centre</u>
<u>Federation of Community Legal Centres</u>	<u>Melanie Schleiger</u>
<u>Hotham Mission Asylum Seeker Project</u>	<u>Simon Rice</u>
<u>Human Rights Law Resource Centre staff, secondees and volunteers - Philip Lynch, Ben Schokman, Rachel Ball, Audrey Yeap, Megan Fitzgerald, Susanna Hedenmark, Loren Days and Michael Dunstan</u>	<u>Tangentyere Council</u>
<u>Illawarra Legal Centre</u>	<u>Top End Legal Centre</u>
<u>Kingsford Legal Centre</u>	<u>Victorian Aboriginal Legal Service</u>
<u>Moreland Community Legal Centre</u>	<u>Women's Legal Service NSW</u>

List of Supporting Organisations

This submission is supported, in whole or in part, by the following NGOs:

Executive Summary

16. Since 2005, racial discrimination has been the subject of major legislative and policy initiatives for Australian governments and a subject of major concern for NGOs in Australia. This report documents areas in which Australia is falling short of fulfilling its obligations under CERD and focuses on areas that have been the subject of extensive NGO activity and research in Australia.
17. This Executive Summary sets out:
 - (a) key developments in the promotion of CERD rights since the CERD Committee's Concluding Observations on Australia in April 2005; and
 - (b) key concerns in relation to breaches of CERD and implementation failures in Australia during that time.
18. This submission also contains an Appendix which provides a schedule of Proposed Recommendations to be included in the CERD Committee's Concluding Observations.

RECENT KEY DEVELOPMENTS IN THE PROMOTION OF CERD RIGHTS

19. Since its election in November 2007, the current Australian Government has taken a number of significant steps towards the realisation of CERD rights and the promotion of human rights generally, including:
 - (a) issuing a formal parliamentary 'apology' to the Aboriginal children who were forcibly removed from their families under official government policy between 1909-1969, known as the 'Stolen Generations' (the **Stolen Generations**);
 - (b) reversing Australia's opposition to the UN Declaration on the Rights of Indigenous Peoples (**DRIP**);
 - (c) committing to more extensive and constructive engagement with the United Nations human rights mechanisms, including by issuing a standing invitation to the Special Procedures of the UN Human Rights Council and ratifying a number of additional human rights treaties and optional protocols;
 - (d) undertaking key reforms of the immigration system, including:
 - (i) ending the so-called 'Pacific Solution';
 - (ii) removing the system of temporary protection visas for asylum seekers; and
 - (iii) reforming Australia's policy of mandatory immigration detention;
 - (e) reforming and repealing some aspects of the Northern Territory Intervention;
 - (f) supporting the establishment of the new Aboriginal peoples' representative body, the National Congress of Australia's First Peoples;
 - (g) committing to 'overhaul' the Aboriginal peoples' native title system to make it more fair and efficient; and

- (h) committing to achieve equality of health status and life expectancy between Aboriginal peoples and other Australians by 2030, including ensuring primary health care services and health infrastructure for Aboriginal peoples that are capable of bridging the gap in health standards by 2018.

SIGNIFICANT CONCERNS REGARDING THE REALISATION OF CERD RIGHTS

- 20. However, despite some progress, racial and religious minority groups continue to experience racism in their daily lives. There also remain serious concerns about the racially discriminatory character and impact a range of Australian laws, policies and practices. Many of the advancements since the election of the new government have been symbolic in nature; structural changes necessary to turn commitments into practice still need to be made.
- 21. This section summarises key concerns in relation to breaches of CERD and implementation failures since the CERD Committee's Concluding Observations on Australia in April 2005. The discussion below is set out by themes, whereas the body of the report is structured according to the articles of CERD.

Legal and Policy Framework

- 22. There is no overarching and comprehensive protection of human rights in Australian law, such as a bill of rights enshrined in legislation or the constitution that protects the rights set out in article 5 of the Covenant. The absence of such protection was one of the reasons why the National Human Rights Consultation found that Australia's legal and institutional protection of human rights is inadequate, particularly for individuals and communities that are marginalised or disadvantaged.
- 23. The RDA provides some protection from racial discrimination but there is no protection from racial discrimination entrenched in the Australian Constitution. In fact, the 'race power' in the Australian Constitution has been interpreted as permitting the Government to enact legislation which is detrimental and discriminatory on the basis of race. The protection of the RDA is also limited in the following ways:
 - (a) as an Act of Federal Parliament, the RDA does not prevent the Federal Parliament from enacting legislation which discriminates against people on the basis of race;
 - (b) there is no requirement that the Australian Government or its agencies take positive steps to promote equality in the provision of public services; and
 - (c) the RDA does not require 'special measures' to accord with the definition of 'special measures' in General Recommendation No. 32.
- 24. The extent of legislative protection of CERD rights is discussed in parts [A.1: Discrimination Law](#) and [A.2: Special Measures](#) below.
- 25. The Australian Government can, and has, passed laws that are racially discriminatory. An example of this is the suite of legislation passed to facilitate the 'emergency' intervention into Northern Territory Aboriginal communities (see [B.1: Northern Territory Intervention](#)).
- 26. The Australian Government recently announced a review of all federal anti-discrimination laws, including the RDA, with a view to harmonising those laws. The RDA currently provides

- the strongest protection from anti-discrimination of all the federal anti-discrimination laws. The Government has not provided any guarantee that the RDA will not be weakened as a result of the harmonisation review (see [A.1: Discrimination Law](#)).
27. The gaps in the legal framework for protecting rights in Australian law means that corporations that are registered in Australia are not adequately regulated for their human rights impact on Indigenous communities overseas. Australia is home to many large mining and extractive companies and there have been reports of their adverse impact on Indigenous communities overseas (see [A.4: Regulating Australian Corporations Overseas](#)).
 28. The AHRC is Australia's National Human Rights Institution. While it does important work investigating and conciliating complaints of racial discrimination the AHRC is unable to provide complainants with enforceable remedies in the absence of such a conciliated outcome (see [I.2: Australian Human Rights Commission](#)). The AHRC's functions and powers are limited in a number of other ways, including in its inability to initiate investigations of systemic human rights issues. The AHRC is also seriously under-resourced and currently only has a part-time Race Discrimination Commissioner (see [A.3: Australian Human Rights Commission](#)).
 29. The Australian Government has maintained its reservation to Article 4(a) of the CERD. No Australian jurisdiction has created a specific provision criminalising acts of racial or religious hatred and there is no express protection against religious vilification at a federal level (see [D.1: Australia's Reservations to Article 4\(a\)](#)).

Aboriginal and Torres Strait Islander Peoples

30. Australian laws, policies and practices continue to inhibit Aboriginal peoples' equal enjoyment of their rights under CERD.
31. The historic dispossession and disenfranchisement of Aboriginal peoples was further compounded in 2004 by the abolition of the Aboriginal representative body, the Aboriginal and Torres Strait Islander Commission. The new National Congress of Australia's First Peoples is expected to be operational by January 2011. However, the absence of an Aboriginal representative body has diminished Aboriginal peoples' equal rights to effective participation in public life and the right to free, prior and informed consent. This is particularly concerning given that there is currently no Aboriginal person holding a seat in the Federal Parliament. The Aboriginal representative body is discussed in [B.2: Aboriginal Representative Body](#).
32. Aboriginal peoples do not enjoy the right to sustainable economic and social development inequality with other Australians. In fact, there are significant gaps in the treatment and outcomes for Aboriginal people in relation to a number of key economic, social and cultural rights. The Australian Government has announced its 'Close the Gap' framework to reduce these gaps. However, Close the Gap is not a rights-based policy and has not been incorporated into the broader policy settings (see [B.4: Close the Gap Policies](#)).
33. Aboriginal peoples experience significant barriers to the realisation of the right to housing and an adequate standard of living. Key challenges include lack of affordable and culturally appropriate housing, lack of appropriate support services, significant levels of poverty across Aboriginal communities and underlying discrimination. Access to, and the conditions of,

Aboriginal housing has been described by the UN Special Rapporteur as a ‘humanitarian tragedy’. Aboriginal people are also more likely to be homeless and to live in social housing, and are half as likely to own a home as other Australians. Aboriginal peoples’ right to housing is discussed in [G.1\(e\): Aboriginal and Torres Strait Islander People - Housing and Homelessness](#) and the right to an adequate standard of living is otherwise discussed in [G.1\(c\): Aboriginal and Torres Strait Islander People - Access to Water](#).

34. Aboriginal peoples also have diminished rights to education. For example, 35% of Indigenous 17-year-old children attend secondary school, compared with 66% of non-Indigenous 17-year-olds. School attendance and retention rates for Aboriginal students are consistently lower across all age groups than for other Australian children. Further, the public education system fails to preserve and promote, and at times actively denies, bilingual education despite the clear disadvantages to Aboriginal children for whom English is not their first language. The lack of bilingual education also fails to recognise, respect and preserve Aboriginal culture and tradition (see discussion of Aboriginal peoples’ right to education in [G.1\(a\): Aboriginal and Torres Strait Islander People - Education](#)).
35. Aboriginal peoples do not enjoy the right to health equally with other Australians. To illustrate:
 - (a) life expectancy for Aboriginal peoples is 67.2 years for males (compared with 78.7 for other Australian men) and 72.9 years for females (compared with 82.6 years for other Australian females); and
 - (b) Aboriginal children have significantly poorer outcomes across a number of indicators as compared with non-Aboriginal children, including higher rates of infant mortality (Aboriginal children are 2-3 times more likely to die in the first year of life), chronic and preventable illnesses (Aboriginal children are 30 times more likely to suffer from malnutrition) and lower rates of adult supervision and care.
36. Many Aboriginal peoples do not have equal access to primary health care and other basic determinants of health, such as adequate housing, safe drinking water, electricity and effective sewerage systems (see discussion of Aboriginal peoples’ right to health in [G.1\(b\): Aboriginal and Torres Strait Islander People - Health](#), access to safe drinking water in [G.1\(c\): Aboriginal and Torres Strait Islander People - Access to Water](#) and access to food in [G.1\(d\)\(ii\): Northern Territory Intervention – Access to Food](#)).
37. Aboriginal peoples do not enjoy equal rights to own, develop, control and use communal lands, territories and resources, including rights to the return of, or restitution for, lands and territories. Although Aboriginal peoples might have a right to native title, in practice it is extremely difficult to prove and does not provide security of tenure (it is subject to extinguishment). Further, Aboriginal peoples whose rights have been extinguished face extreme difficulty in obtaining compensation under the current native title scheme (see [F.1\(f\): Aboriginal and Torres Strait Islander People - Native Title](#) for a discussion of property rights and [I.1\(d\): Aboriginal and Torres Strait Islander People - Native Title](#) for a discussion of remedies).

38. Australian law and policy creates significant barriers to Aboriginal peoples' equality and freedom from discrimination. This is reflected in the 'Northern Territory Intervention', which is the subject of a Request for Urgent Action to the CERD Committee, and which:
- (a) is directly targeted at Aboriginal communities in the Northern Territory;
 - (b) suspends the operation of the RDA in relation to measures taken under the Intervention;
 - (c) was imposed without consultation with affected communities; and
 - (d) restricts and removes a range of human rights including:
 - (i) property rights: the compulsory acquisition and control of specified Aboriginal land, without compensation (see part [F.1: Northern Territory Intervention – Compulsory Five Year Leases](#)).
 - (ii) social security, adequate standard of living, health and education: the compulsory income management regime includes measures such as quarantining welfare payments and linking welfare payments to children's school attendance (see [C.1\(a\): Northern Territory Intervention – Basics Card](#) and [G.1\(d\)\(i\): Northern Territory Intervention – Social Security](#)).
 - (iii) self-determination: lack of consultation with affected communities prior to the implementation of the Intervention measures, and powers given to the Australian Government to take over representative community councils.⁶ Alcohol and pornographic materials are banned in prescribed areas, with fines and terms of imprisonment imposed for failure to abide by the restrictions (see [B.1: Northern Territory Intervention](#)).
 - (iv) the right to work: the abolition of Community Development Employment Projects (subsequently partially-reinstated), which employed Aboriginal people in a wide variety of jobs directed towards meeting local community needs (see [G.1\(f\): Aboriginal and Torres Strait Islander People - Work Rights](#)).
 - (v) remedies: limiting the consideration of Aboriginal customary law and cultural practice in bail and sentencing hearings (see [B.1: Northern Territory Intervention](#)).
39. The Australian Government proposes to reinstate the RDA under the Northern Territory Intervention, however to date this has not occurred, and the proposed legislative amendments limit the ability of affected peoples to challenge Intervention measures as discriminatory under the RDA (see discussion of the Northern Territory Intervention in detail in [B.1: Northern Territory Intervention](#)).
40. Aboriginal peoples' equality, dignity and freedom from discrimination are also curtailed by the current framework for the administration of justice. For example, Aboriginal people are:

⁶ *Northern Territory National Emergency Response Act 2007* (Cth) part 5.

- (a) significantly overrepresented in the Australian prison population (being 13 times more likely to be imprisoned, and in some territories comprise as much as 87% of the prison population) (see [F.1\(a\) and \(b\): Aboriginal and Torres Strait Islander peoples – Imprisonment and Aboriginal Women in Prison](#));
 - (b) are more likely to die in police custody and to be either under- or over- policed (see [E.2: Aboriginal and Torres Strait Islander peoples – Policing](#));
 - (c) are disproportionately affected by mandatory sentencing laws in Western Australia and the Northern Territory (see [F.1: Aboriginal and Torres Strait Islander peoples – Mandatory Sentencing](#)); and
 - (d) are effectively removed from public spaces through increasing public order laws throughout Australia (see [H.2: Aboriginal and Torres Strait Islander peoples](#)).
41. Funding for specialised Aboriginal legal services and interpreting services, and therefore access to justice by Aboriginal people, is lower overall than for non-Aboriginal legal services. (see part [E.2\(a\) and \(b\): Aboriginal and Torres Strait Islander peoples – Aboriginal Legal Assistance and Interpreting Services](#)).
42. Finally, Aboriginal peoples who were forcibly removed from their families under official government policies (the **Stolen Generations**) and those who had their wages withheld by the state do not have access to effective remedies. To date, and despite recommendations from Australian Parliamentary inquiries and UN treaty bodies, no comprehensive national compensation scheme exists for the survivors of the Stolen Generations or for stolen wages (see [G.1: Aboriginal and Torres Strait Islander peoples – Stolen Wages](#) and [I.1\(b\) and \(c\): Aboriginal and Torres Strait Islander peoples – Stolen Generations and Stolen Wages](#)).

Asylum Seekers, Refugees and Non-Citizens

43. Australian laws, policies and practice continue to violate the human rights of asylum seekers, refugees and other non-citizens, both in detention and in the community. For asylum seekers in detention, there are three key issues which raise serious concerns in the equal enjoyment of those people to Article 5 rights in the CERD.
44. First, despite some softening of immigration policy, Australia continues its policy and practice of mandatory immigration detention of all ‘unlawful non-citizens’, including children. In practice, this policy applies mostly to asylum seekers from the Asia Pacific region. Mandatory detention is not only arbitrary, but the conditions of detention, particularly in remote detention centres where service provision is difficult, are particularly inhumane and have detrimental impacts on the health of detainees. See [F.4\(a\): Asylum Seekers, Refugees and Non-Citizens - Mandatory Immigration Detention](#).
45. Secondly, most ‘unlawful non-citizens’ are held on Christmas Island, 2600km from Perth and significantly closer to Indonesia than Australia. Christmas Island has been ‘excised’ from Australia’s migration zone. This means that asylum seekers on Christmas Island do not have the full rights to apply for refugee status or to review of decisions about their protection application as applicants for protection within Australia’s migration zone. See [F.4\(b\): Asylum Seekers, Refugees and Non-Citizens - Excision from the Migration Zone](#).

46. Thirdly, the Australian Government has recently returned to more draconian immigration policies. In April 2010 the Australian Government suspended the processing of asylum claims for all Afghan and Sri Lankan asylum seekers. The Government then announced it would re-open the remote and notoriously inhospitable Curtin Immigration Detention Centre to house the asylum seekers whose claims have been frozen. This will remove procedural rights from Afghan and Sri Lankan asylum seekers on the basis of their nationality and also subject them to arbitrary detention, restriction of their freedom of movement and to proper health care and legal advice. See [F.4\(l\): Asylum Seekers, Refugees and Non-Citizens - Suspension of Asylum Claims](#).
47. Asylum seekers living in the Australian community also continue to be vulnerable to violations of their economic and social rights. Although most asylum seekers have now secured the right to work, in practice very few asylum seekers (possibly as few as 15%) are able to secure employment (see [G.4\(b\): Refugees and Asylum Seekers - Work Rights for People in the Community](#)). Asylum seekers are not generally able to access social security and rely on other welfare schemes for financial and health assistance. These schemes have limited resources and give priority to certain classes of people, such as unaccompanied minors and people suffering trauma, meaning that other groups of asylum seekers, such as single men, are at grave risk of destitution (see [G.4\(c\): Refugees and Asylum Seekers - Social Security](#)).
48. For non-citizens more generally, there are three matters that threaten their enjoyment of Article 5 rights. First, Australian law does not contain adequate complementary protection and the Australian government can, and does, return non-citizens to situations where they face the risk of serious human rights abuses including torture and death (see [F.4\(d\): Asylum Seekers, Refugees and Non-Citizens – Refoulement of Non-Citizens](#)).
49. Secondly, Australian law also does not provide adequate protection for stateless people. Stateless people are able to be held in immigration detention indefinitely under Australian law, even if there is no real likelihood of them being removed in the reasonably foreseeable future (see [F.4\(e\): Asylum Seekers, Refugees and Non-Citizens – Stateless People](#)).
50. Finally, Australia continues to deport long-term residents on ‘character grounds’ even in cases where those people are:
 - (a) removed from their long-term place of residence to a place where they do not speak the language or have any social or family connections;
 - (b) separated from their children against considerations of the best interests of the child; and
 - (c) are separated from their families in violation of the right to respect for privacy, family and home life (see [F.4\(f\): Asylum Seekers, Refugees and Non-Citizens – Deportation of Long-Term Residents](#)).

Migrant and Culturally and Linguistically Diverse (CALD) Communities

51. African communities are one of the fastest growing communities in Australia. One of the biggest issues facing young African Australians is policing and in particular, the overuse of stop and search powers, excessive questioning by police, police provocation and in some cases, unlawful police violence. Rather than feel that they are being protected by the police,

- young Africans feel they need some sort of protection from the police. This threatens young African peoples' rights to liberty and security, freedom of movement, right to be free from torture and other ill treatment, and right to equality before the law (see [E.3: Policing African Communities](#)).
52. Another issue associated with policing is that young African people are effectively being denied equal access to public space because they are frequently 'moved on' by police who provide no legitimate reason for doing so. This can lead to conflict between the police and young people, particularly for the many African Australians living in public housing high rise towers, for whom the distinction between public and private space is blurred (see [E.3 Policing African Communities](#) and [H.2: Access to Public Spaces – African Communities](#)).
53. African communities, particularly Sudanese communities, have also been portrayed negatively in the media and stereotyped as a community with a high level of involvement in crime. This has led to a belief within the Australian community that African people do not integrate well in Australian society (see [D.2: Vilification of African Communities](#)).
54. International students in Australia also face a range of issue that threaten their Article 5 rights, such as:
- (a) increased hostility including as the target of violence in the community (this also applies to Indian people in Australia) (see [F.3: International Students](#));
 - (b) exploitation and discrimination in the terms and conditions of employment (see [G.2\(a\): International Students - Employment](#));
 - (c) living in overcrowded, low income housing without the protection of local residential tenancy laws (see [G.2\(b\): International Students - Housing](#)); and
 - (d) receiving unsatisfactory education at colleges that are not properly regulated (see [G.2\(c\): International Students - Education](#)).
55. Migrant and CALD communities more broadly experience inadequate access to ethno-specific services such as aged care (see [G.5\(a\): Migrant and Culturally and Linguistically Diverse Communities: Aged Care Services](#)).
56. Young people from migrant and CALD communities face specific issues, (in addition to those faced by young African people discussed above). Those who have poor English language skills are not provided with the necessary institutional supports to assist them to realise their right to education (see [G.5\(b\): Migrant and Culturally and Linguistically Diverse Communities - Young People](#)).

Counter-Terror Laws

57. Australia has passed over 40 pieces of legislation purportedly to counter the threat of terrorism in Australia. These laws have created new terrorism offences and given increased powers to police and intelligence agencies. Although these laws are not discriminatory on their face, in practice the impact of the new laws has been felt adversely and disproportionately by the Muslim, Kurdish, Tamil and Somali communities in Australia (see [E.4: Counter-Terrorism Measures](#)). All prosecutions to date under the counter terror laws have been against Muslim people and Tamils, while all but one of the 18 organisations that

have been listed as terrorist organisations are self-identified Islamic organisations.⁷ The disproportionate representation of Islamic organisations suggests a discriminatory application of the relevant laws by the executive government in Australia. Identifying a group as a 'terrorist organisation' is effectively an act of public condemnation of the political, religious or ideological goals of the organisation in question. It will also lead to increased surveillance of those communities 'associated' with the group through social, cultural, ethnic or religious commonalities (see [F.5\(b\): Proscription of Organisations and Freedom of Association](#)).

58. Australia's counter-terrorism strategy includes, among other things, introduction of a biometric (fingerprint and facial image) based visa system for non-citizens from ten overseas countries. The collection of biometric data is a serious intrusion on the right to privacy. While the ten countries chosen are not publicly known, the United States has strengthened its own airport checks for citizens from countries including Afghanistan, Iraq and Somalia, which may be an indicator of countries the Australian Government may identify as part of this process (see [F.5: Border Security and the Right to Privacy](#)).
59. Muslim women in Australia are at particular risk of compounded discrimination, which fluctuates with media discussion of Muslim-related terrorism. Given their more visible religious dress, Muslim women are vulnerable to discrimination on the basis of race, colour, religion, national origin and sex. Muslim women experience racism through being insulted, pushed, spat at, assaulted and having their hijab pulled and interfered with (see [F.6: Muslim Women](#)).

Remedies

60. The right of Aboriginal peoples to effective remedies is significantly compromised by the Australian Government's failure to establish compensation schemes or any other appropriate and effective remedies for:
 - (a) the people forcibly removed from their families under the historical Stolen Generations policy;
 - (b) the stolen wages of Aboriginal people;
 - (c) the loss of rights arising from the suspension of the RDA and the operation of the Northern Territory Intervention; and
 - (d) the extinguishment of native title.
61. These issues are discussed in the context of Article 6 under [I.1: Aboriginal and Torres Strait Islander Peoples](#).
62. Remedies for discrimination and breaches of human rights are also limited, as the AHRC can only conciliate complaints or make non-binding recommendations to the Australian Government. It is also very difficult to establish race discrimination in court, as the complainant bears the burden of proving discrimination. Complainants who pursue unlawful

⁷ Australian Government, *What Governments are Doing: Listing of Terrorist Organisations*, available at <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FA B001F7FBD?OpenDocument> at 6 May 2010.

discrimination claims in the courts are also exposed to adverse costs orders if they are unsuccessful (see [I.2: Australian Human Rights Commission](#)).

Education to Combat Prejudice and to Promote Tolerance and Understanding

63. Aboriginal peoples and people from non-English speaking backgrounds, especially migrants and refugees, are the most vulnerable groups to racial discrimination in everyday settings. There is plenty of evidence to show that attitudes towards diversity and tolerance in Australia remain tinged with racism, and that more education is required. For example, one survey in Victoria showed that nearly 1 in 10 respondents agreed with the statement that 'not all races are equal'.
64. Further, the Australian Government recently announced its commitment to enhance human rights education, but the effectiveness of these measures is likely to be significantly compromised by the lack of an overarching human rights instrument in Australia to support these educational initiatives.
65. The above issues in relation to Article 7 are discussed in [J: Education to Combat Prejudices and Promote Tolerance and Understanding](#).

Implementation of CERD Recommendations and Views in Australia

66. There are currently no institutional mechanisms in Australia for the implementation of the views and recommendations of the CERD Committee and other treaty bodies. The Australian Government recently introduced legislation to establish a Parliamentary Joint Committee on Human Rights to scrutinise legislation for compliance with Australia's international human rights obligations. However, the proposed new Committee has no mandate to consider the recommendations and views of UN human rights bodies in order to guide the implementation of those recommendations into Australian law, policy and practice.
67. Further, the Australian Government's position is that treaty body views are not binding. The Government should expressly state its commitment to responding in good faith to views and recommendations of treaty bodies. It is of great concern that the Australian Government recently decided to deport a man in defiance of the Human Rights Committee's granting of interim measures.
68. The above issues are discussed in [K: Domestic Implementation of CERD Views and Recommendations](#).

A. LEGAL FRAMEWORK AND GENERAL POLICIES (ARTICLES 1 & 2)

A.1 Discrimination Law

69. Australia has enacted the RDA which, together with state and territory anti-discrimination laws, provides protection from racial discrimination in Australia.⁸ The RDA, among other things:
- (a) prohibits both 'direct' and 'indirect' discrimination on the basis of race;
 - (i) direct discrimination is treating someone less favourably because of his or her race, colour, descent, national origin or ethnic origin than someone of a 'different' race would be treated in a similar situation; and
 - (ii) indirect discrimination is the imposition of unreasonable conditions or requirements with which a higher proportion of people of a particular race, colour, descent, national origin or ethnic origin cannot comply;
 - (b) provides for 'special measures' to assist particular disadvantaged groups to achieve substantive equality; and
 - (c) enables individuals to make a complaint if they have been discriminated against or vilified on the basis of race.
70. The RDA also includes specific prohibitions on discrimination in access to housing, land, goods, services, the right to join trade unions and employment.
71. With the exception of the issues set out below, the RDA generally reflects the provisions of CERD. However, the lack of constitutional protection against racial discrimination in Australia, coupled with the Australian judiciary's restrictive approach to the RDA's application, has the effect of compromising Australia's compliance with Articles 1 and 2.
72. The 'race power' in the Australian Constitution⁹ has been interpreted by the High Court of Australia as permitting the enactment of legislation which is detrimental and discriminatory on the basis of race.¹⁰ This leaves the RDA as the only protection against racial discrimination in Australia at a federal level. However, the effectiveness of the RDA is limited both by its status as an Act of Federal Parliament and its failure to criminalise racial vilification and to take an approach to discrimination that addresses both substantive equality and systemic discrimination.

⁸ *Discrimination Act 1991 (ACT); Anti-Discrimination Act 1977 (NSW); Anti-Discrimination Act 1992 (NT); Anti-Discrimination Act 1991 (Qld); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1998 (Tas); Equal Opportunity Act 1995 (Vic); Equal Opportunity Act 1984 (WA).*

⁹ *Australian Constitution s 51(xxvi).*

¹⁰ *Kartinyeri v Commonwealth* (1998) 152 ALR 540. However, see dissenting judgment of Kirby J: 'whatever else it permits section 51(xxvi) does not extend to the enactment of detrimental and adversely discriminatory special laws by reference to people's race'.

73. As an Act of Federal Parliament, the RDA will, on one hand, override provisions of state legislation that are inconsistent with its provisions (and it has been used to this effect),¹¹ while on the other, it does not prevent the Federal Parliament from enacting legislation which discriminates against people on the basis of race.
74. The Australian Government can, and has, enacted racially discriminatory laws under the powers vested in it by the Australian Constitution and has authorised states and territories to do the same. Examples include the *Native Title Amendment Act 1998* (Cth) (discussed in [F.1\(f\): Aboriginal and Torres Strait Islander Peoples – Native Title](#)) and the suite of legislation that facilitated the ‘emergency’ intervention into certain Northern Territory Aboriginal communities (discussed in [B.1: Northern Territory Intervention](#)).
75. The RDA is also limited by its failure to address the following aspects of the Convention:
- (a) it does not protect against discrimination on the grounds of religion, and neither does any other federal act; and¹²
 - (b) it is a complaints-based system that does not proactively address systemic discrimination or promote substantive equality. Although the RDA provides remedies for racial discrimination when a claim is proven, it does not require the Australian Government or its agencies to take active steps towards promoting equality in the provision of public services.
76. As part of the Australian Government’s Human Rights Framework, the Federal Attorney-General announced that the Government will review federal anti-discrimination legislation, including the RDA, with a view to consolidating and harmonising equality protection in a single Act of Federal Parliament.¹³ The terms of reference for that review have not been released, although it appears that the review will be limited to ‘removing regulatory overlap’, ‘addressing inconsistency’ and making the system ‘more user friendly’, rather than genuine substantive reform. There is no guarantee that the review will not result in the rights protected under the RDA being diminished.

¹¹ *Australian Constitution* s 109. See *Koowarta v Bjelke Peterson* (1982) 153 CLR 168; *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

¹² However, Sikhs and Jews are considered to be protected by the RDA as groups distinguished by ‘ethnic origin’. AHRC, *Isma-Listen: National Consultations on eliminating Prejudice Against Arab and Muslim Australians* (2004) page 29.

¹³ Attorney-General, the Hon Robert McClelland and Minister for Finance and Deregulation, the Hon Lindsay Tanner, ‘Reform of Anti-Discrimination Legislation’ (Press Release, 21 April 2010), available at http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-ReformofAnti-DiscriminationLegislation.

Proposed Recommendations for Concluding Observations (Articles 1 & 2)

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

THAT the Australian Government hold a referendum proposing that the Australian Constitution be amended to specifically recognise Aboriginal peoples as First Nations Peoples and original custodians of the land.

THAT the Australian Government enact comprehensive equality legislation which effectively and proactively promotes substantive racial equality and addresses systemic racial discrimination.

A.2 Special Measures

77. Special measures are 'positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life'.¹⁴ Special measures are an essential component in achieving substantive equality and eliminating racial discrimination.
78. Section 8 of the RDA provides an exception to the prohibition on racial discrimination on the basis that the measures are 'special' measures for the purpose of the CERD.
79. The meaning and scope of 'special measures' in Australian domestic law has been examined by the High Court of Australia. In *Gerhardy v Brown*, Brennan J stated that four elements must be satisfied to establish a special measure. Those elements are that the measure:¹⁵
- (a) provides a benefit to some or all members of a group based on race;
 - (b) has the sole purpose of securing the advancement of the group so the group can enjoy human rights and fundamental freedoms with others;
 - (c) is necessary for the group to achieve that purpose; and
 - (d) stops once the purpose has been achieved and does not set up separate rights permanently for different racial groups.
80. Australian law governing special measures falls short of the CERD Committee's requirements contained in General Recommendation No 32.¹⁶ In particular, Australian law does not provide legislative protections in respect of the following recommendations:

¹⁴ Rebecca Cook, 'Obligation to Adopt Temporary Special Measures under the Convention on the Elimination of All Forms of Discrimination Against Women' in Ineke Boerefijn et al (eds), *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (2003) 119.

¹⁵ *Gerhardy v Brown* (1985) 159 CLR 70, 133 (Brennan J).

¹⁶ CERD Committee, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (August 2009).

- (a) that the objective of the measure be either (i) alleviating and remedying present disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, (ii) protecting those people from discrimination, or (iii) preventing further imbalances;¹⁷
- (b) that membership of the group subject to special measures be self-identified;¹⁸
- (c) that consultation be conducted with affected communities and that they participate in the design and implementation of proposed special measures;¹⁹
- (d) that appraisals of 'need' for special measures be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective;²⁰ or
- (e) that measures be appropriate, legitimate and respect the principles of fairness and proportionality.²¹

81. The CERD Committee has stated that participation of the affected group is a minimum requirement for special measures.²² As outlined in [B.1: Northern Territory Intervention](#), the former and current Australian Governments have relied on special measures to implement a range of racially discriminatory measures as part of its 'emergency' intervention into certain Aboriginal communities in the Northern Territory.

Proposed Recommendations for Concluding Observations (Articles 1 & 2)

THAT the Australian Government take all legislative and administrative steps necessary to ensure that special measures in Australian law are in accordance with CERD General Recommendation 32.

A.3 Australian Human Rights Commission

82. The AHRC, formerly the Human Rights and Equal Opportunity Commission, is Australia's National Human Rights Institution (NHRI). It administers a range of anti-discrimination legislation, including the RDA. The AHRC investigates and conciliates complaints under federal anti-discrimination legislation, including the RDA, conducts inquiries, publishes annual reports on Aboriginal peoples' social justice and native title, advises parliaments and

¹⁷ CERD Committee, *General Recommendation No 32*, above n 16, para [22].

¹⁸ CERD Committee, *General Recommendation No 32*, above n 16, para [34].

¹⁹ CERD Committee, *General Recommendation No 32*, above n 16, para [18].

²⁰ CERD Committee, *General Recommendation No 32*, above n 16, para [17].

²¹ CERD Committee, *General Recommendation No 32*, above n 16, para [16].

²² CERD Committee, 'Committee on Elimination of Racial Discrimination Discusses States' Obligation to Undertake Special Measures' (Press Release, 5 August 2008).

- governments about the development of laws, programs and policies to protect human rights and increases public awareness of human rights through education and public discussion.²³
83. CERD is annexed to the AHRC's constitutive act and ostensibly fulfils the Australian Government's Article 2 obligation to take all measures to ensure that Australian law, and its ensuing practice, is in accordance with CERD and General Recommendation 17. However, as set out below, Australia's compliance is limited by the scope of the AHRC's powers and functions as set out in its constitutive act, and since 1999, by the absence of a full-time Race Discrimination Commissioner. This also means that the Australian Government fails in its obligation to support the proper performance of its NHRI under the Paris Principles.
84. The complaints-based system allows the AHRC to investigate and conciliate complaints lodged by individuals. In 2008-09, the number of complaints received under the RDA was more than double the number received in 2004-05. However, in relation to complaints of unlawful discrimination, matters that cannot be conciliated can be taken by complainants to the courts, who risk being ordered to pay the other side's legal costs if they lose. Further, the AHRC does not have the power to initiate complaints independently. Hence individuals themselves, who are often vulnerable, are responsible for asserting their rights and ensuring that the RDA is complied with. In relation to complaints of human rights breaches, the AHRC cannot provide affected persons with effective or enforceable remedies²⁴ and if AHRC conciliation fails, individuals cannot take the matter to court.
85. The AHRC has experienced funding decreases which, in 2008-9 resulted in all AHRC business units having their budget reduced by 14.5%.²⁵ In May 2010, the Australian Government announced a funding increase of \$6.6 million over four years. However, the funding is directed towards the implementation of a new educational framework for the 'protection and promotion' of human rights in Australia.²⁶ As set out in section [A.1: Discrimination Law](#), the framework raises issues in relation to Australia's compliance with CERD as it does not address the lack of legal and constitutional protections against discrimination.
86. The AHRC produces reports that indicate when Australia is not meeting its international human rights obligations under the treaties that it has ratified. However, these reports are not

²³ AHRC website, <http://www.hreoc.gov.au>.

²⁴ Elizabeth Evatt, 'Meeting Universal Human Rights Standards: The Australian Experience', (Speech delivered at Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 22 May 1998) at page 7.

²⁵ Budget appropriation for 2007-08 was \$15.5 million, reduced to \$14.981 million at additional estimates with the withdrawal of funding for workplace relations reform and the application of the additional 2% efficiency dividend: AHRC, *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (1 September 2008) page 217.

²⁶ Australian Government, *Budget Measures: Budget Paper No 2: 2010-11: Attorney-General's Portfolio* (2010) page 94.

binding on Government. In many respects, therefore, the AHRC is only as effective as the government of the day allows it to be.²⁷

Proposed Recommendations for Concluding Observations (Articles 1 & 2)

THAT the Australian Government increase recurrent funding to the AHRC to a level where it will be able to properly protect and promote human rights through its policy development, education, research, and inquiry functions.

THAT the Australian Government expand the function and powers of the AHRC so that it meets the standards for proper performance under the Paris Principles and can effectively:

- consider (on its own motion) and report on the human rights implications of any existing or proposed federal, state or territory legislation;
- initiate investigations of its own motion and conduct those investigations appropriately, including using powers to enter and search premises and to compel the production of information and evidence where necessary;
- on its own motion, seek to enforce conciliation agreements;
- make binding codes of conduct or guidelines setting out the process for the resolution of complaints; and
- intervene in all proceedings where significant human rights arise.

THAT the Australian Government appoint a full-time Race Discrimination Commissioner.

A.4 Regulating Australian Corporations Overseas

87. As a party to CERD, Australia is required to take appropriate means, including legislation, to prohibit racial discrimination by any persons, group or organisation (Article 2(1)(d)). This includes regulating the impact of the activities of corporations registered in Australia on the rights of Indigenous people outside of the jurisdiction.²⁸ However, there is no comprehensive legal framework that imposes human rights obligations on Australian corporations when they are operating overseas, and only very limited laws or regulations which would otherwise require Australian corporations to respect the rights of overseas Indigenous communities that are affected by a company's transnational operations.²⁹

²⁷ Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (Doctoral Thesis, Monash University, 2004) pages 12-14.

²⁸ See article 2(1)(d) and article 5(e) of CERD and CERD Committee, *General Recommendation 23: Indigenous Peoples* (1997). See also CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc CERD/C/USA/CO/6 (8 May 2008) paragraph [30].

²⁹ Australia does not have a federal bill of rights. Two jurisdictions in Australia (Victoria and the ACT) have enacted dedicated human rights legislation, but that legislation has only limited application to private companies exercising functions 'of a public nature' and the legislation is presumed not to operate extra-

88. Although the *Criminal Code Act 1995* (Cth) allows for corporations to be ascribed with criminal responsibility for direct or indirect involvement in a limited number of the most serious international crimes, such as genocide, torture and apartheid,³⁰ to date there has only been one known investigation by the Australian Federal Police and there have not been any prosecutions of corporations under those provisions.
89. It is also possible to make a complaint about the conduct of Australian corporations overseas to the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises (**NCP**) (see ANZ Bank case study below). However, there are serious shortcomings to the effectiveness and utility of the NCP process, including that the Australian NCP:
- (a) cannot make enforceable decisions and instead assists in facilitating mediated outcomes, or makes unenforceable findings and recommendations about complaints made to it;
 - (b) has taken a narrow and technical view of its mandate in some cases;³¹ and
 - (c) is currently under-resourced. For example, it has no full-time staff, no investigative powers and limited expertise in international human rights law.
90. An even more fundamental problem is that a successful OECD complaint relies upon the willingness of the multinational to engage in a good faith, structured mediation process. Where companies refuse to accept that there is a potential breach, or refuse to engage with the process entirely, there is ultimately nothing the NCP can do.
91. It is well established that the extractives sector (oil, gas and mining) can have a significant impact on human rights.³² Australian resources companies increasingly operate in developing countries in the Asia Pacific region, Latin America and Africa. These companies can have a considerable impact on the economic development of these areas, both positive and negative. When these activities overlap with the traditional territories of Indigenous peoples it can result in threats to Indigenous peoples' human rights, including land rights, workers' rights, cultural rights and the right to health.

territorially. The RDA protects people from racial discrimination in Australia but it is presumed not to have any extra-territorial effect.

³⁰ In 2002 Australia introduced the offences of genocide, crimes against humanity and various war crimes (including slavery, torture, rape and apartheid) into the *Criminal Code Act 1995* (Cth), when it ratified the *Rome Statute of the International Criminal Court*. The liability of corporations is governed by Part 2.5 of the *Criminal Code*, which provides, among other things, for the *mens rea* of corporations to be established.

³¹ As demonstrated by its rejection of a complaint about ANZ Bank's involvement in devastating logging practices in Papua New Guinea (see case study).

³² The extractive sector dominated the complaints of abuse surveyed by the Special Representative on Business and Human Rights, in which 28% of all complaints related to the extractives industry, the highest of any sector: see John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Addendum, Corporations and Human Rights — A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, A/HRC/8/5/Add.2 (23 May 2008).

92. There have been a number of reports of the adverse effects of transnational corporations registered in Australia in relation to their activities exploiting natural resources in developing countries outside Australia.³³ These reports and the case studies below highlight the need for greater regulation of corporate activity in Australia in order to satisfy Articles 2.1(d) and 4(a) and (b) of CERD.

Case Study: OceanaGold in Didipio, Philippines

The Australian mining company OceanaGold's proposed gold and copper mining project in Didipio, the Philippines, has been criticised by the local and Indigenous people from the Kasibu and Quirino provinces for years.³⁴ The Indigenous people claim that they have been denied the right to give 'free, prior and informed consent' to the project³⁵ and there have been allegations of bribes, harassment and intimidation.³⁶ According to Oxfam Australia, community members have been forced to sell or provide access to their lands at a price determined by the company.³⁷ The Indigenous peoples' land is essential for their survival as they derive their livelihood from agriculture. Furthermore, homes of Indigenous peoples have been demolished during the land clearing process, allegedly without payment of just compensation and without providing options for relocation and resettlement.³⁸ The Philippine Human Rights Commission has investigated OceanaGold's demolition of 187 houses in Didipio in 2008.³⁹ In March 2010 a Philippine court denied an application by OceanaGold to continue demolishing homes.

³³ Oxfam Australia has submitted several reports on the effects of Australian mining activity overseas, through its previous Mining Ombudsman program see http://www.oxfam.org.au/resources/pages/search.php?search=mining&order_by=relevance&archive=0&k=&per_page=400 at 20 April 2010.

³⁴ Christina Hill, *The Australian Mining Industry Overseas: OceanaGold in the Philippines*, Friends of the Earth Australia (September 2008) <http://www.foe.org.au/resources/chain-reaction/editions/103/undermining-human-rights-the-australian-mining-industry-overseas> at 20 April 2010.

³⁵ See Oxfam Mining Ombudsman Report, above n 33. The principle of 'free, prior and informed consent' is recognised in articles 10 and 23(2) of DRIP. The principle is also reflected in CERD art 5(c), in the framework of the United Nations Special Representative of the Secretary General for Business and Human Rights, John Ruggie, and is recognised and supported by the International Labour Organisation and the Inter-American Court of Human Rights.

³⁶ Oxfam Australia, *Our Work with Communities: Didipio, The Philippines* (April 2010) <http://www.oxfam.org.au/explore/mining/our-work-with-communities/didipio-the-philippines> 14 April 2010.

³⁷ Oxfam Mining Ombudsman Report, above n 33, page 19

³⁸ Cultural survival, as above, also Oxfam Mining Ombudsman Report, above n 33, p. 19

³⁹ Cultural survival, as above.

Case Study: ANZ Bank

In 2006, five non-governmental organisations made a complaint to the OECD National Contact Point in Australia, alleging that the ANZ Banking Group (**ANZ**), through its financial support of Malaysian-owned forestry company Rimbunan Hijau (**RH**), operating in Papua New Guinea, had breached provisions of the OECD's Guidelines for Multinational Enterprises.⁴⁰ The operations of RH in Papua New Guinea allegedly involve environmentally devastating logging practices.⁴¹ The operations have allegedly included the destruction of cultural sites, artefacts and grave sites, as well as the illegal appropriation of forest and lands.⁴² The logging has led to river pollution and habitat reduction, leaving local communities without adequate food resources.⁴³ The claimants alleged that ANZ's responsibilities extended to the human rights impacts of RH's practices in PNG, given the commercial relationship between ANZ and RH. ANZ stated that it merely provided financial and banking services to RH, whereas the claimants argued that ANZ's role was more akin to that of an investor in the project.⁴⁴ In any event, the ANCP did not accept the case, stating that it was unable to ascertain the degree to which ANZ has the capacity to influence RH's logging decisions in PNG.⁴⁵

In October 2008, the PNG Supreme Court overturned a 2007 National Court decision to grant RH logging rights in Kamula Doso. Just prior to the commencement of the hearing, the company conceded its logging rights were awarded illegally,⁴⁶ thus substantiating one of the primary arguments advanced in the ANZ complaint. Notwithstanding these victories,

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- ⁴⁰ In particular the human rights provisions contained in Article II, Section 2, which provide that "Enterprises should respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments" and the obligations in Article II, Section 10 which provides that "Enterprises should encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines": *Statement by the Australian National Contact Point* (October 2006) http://www.ausncp.gov.au/content/docs/366_415_ANZ%20Statement.pdf at 20 April 2010.
- ⁴¹ Australian Conservation Foundation et al, *Submission of Specific Instance under the OECD Guidelines for Multinational Enterprises to the Australian National Contact Point Concerning: Facilitation by the Australia and New Zealand Banking Group Limited of Illegal and Environmentally and Socially Destructive Forestry Operations in Papua New Guinea* (August 2006) available at http://www.acfonline.org.au/uploads/res/res_oecdanz.pdf at 14 April 2010.
- ⁴² World Rainforest Movement, *Papua New Guinea: Large-scale Logging and Human Rights Abuses* (August 2006) <http://www.wrm.org.uy/bulletin/109/PapuaNG.html> at 14 April 2010.
- ⁴³ World Rainforest Movement, above n 42.
- ⁴⁴ Australian National Contact Point, above n 40.
- ⁴⁵ Australian National Contact Point, above n 40.
- ⁴⁶ The Papua New Guinea Eco-Forestry Forum, 'Supreme Court rules RH logging rights illegal' (Press Release, 29 October 2008) available at: http://rightsandclimatechange.files.wordpress.com/2008/10/png_logging_victory.pdf.

unsustainable and illegal logging continues to be widespread in PNG, and whether forest communities will have a secure future remains unclear.

Proposed Recommendations for Concluding Observations (Articles 1 & 2)

THAT Australia takes appropriate legislative and administrative measures to regulate the extra-territorial activities of Australian transnational corporations and to prevent activities that negatively impact on the enjoyment of rights of Indigenous peoples.

THAT Australia ensures adequate judicial and non-judicial grievance mechanisms are in place to hold transnational corporations registered in Australia accountable for their actions overseas, especially when their actions violate the human rights of Indigenous peoples *and when the local government is unable or unwilling to take action.*

THAT Australia ensures that Indigenous peoples affected by the activities of transnational Australian corporations operating overseas have the right to free, prior and informed consent, consistent with Australia's support of the DRIP.

A.5 Multicultural Policy

93. On the whole, Australia has effectively managed cultural diversity with proactive and positive multicultural policies that have fostered social inclusion and embraced cultural, linguistic and faith diversity. These policies have always stipulated that multiculturalism requires an overriding commitment to Australia, including its underlying democratic and legal framework.
94. However, challenges discussed in this NGO report in areas such as settlement, social inclusion, economic participation, employment, education, English language training, health, housing and discrimination remain acute for many migrant and refugee communities, raising concerns about Australia's compliance with Articles 1 and 2 of CERD.
95. Australia's last multicultural policy, the former Australian Government's *Multicultural Australia United in Diversity* (2003-2006) expired in 2006. A new multicultural advisory body was established by the current Australian Government in late 2008, however an updated multicultural policy has not been released. An updated contemporary multicultural policy is needed to reflect an increasingly culturally diverse society and to strengthen the commitment and capacity to address ongoing issues of discrimination, barriers of access and inequity in delivery of services.

Proposed Recommendations for Concluding Observations (Articles 1 & 2)

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

A.6 The Durban Review

96. In April 2009, the Australian Government announced that it would boycott the Durban Review Conference, which raises concerns in relation to Australia's obligations under Articles 1 and 2 of CERD. Australia's Foreign Minister, the Hon Stephen Smith MP, made a decision to boycott the Conference on the basis that it may provide a forum to 'air offensive views, including anti-Semitic views'.⁴⁷ This decision was criticised by the UN High Commissioner for Human Rights, noting that the text for the Conference did not contain offensive or prejudicial views.⁴⁸
97. Australia's Social Justice Commissioner, Tom Calma, participated in the Conference. He expressed his concern that Australian parliamentarians had called on him to 'reconsider' his decision to attend the conference, despite his role being politically independent.⁴⁹
98. The Durban Declaration and Programme of Action, together with the 2010 Outcome Document of the Durban Review Conference, should provide a framework for the Australian Government to address issues of racism, particularly in relation to Aboriginal peoples, refugee, migrant and other minority communities. The Australian Government maintains that its existing legislative, policy and human rights education structures 'mirror' the requirements in the Durban Declaration and Programme of Action.⁵⁰
99. However, the Australian Government has not effectively implemented the Durban Conference outcomes, particularly with respect to Aboriginal peoples. In particular, the Australian Government has:⁵¹
- (a) suspended the operation of the RDA as part of the Northern Territory Intervention (discussed in further detail in [section B.1: Northern Territory Intervention](#));
 - (b) since 2001, failed to adequately or effectively address the significant gap in development outcomes between Aboriginal peoples and other Australians (discussed

⁴⁷ ABC News (Online), *Aust to Boycott UN's Geneva Racism Talks* (19 April 2009) <http://www.abc.net.au/news/stories/2009/04/19/2546768.htm> at 14 April 2010.

⁴⁸ ABC News (Online), *Australia's Boycott of Racism Summit Stuns UN* (20 April 2009) <http://www.abc.net.au/news/stories/2009/04/20/2547692.htm> at 14 April 2010.

⁴⁹ ABC News (Online), *Calma Defends Attending Boycotted Racism Talks* (24 April 2009) <http://www.abc.net.au/news/stories/2009/04/24/2551439.htm>.

⁵⁰ Australian Government, *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* (2010).

⁵¹ See, Commissioner Tom Calma, 'Indigenous Issues in the Durban Review' (Speech delivered at the Castan Centre Public Forum: Can the UN Combat Racism – A Preview of the Durban Review Conference, Melbourne, 20 February 2009) available at http://www.hreoc.gov.au/about/media/speeches/race/2009/20090220_Durban_Review.html.

in further detail in [B.4: Close the Gap](#) and [G.1: Aboriginal and Torres Strait Islander Peoples](#));

- (c) consistently failed to respect Aboriginal peoples right to self determination and to representation and participation in decision making;
- (d) not adequately addressed Aboriginal peoples' overrepresentation in the criminal justice system (section [F.1\(a\) and \(b\): Aboriginal and Torres Strait Islander Peoples – Imprisonment and Aboriginal Women in Prison](#)); and
- (e) failed to improve Aboriginal peoples' access to their cultural rights to land (section [F.1\(f\): Aboriginal and Torres Strait Islander Peoples – Native Title](#)).

Proposed Recommendations for Concluding Observations (Articles 1 & 2)

THAT the Australian Government immediately review its current legislative and policy provisions regarding racial discrimination against the benchmarks set out in the Durban Plan of Action, and where it fails to meet those benchmarks, implement measures to ensure compliance.

A.7 Discrimination against Non-Citizens

100. Under CERD Australia is required:

- (a) to guarantee equality between citizens and non-citizens in the enjoyment of their rights to the extent recognised under international law;
- (b) only to discriminate between citizens and non-citizens for a legitimate aim and in a proportionate manner;
- (c) to 'reduce statelessness'; and
- (d) to ensure the security of non-citizens particularly with regard to arbitrary detention.⁵²

101. There are six issues that are of particular concern in the way that Australia treats non-citizens and which violate a range of the civil and political rights of non-citizens:

- (a) mandatory immigration detention of all 'unlawful non-citizens';
- (b) removal of procedural rights for non-citizens in parts of Australia that have been excised from Australia's migration zone;
- (c) the suspension of asylum claims for all Afghan and Sri Lankan asylum seekers;
- (d) the law, policy and practice allowing the refoulement of non-citizens;
- (e) the ability to indefinitely detain stateless people; and
- (f) the deportation and removal of long-term residents on 'character grounds.

⁵² CERD Committee, *General Recommendation No 30: Discrimination against Non Citizens* (October 2004), see in particular paras [3], [4], [16] and [19].

102. Each of these issues is discussed in part [F.4: Asylum Seekers, Refugees and Non-Citizens](#) below.

(a) Citizenship Test

103. In October 2007, the Australian Citizenship Test was introduced. This test required applicants for citizenship to pass a written test, in English, in order to be conferred with citizenship. Given its formality and basis in a written test, the test was criticised for discriminating against non-English speaking migrants, and particularly refugees with low level English language skills and low levels of literacy and comprehension.⁵³ For example, statistics in March 2009 showed that 42.3% of humanitarian entrants to Australia fail the test on their first sitting (6,275 people). In contrast, skilled migrants passed the test at a rate of 99% on their first sitting.⁵⁴

104. In October 2009, the Australian Government amended the Citizenship Test, in response to a report that found that the current test is flawed, intimidating and discriminatory.⁵⁵ Some positive changes to the test were made, including the rewriting of the questions in plain English and the development of alternative pathways to citizenship for refugees and disadvantaged or vulnerable migrants, such as completing a course, rather than sitting a test. However, despite some positive amendments, the Government also increased the pass mark from 60% to 75%, thereby making passing the test more difficult. This amendment was not recommended by the review committee.

105. Although the amendments are welcome, the Government must ensure that prospective citizens are aware of the alternative pathways to citizenship, in order to ensure that non-English speaking migrants are not discriminated against in their applications for citizenship.

Proposed Recommendations for Concluding Observations (Articles 1 & 2)

THAT the Australian Government ensure that prospective citizens are aware of the alternative pathways to citizenship and the support services available to assist members of the community with low literacy and English language skills to obtain citizenship. Particular measures should be taken to ensure support is provided to women from refugee backgrounds.

⁵³ This is the position of the Federation of Ethnic Communities Councils of Australia in their submission to the National Human Rights Consultation, available at http://www.fecca.org.au/Submissions/2009/submissions_2009019.pdf, cited with approval by the Multicultural Council for the Northern Territory, in its Submission for the Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and other Measures) Bill 2009.

⁵⁴ Federation of Ethnic Communities Councils of Australia, *Submission for the Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and other Measures) Bill 2009* (July 2009) para [8], available at http://www.fecca.org.au/Submissions/2009/submissions_2009029.pdf.

⁵⁵ Australian Citizenship Test Review Committee, *Moving Forward... Improving Pathways to Citizenship: A Report by the Australian Citizenship Test Review Committee*, available at http://www.citizenship.gov.au/_pdf/moving-forward-report.pdf at 15 June 2010.

B. LEGAL AND POLICY FRAMEWORK FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (ARTICLES 1 & 2)

B.1 The Northern Territory Intervention

106. In 2007, the former Australian Government passed a package of legislation, known as the ‘Northern Territory Intervention’ or the ‘Northern Territory Emergency Response’ (the **Northern Territory Intervention**). The Northern Territory Intervention raises serious concerns in relation to Australia’s compliance with Articles 1 and 2 of CERD, as the legislative measures are targeted directly at Aboriginal people, having the effect of limiting the human rights of affected Aboriginal peoples.⁵⁶
107. The Northern Territory Intervention was targeted directly at Aboriginal peoples, but was passed without consultation with Aboriginal representatives and affected communities. This occurred despite the former Australian Government’s statement in the Common Core Document that it was committed to consulting with and involving Aboriginal peoples in decisions involving policies and programs that have an impact on them.⁵⁷
108. The Northern Territory Intervention suspends the operation of the RDA (as well as Northern Territory and Queensland anti-discrimination laws) in respect of all acts or omissions done under or for the purposes of the Intervention.⁵⁸ The Intervention also restricts the following rights of Aboriginal peoples:
- (a) property rights: the compulsory acquisition and control of specified Aboriginal land and community living areas through renewable five-year leases, without compensation⁵⁹ and Government control of designated Aboriginal town camps (see [F.1\(h\): Northern Territory Intervention – Compulsory Five Year Leases](#))⁶⁰
 - (b) social security, adequate standard of living, health and education: the compulsory income management regime includes measures such as quarantining 50% of welfare payments and 100% of lump sum payments for food and other essentials, and links

⁵⁶ *Northern Territory National Emergency Response Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth); Families, Community Service and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth).*

⁵⁷ Australian Government, *Common Core Document Forming Part of the Reports of State Parties Incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights* (June 2006) para [181].

⁵⁸ See, eg, *Northern Territory National Emergency Response Act 2007 (Cth)* ss 132 and 133; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)* ss 4 and 5.

⁵⁹ *Northern Territory National Emergency Response Act 2007 (Cth)* s 31.

⁶⁰ *Northern Territory National Emergency Response Act 2007 (Cth)* s 47.

- welfare payments to children's school attendance (see [C.1\(a\): Northern Territory Intervention – Basics Card](#)).
- (c) self-determination: lack of consultation with affected communities prior to the implementation of the Intervention measures, and powers given to the Australian Government to take over representative community councils.⁶¹ Alcohol and pornographic materials are banned in prescribed areas, with fines and terms of imprisonment imposed for failure to abide by the restrictions.
 - (d) the right to work: the abolition of Community Development Employment Projects (subsequently partially-reinstated), which employed Aboriginal people in a wide variety of jobs directed towards meeting local community needs (see [G.1\(f\): Aboriginal and Torres Strait Islander Peoples – Work Rights](#)).
 - (e) child rights: the failure to use a children's rights framework to address the complex issues of the protection of children from sexual abuse in Aboriginal communities.
 - (f) remedies: consideration of Aboriginal customary law and cultural practice of an offender in criminal proceedings for all offences in bail and sentencing hearings has been limited.⁶²
109. The Northern Territory Intervention is the subject of a Request for Urgent Action to the CERD Committee.⁶³
- (a) Justification and Reactions to the Northern Territory Intervention**
110. The Northern Territory Intervention was justified by the former Australian Government as being necessary to prevent child sex abuse in Aboriginal communities. In June 2007, the Northern Territory Government released a report on the protection of children from sexual abuse in Aboriginal communities, entitled *Little Children Are Sacred*.⁶⁴ The report made 97 recommendations to the Northern Territory Government about how best to support and empower communities to prevent child sexual abuse now and in the future. However, there was very little relationship between the recommendations in the *Little Children Are Sacred* report and the measures adopted in the Northern Territory Intervention.⁶⁵

⁶¹ Northern Territory National Emergency Response Act 2007 (Cth) part 5.

⁶² Northern Territory National Emergency Response Act 2007 (Cth) part 6.

⁶³ Request for Urgent Action (February 2009) is available at <http://www.hrlrc.org.au/content/topics/equality/northern-territory-intervention-request-for-urgent-action-cerd/>.

⁶⁴ Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007).

⁶⁵ See, eg, Parliament of Australia Parliamentary Library, *Briefing Book for the 42nd Parliament: National Emergency Intervention in the Northern Territory* (2008), available at http://www.aph.gov.au/library/Pubs/BriefingBook42p/18SocialPolicy-IndigenousAffairs/emergency_intervention.htm.

111. The former Aboriginal and Torres Strait Islander Social Justice Commissioner described the Northern Territory Intervention measures as 'punitive and racist'⁶⁶ and inconsistent with international human rights conventions and the RDA.⁶⁷ The Human Rights Committee, the CERD Committee, the Committee on Economic, Social and Cultural Rights, the Special Rapporteur on Health and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (**Special Rapporteur on Indigenous People**) have all described the Northern Territory Intervention as racially discriminatory and have called for the full, immediate and unconditional reinstatement of the RDA.⁶⁸

(b) Northern Territory Intervention Review

112. After one year of operation, the Federal Government established a Northern Territory Emergency Response Review Board to conduct an 'independent and transparent review of the Northern Territory Intervention' (**Review Board**).⁶⁹ The Review Board released its report on 13 October 2008, concluding that the situation in remote Northern Territory communities and town camps remained 'sufficiently acute to be described as a national emergency and that the Northern Territory Intervention should continue'.⁷⁰

⁶⁶ Russell Skelton, 'Rights Watchdog Proposes Overhaul of Howard's Emergency Intervention', *The Age* (Melbourne), 12 February 2008, available at <http://www.theage.com.au/news/national/pressure-to-overhaul-intervention/2008/02/11/1202578694335.html>.

⁶⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2007) pages 215-19.

⁶⁸ See UN Committee on the Elimination of All Forms of Racial Discrimination, *Urgent Action Letter to the Australian Government dated 13 March 2009 in relation to the Northern Territory Emergency Response*, available at <http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf>; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia* (March 2009) UN Doc CCPR/C/AUS/CO/5; Committee on Economic, Cultural and Social Rights, *Concluding Observations on the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (May 2009); *Statement of James Anaya, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, (27 August 2009); James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Observations on the Northern Territory Emergency Response in Australia*, UN Doc A/HRC/15 (February 2010) paras [15]-[16], Anand Grover, United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Addendum: Mission to Australia*, UN Doc A/HRC/14/20/ADD.4 (3 June 2010) para [64].

⁶⁹ Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'NT Emergency Response Review Board' (Press Release, 6 June 2008) at http://www.facsia.gov.au/internet/jennymacklin.nsf/printer/nter_measure_23oct08.htm.

⁷⁰ Northern Territory Emergency Response Review Board, Australian Government, *Report of the Northern Territory Emergency Response Review Board* (October 2008) page 10; Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Compulsory Income Management to Continue as a Key NTER Measure' (Press Release, 23 October 2008), at http://www.facsia.gov.au/internet/jennymacklin.nsf/printer_measure_23oct08.htm.

113. The Review Board also expressed its concern about the lack of Federal Government consultation with affected Aboriginal communities prior to the introduction of the measures. The Review Board observed that:

... many of the [Northern Territory Intervention] measures were not as effective as they should have been because Aboriginal people were not involved in their original design. There was no consultation or engagement. This Government is committed to real consultation with Aboriginal people in the Northern Territory so the [Northern Territory Intervention] measure can be improved.⁷¹

114. In reaching this conclusion, the Review Board made three overarching recommendations:

- (a) there is a continuing need to address the unacceptably high level of disadvantage and social dislocation experienced by Aboriginal people living in remote communities in the Northern Territory;
- (b) there is a requirement for a relationship with Aboriginal people based on genuine consultation, engagement and partnership; and
- (c) there is a need for government actions affecting Aboriginal communities to respect Australia's human rights obligations and to conform with the RDA.⁷²

(c) Consultation with Affected Communities

115. From June to August 2009, the Department of Families, Housing, Community Services and Indigenous Affairs undertook a series of consultations with Aboriginal people in the Northern Territory about the future directions for the Northern Territory Intervention (**Redesign Consultations**).⁷³ The Redesign Consultations purported to seek to redesign a number of measures, including income management, alcohol and pornography restrictions, and five-year leases.⁷⁴ However, serious concerns have been raised regarding significant procedural and substantive failures of the consultation process, including:

- (a) lack of independence;
- (b) lack of notice to communities about the consultations;

⁷¹ Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper* (2009) page 3.

⁷² *Report of the NTER Board*, above n 70, page 12.

⁷³ Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (November 2009) page 5.

⁷⁴ Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations* (November 2009) at 7 available at http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_consultations.aspx.

- (c) the absence of interpreters and inadequate explanations of the Northern Territory Intervention measures and complex legal concepts;
- (d) the fact that the consultations were on matters which the government had already implemented and determined would continue, such as compulsory income quarantining; and
- (e) inadequate recording and reporting of consultations.⁷⁵

(d) Proposed Amendments to the Northern Territory Intervention

116. In December 2009, the Federal Government introduced two bills into Parliament to amend the Northern Territory Intervention: the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009* (Cth) and the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009* (Cth) (**Government Bills**). The Government Bills were passed by the House of Representatives on 24 February 2010 and are likely to be debated in the Senate during the May or June 2010 sitting of Parliament.⁷⁶
117. The Government purports that the Bills will make the following changes to the Northern Territory Intervention measures:
- (a) extend compulsory income management beyond the Northern Territory Intervention to apply to prescribed areas and communities across the whole of Australia and modify somewhat the categories of people affected by quarantining (welfare quarantining is discussed in detail in part [C.1: Northern Territory Intervention – Basics Card](#) and [G.1\(d\)\(iii\) Northern Territory Intervention – Social Security](#) below);⁷⁷
 - (b) restore the application of the RDA to the Northern Territory Intervention measures;⁷⁸
 - (c) ensure more flexibility and community consultation with respect to the blanket alcohol restrictions.⁷⁹

⁷⁵ Nicholson, Behrendt, Vivian, Watson and Harris, *Will they be Heard? — A Response to the NTER Consultations June to August 2009* (November 2009). See also, Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation Final Report* (September 2009).

⁷⁶ Statement by Dr Jeff Harmer AO, Secretary, Department of Families, Housing, Community Services and Indigenous Affairs to the UN Permanent Forum on Indigenous Issues under Item 4: 'Implementation of the UN Declaration on the Rights of Indigenous Peoples', delivered on 22 April 2010.

⁷⁷ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (Cth) sch 2.

⁷⁸ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (Cth) sch 1.

⁷⁹ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (Cth) sch 4.

- (d) provide more clarity on the permitted uses, objectives and approval processes with respect to the five-year leases;⁸⁰
- (e) increase the powers of the Australian Crime Commission in relation to violence and child abuse.⁸¹

(e) Special Measures

118. Currently the Northern Territory Intervention legislation specifies that the provision of the Northern Territory Intervention legislation, and any acts done under or for the purposes of the legislation are, for the purposes of the RDA, 'special measures'.⁸² The Government Bills repeal those provisions.⁸³ Instead, an object clause is proposed that provides 'the object of this Part is to enable special measures to be taken'.
119. As a result, the following Northern Territory Intervention measures are deemed to be special measures: alcohol restrictions; pornography restrictions; five-year leases; community store licensing; controls on use of publicly funded computers; law enforcement powers; and business and management powers.
120. However, simply altering the objects clause, rather than substantively redesigning the measures themselves, does not satisfy the criteria necessary for the measure to be a 'special measure'. For example:
- (a) the measures have not been developed with the participation⁸⁴ and consent⁸⁵ of affected Aboriginal individuals and communities (an obligation rests on the Government to ensure that no decision directly affecting Aboriginal people are taken without their consent);⁸⁶ and

⁸⁰ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (Cth) sch 5.

⁸¹ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (Cth) sch 7.

⁸² *Northern Territory National Emergency Response Act 2007* (Cth) s 132(1); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 4(2); *Families, Community Service and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth)s 4(1).

⁸³ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009* (Cth) sch 1 item 1.

⁸⁴ CERD Committee, *General Recommendation No 23: Indigenous Peoples* (18 August 1997) para [18].

⁸⁵ AHRC, *Social Justice Report 2007* (11 February 2008) 261, available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/index.html.

⁸⁶ CERD Committee, *General Recommendation No 23*, above n 84, para [18] and CERD Committee, *General Recommendation No 32*, above n 16.

- (b) there is insufficient evidence to demonstrate that the measures will be for the benefit of Aboriginal people and secure the advancement of the realisation of other human rights.

121. It is clear that the Federal Government's Redesign Consultations were conducted in part to demonstrate participation and consent to support the classification of particular measures as special measures. However, post-implementation consultation, even if adequate, cannot be used to retrospectively justify measures as 'special measures'.⁸⁷ In any event, there are a number of significant deficiencies in these consultations, including their design (see paragraph 115 above).

(f) Proposed Reinstatement of the Racial Discrimination Act

122. The Government states that the Bills will reinstate the RDA. However, it is unclear whether the RDA will be properly reinstated in such a way that it could be used to challenge any Northern Territory Intervention measures as discriminatory.

123. The Government Bills do not provide for a 'notwithstanding' clause which would ensure that the provisions of the RDA would prevail over any inconsistent (racially discriminatory) provisions in the Northern Territory Intervention legislation. The Australian Government maintains that a 'notwithstanding' clause is not required, and that the proposed legislation reinstates the RDA in full. However, that is clearly not the case. The Government Bills alter the 'objects' clause for the Northern Territory Intervention laws to state that the laws are intended to be 'special measures'. This drafting makes it very difficult to successfully challenge the provisions of the Bills, as Australian courts are required to interpret legislation consistently with the purpose of legislation.⁸⁸ If the amended purpose leads to an interpretation that the laws are special measures, then they cannot be successfully challenged.

124. For reinstatement of the RDA to be meaningful, it must provide unequivocal protection against racial discrimination, which includes the right to a remedy where there is a finding that a particular measure is discriminatory.

⁸⁷ Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 78 page 14.

⁸⁸ *Acts Interpretation Act 1901* (Cth) s 15AB.

Proposed Recommendations for Concluding Observations (Article 2)

THAT the Australian Government repeal those aspects of the Northern Territory Intervention legislation that do not meet the test for 'special measures' (as set out in General Comment No. 32) and which are otherwise incompatible with domestic and international human rights standards, and fully reinstate the operation of the RDA.

THAT the Australian Government establish a policy of consultation with Aboriginal and Torres Strait Islander communities that meets the benchmarks established in the DRIP.

THAT the Australian Government ensure that the RDA provides the legislative protections which reflect the standards for special measures set out in General Comment No 32.

B.2 Aboriginal Representative Body

125. The historic dispossession and disenfranchisement of Aboriginal peoples was further perpetuated by the abolition in 2004 of the Aboriginal and Torres Strait Islander Commission (**ATSIC**). Composed of elected Aboriginal representatives, ATSIC was the main policy-making body in domestic Aboriginal peoples' affairs and also represented the interests of Aboriginal peoples internationally. ATSIC was replaced in late 2004 with a 'National Indigenous Advisory Council' whose members were appointed by the former Australian Government, not by Aboriginal peoples, and had only a limited role in monitoring government policy. In early January 2008, the current Australian Government disbanded the National Indigenous Advisory Council.
126. Since that time, there have been a number of developments that have resulted in the establishment of the National Congress of Australia's First Peoples, which is expected to be fully operational by January 2011.⁸⁹ The Australian Government has supported the development of a National Congress that:⁹⁰
- (a) is an independent non-government entity;
 - (b) is incorporated as a company limited by guarantee (rather than a statutory authority);
 - (c) aims to 'provide national leadership in advocating for the recognition of the status of Aboriginal peoples as First Nations peoples, in protecting our rights and advancing the wellbeing of our communities'; and

⁸⁹ Commissioner Tom Calma, 'New National Congress of Australia's First Peoples Announced' (Press Release, 22 November 2009), available at http://www.hreoc.gov.au/about/media/media_releases/2009/116_09.html

⁹⁰ These are the process and features recommended in the Report of the Steering Committee for the Creation of a New National Representative Body, *Our Future in our Hands – Creating a Sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples* (2009). The Australian Government has announced that it will support the recommendations in that report, including funding for the entity until 2013: Commissioner Tom Calma, 'New National Congress of Australia's First Peoples Announced', above n 89.

- (d) has as its functions the formulation of policy and advice in relation to the Aboriginal peoples, advocacy and lobbying on behalf of Aboriginal peoples, and ensuring the presence of monitoring and evaluation mechanisms in government to evaluate the performance.
127. In January 2010 members of the Ethics Council, the body responsible for developing and maintaining standards of the National Congress of Australia's First Peoples, were announced.⁹¹ On 2 May 2010, the members of the National Executive of the National Congress were announced as well as the incorporation of the Congress as an entity.⁹²
128. For almost a decade, the absence of a representative Aboriginal peoples' body has deprived Aboriginal peoples of the right to participate meaningfully in policy formulation and public debate and to be consulted on issues that affect them. It has also reduced Australia's ability to address the full range of issues affecting Aboriginal peoples. Without national or regional Aboriginal-controlled representative organisations, the ability of Aboriginal peoples to contribute to the formulation of Aboriginal policy is limited. This is compounded by the fact that there is currently not one Aboriginal member of Federal Parliament.⁹³
129. In its previous Concluding Observations, the CERD Committee recommended that the Australian Government take decisions directly relating to the rights and interests of Aboriginal peoples with their informed consent.⁹⁴ Separately, since 2005, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have each expressed their concern that insufficient action has been taken in relation to Aboriginal peoples' exercising meaningful control over their affairs and recommended that a national Indigenous representative body with adequate resources be established.⁹⁵
130. Following his country visit to Australia in 2009, the Special Rapporteur on Indigenous People welcomed the Australian Government's support for the National Congress of Australia's First Peoples and emphasised the importance of Indigenous participation in the ongoing design,

⁹¹ Commissioner Tom Calma, 'Inaugural Ethics Council Up and Running' (Press Release, 4 January 2010) available at http://www.hreoc.gov.au/social_justice/rebody/index.html.

⁹² The Ethics Council will shortlist candidates for election as members of the National Executive, the governance and operational arm of the National Congress. It will then be responsible for ensuring the ethical conduct of representatives of the organization: Commissioner Gooda, 'First National Executive is a Milestone Moment for Indigenous Australians' (Press Release, 2 May 2010) available at http://www.humanrights.gov.au/about/media/media_releases/2010/40_10.html.

⁹³ Currently, there are only nine Indigenous State and Territory Parliamentarians out of a total of 594 seats (1.5 per cent).

⁹⁴ CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005) para [11].

⁹⁵ See 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 (22 May 2009) para [15]; Human Rights Committee, *Concluding Observations: Australia*, above n 68, para [13].

development and functioning of the mechanism.⁹⁶ He also suggested that the Australian Government integrate the new body into its federal Council of Australian Governments structure for the purpose of coordinating policies and strategies relating to Aboriginal peoples.

131. The Special Rapporteur noted in particular the link between Aboriginal peoples' self-determination and practical outcomes, suggesting the 'the Government should seek to decidedly fold into its initiatives the goal of advancing indigenous self-determination, in particular by encouraging indigenous self-governance at the local level, ensuring indigenous participation in the design, delivery, and monitoring of programmes, and developing culturally appropriate programmes that incorporate and build on indigenous peoples' own initiatives.'⁹⁷
132. Following his visit to Australia in 2009, the Special Rapporteur on the Right to Health, Anand Grover, welcomed the Australian Government's commitment to establishing the National Congress of Australia's First Peoples but highlighted 'the importance of legislative guarantees, or other such mechanisms, to ensure that the opinions of any such body must be taken into account.'⁹⁸
133. The absence of an Aboriginal Representative body is also an issue in relation to the right to participate in political affairs under Article 5 of CERD.

Proposed Recommendations for Concluding Observations (Article 2)

THAT the Australian Government continue to support the National Congress of Australia's First Peoples to become fully operational by January 2011.

THAT the Australian Government take measures to ensure that the National Congress of Australia's First Peoples receives autonomous, recurrent and sustainable funding.

The Australian Government further the goal of Indigenous self determination by adopting the measures recommended by the Special Rapporteurs on Indigenous People and on Health, namely:

- to integrate the National Congress of Australia's First Peoples into Australia's federal Council of Australian Governments structure for the purpose of coordinating policies and strategies relating to Aboriginal peoples; and
- to enact legislative guarantees or adopt other mechanisms to ensure that the opinions of the National Congress are taken into account by the Federal Government.

⁹⁶ James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15 (4 March 2010) para [79].

⁹⁷ Anaya, *Addendum: The Situation of Indigenous Peoples in Australia*, above n 96, para [55].

⁹⁸ Anand Grover, United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Preliminary Observations and Recommendations* (4 December 2009).

B.3 Australia's Conduct in Intergovernmental Financial Institutions

134. Starting in 2005, the Asian Development Bank (**ADB**) reviewed its three main safeguard policies, including its policy on Indigenous Peoples. The Indigenous Peoples policy is an important measure by which the ADB (and its member states including Australia) can not only ensure that its development projects do not infringe the human rights of Indigenous persons, but that the development process fully respects the dignity, human rights, economies and cultures of Indigenous Peoples.
135. The DRIP and CERD clearly affirm that Indigenous Peoples have a right to Free Prior and Informed Consent (**FPIC**) in relation to any activity impacting on Indigenous peoples' land, territories and resources; any resettlement of indigenous people; or the adoption of legislative, administrative and other measures that may affect them.⁹⁹
136. On 3 April 2009, the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous People, made a statement indicating that the Australian Government would give its support to the DRIP. This support was said to be given 'in the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust.' Further, the Minister acknowledged that the DRIP 'recognises the legitimate entitlement of Indigenous people to all human rights - based on principles of equality, partnership, good faith and mutual benefit'. Separately the Australian Government has recently re-stated its commitment to being a 'principled advocate for the human rights of all', and that it has an 'ambition to play a more active and responsible role in our region.'¹⁰⁰
137. Despite these public statements, the Australian Government did not support the full right of Indigenous People to FPIC in the ADB's Safeguard policies, raising concerns about its obligations under Article 2 of CERD.¹⁰¹ Instead, the Government supported a less onerous test of 'consent from affected Indigenous communities through meaningful consultation, ...for relevant projects.'¹⁰² Whilst this provides some rights of consultation and requires some form of consent from Indigenous communities, the Safeguard policy falls short of providing Indigenous communities a right to FPIC.

⁹⁹ See arts 3, 10, 19 and 32.

¹⁰⁰ Stephen Smith, Minister for Foreign Affairs, 'Australia's New Approach to the Pacific' (Speech delivered at the Australian Institute for International Affairs, Melbourne, 7 August 2008).

¹⁰¹ On 24 February 2009, the Executive Director of the constituency including Australia made a statement at the ADB board meeting held in Manila on behalf of Australian authorities indicating that the concept of the right to FPIC remains the subject of debate.

¹⁰² This was stated in a letter from Bob McMullan, Parliamentary Secretary for International Development Assistance, to the Human Rights Law Resource Centre (17 August 2009).

Proposed Recommendations for Concluding Observations (Article 2)

THAT, in accordance with its support for the DRIP, the Australian Government ensure that it respects, protects and promotes all the rights of Indigenous Peoples, including the right to free, prior and informed consent.

THAT the Australian Government ensure that it supports the rights in the DRIP in all its foreign policy and in its position taken on issues arising in intergovernmental financial institutions.

B.4 Close the Gap Policies

138. As set out in section [G.1: Aboriginal and Torres Strait Islander Peoples](#), which discusses Aboriginal peoples' economic, social and cultural rights, Aboriginal peoples do not enjoy the same development outcomes as other Australians, notably in key development indicators such as health, education and basic standards of living. This raises significant concerns in relation to Australia's obligations under Articles 2 and 5 of CERD.
139. In July 2009, the Council of Australian Governments (**COAG**) agreed to implement a *National Integrated Strategy for Closing the Gap in Indigenous Disadvantage (Close the Gap)*. Close the Gap commits the Australian, state and territory governments to meeting six targets of:
- (a) closing the gap in life expectancy within a generation;
 - (b) halving the gap in mortality rates for Indigenous children under five within a decade;
 - (c) halving the gap for Indigenous students in reading, writing and numeracy within a decade;
 - (d) at least halving the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020;
 - (e) halving the gap in employment outcomes between Indigenous and non Indigenous Australians within a decade; and
 - (f) ensuring all four-year olds, including those in remote communities, have access to early childhood education, within five years.¹⁰³
140. Close the Gap also includes a commitment to establish performance benchmarks, identify further areas for activity (including food security, welfare reform and infrastructure improvement), and develop case studies for best-practice programs.¹⁰⁴
141. However, Close the Gap is not a rights-based model. Further, targets have not been integrated by the Government into all the relevant policy settings. The UN Special Rapporteur

¹⁰³ Council of Australian Governments National Agreements and National Partnership Agreements, available at <http://www.coag.gov.au/>.

¹⁰⁴ Council of Australian Governments, *COAG Communique, 2 July 2009* (2009).

on Health noted the need for a comprehensive national plan to achieve the targets in Close the Gap.¹⁰⁵ He 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. Barriers at the institutional level, including those influencing policy, allocation of finances and the level of human rights protections currently impede the achievement of equality and non-discrimination, and require action.¹⁰⁶

142. In order to improve the effectiveness of Close the Gap and to introduce a human rights based approach, the Australian government must do two things.
143. First, it must form partnerships with Aboriginal organisations. This was a stated aim of Close the Gap but it has not yet been realised. The AHRC recently expressed its concern that although the Government has made commitments to partnerships, 'there are few signs that the Australian Government is otherwise embracing a partnership approach'.¹⁰⁷
144. The Australian Government must also improve its engagement and consultation with affected communities in a way that enhances and promotes the right to self-determination. This will improve the standard of decision-making and outcomes.¹⁰⁸

Proposed Recommendations for Concluding Observations (Article 2)

THAT the Australian Government establish a comprehensive national plan, in consultation with Aboriginal and Torres Strait Islander communities as part of its Close the Gap campaign, which includes mechanisms for self-determination, partnership and consultation with Aboriginal peoples.

¹⁰⁵ Grover, *Addendum: Mission to Australia*, above n 68, para [47].

¹⁰⁶ Grover, *Preliminary Observations and Recommendations*, above n 98, page 5.

¹⁰⁷ AHRC, Indigenous Peoples' Organisations Network of Australia, *Submission to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Australian Mission* (August 2009) para [42].

¹⁰⁸ The Government's own *Overcoming Indigenous Disadvantage Report*, and the UN Special Rapporteur Indigenous Peoples, both acknowledge that '[w]hen [indigenous peoples] make their own decisions about what approaches to take and what resources to develop, they consistently out-perform [non-indigenous] decision makers': Commonwealth Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (2005) page 653, citing the Harvard Project on American Indian Economic Development 2003-4 (referring to the case of indigenous peoples in the United States of America), cited in James Anaya, *The Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (27 August 2009) para [55].

C. RACIAL SEGREGATION (ARTICLE 3)

C.1 Aboriginal and Torres Straight Islander Peoples

145. The Northern Territory Intervention includes an income management regime which involves quarantining 50% of fortnightly welfare payments and 100% of lump sums and advances to exclude the purchase of tobacco, alcohol, gambling and pornography. Australia's social security agency, Centrelink, then has a duty to take steps to ensure a person's 'priority needs' are met, including food, housing, clothing, power and water and educational needs. Income managed funds can be expended via Centrelink allocated direct to third parties, through cheque, voucher or credit card payments or via the Basics Card.
146. In October 2008, the Federal Government's own Review Board found that the introduction of income management resulted in feelings of anger, resentment, widespread disillusionment, confusion, anxiety, shame, embarrassment and humiliation, severe frustration and overt racism within Aboriginal communities.¹⁰⁹ Evidence adduced by the Review Board also suggests that income quarantining has resulted in:
- (a) hunger and people criss-crossing family groups to find food;
 - (b) inability to travel between communities for ceremony and 'sorry business';
 - (c) strain being placed on kinship and family relationships;
 - (d) people becoming subject to quarantining without their knowledge; and
 - (e) people contributing to services they don't have access to.¹¹⁰
147. The Review Board recommended that income management be voluntary and subject to independent review. However, the Federal Government rejected voluntary income quarantining and stated that it will continue to be compulsory 'because of its demonstrated benefits for women and children'.¹¹¹ The evidence on which the Government bases this assertion is part of a study by the Australian Institute of Health and Welfare (AIHW). Significantly, the AIHW report that the research methods used would sit at the bottom of an evidentiary hierarchy¹¹² and stated that 'overall evidence about the effectiveness of income management was not strong'.¹¹³

¹⁰⁹ *Report of the NTER Board*, above n 70, page 20.

¹¹⁰ Vivian and Schokman, above n 87, page 90.

¹¹¹ Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Compulsory income management to continue as a key NTER measure*, 23 October 2008 at http://www.facsia.gov.au/internet/jennymacklin.nsf/printer/nter_measure_23oct08.htm.

¹¹² Australian Institute of Health and Welfare, *Report on the Evaluation on Income Management in the Northern Territory* (20 August 2009) page 2.

¹¹³ Australian Institute of Health and Welfare, above n 112, page 3.

(a) Basics Card

148. The Basics Card has had a particular impact on the rights of Aboriginal persons under compulsory income management to be free from racial segregation. The 'Basics Card' is only able to be used for the purchase of 'priority needs' as designated by the Government. This has the practical effect of segregating Aboriginal peoples by requiring that they can only shop in particular stores. Some Basics Card outlets, such as roadhouses, are only licensed to sell limited products to Basics Card customers, even though they stock other 'priority items'. This has compounded stigma and embarrassment when Basics Card customers have been refused service when they have sought to buy 'priority items', unaware of these restrictions.¹¹⁴
149. There are a limited range of designated retailers which means that individuals often have to travel over some distance to access a Basics Card retailer, which restricts affected Aboriginal peoples' freedom of movement. As a result, Basics Card users often incur significant transport costs and may be restricted from accessing retailers which are more conveniently located and which offer more suitable and affordable options than designated Basics Card retailers.¹¹⁵ Travel is also impacted by income management limitations on people's ability to pool money to cover travel expenses. This is particularly concerning for Aboriginal communities, who are a highly mobile population for cultural and social reasons, and given the limited public transport options in rural and remote communities. There are also a limited number of Basics Card merchants outside of the Northern Territory which makes it difficult for affected persons to purchase 'priority needs' while interstate.
150. The Basics Card system also poses a challenge to Australia's compliance with Article 5(e)(vi) as research indicates that income management has restricted affected peoples' cultural practices in relation to sharing resources and attending 'sorry business' (where Aboriginal peoples generally use cash to contribute).¹¹⁶
151. Furthermore, the inability of individuals to check the balance of the Basics Cards at point of sale has resulted in nearly one fifth of all Basics Cards transactions being unsuccessful due to insufficient funds. Affected individuals have reported experiencing shame and humiliation.¹¹⁷
152. In an effort to improve access to Basics Card balances, the Government is proposing to provide dedicated kiosks in public areas to allow people to check Basics Card balances.

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

¹¹⁵ See also, Australian Council of Social Service, above n 114, page 17.

¹¹⁶ Northern Territory Council of Social Services, *Submission to the Senate Community Affairs and Legislation Committee inquiry into changes to the Social Security arrangements, and the restoration of the Racial Discrimination Act, 2010*, p 4.

¹¹⁷ Australian Government, *Closing the Gap on Indigenous Disadvantage: The Challenge for Australia* (February 2009) page 5. See also, Australian Council of Social Service, above n 114. See also *Report of the NTER Board*, above n 70.

However, this will have the effect of further stigmatising income managed individuals and compromises privacy.

Proposed Recommendations for Concluding Observations (Article 3)

THAT the Australian Government take immediate steps to amend legislative provisions that implement compulsory income management in favour of a voluntary, opt-in system of income management.

THAT the Australian Government take immediate steps to improve the utility of Basic Cards, including the expansion of stores at which the Basics Card can be used, improving the Basics Card reading infrastructure to eliminate the need for separate lines for users, and improving access by users to Basics Card balances.

D. OFFENCES OF RACIAL HATRED (ARTICLE 4)

D.1 Australia's Reservations to Article 4(a)

153. Australia has made a reservation in respect of Article 4(a) in the following terms:

The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a).

154. The CERD Committee has consistently recommended that Australia adopt legislation to give full effect to Article 4(a) of the Covenant and withdraw its reservation.¹¹⁸ In particular, the Committee has stated that article 4(a) requires legislation that criminalises serious acts of racial hatred, incitement to such acts and incitement to racial hatred. To date that legislation has not been introduced and Australia does not comply with article 4(a) of CERD. Details of existing laws dealing with acts of racial hatred and racial vilification are contained in the following sections.

(a) Acts of Racial Hatred

155. No Australian jurisdiction has a specific law criminalising acts of racial or religious hatred.

156. Instead, to varying degrees, state and territory sentencing laws make provision for consideration of racial hatred as a motive at sentencing. Sentencing legislation in New South Wales, Victoria and the Northern Territory states that a court may or must take into account in sentencing whether the accused was motivated by hate for or prejudice against a group of people when he or she committed the crime.¹¹⁹ The Western Australian *Criminal Code* also

¹¹⁸ CERD Committee, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, [14] CERD/C/304/Add.101, (April 2000); CERD Committee, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, [12], CERD/C/AUS/CO/14, (14 April 2005).

¹¹⁹ If a court finds that a crime was racially or religiously motivated, this would be taken into account as an aggravating circumstance, and a harsher penalty should result: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1991* (Vic) s 5(2)(daaa); *Sentencing Act 1991* (NT) s 6A(e). It should be noted that the Victorian Government announced its *Review of Identity Motivated Hate Crime in Victoria* in January 2010, with the stated aim 'to review the adequacy of the criminal and civil justice system in addressing offences motivated by hatred or prejudice'. This review is to be finalised in September 2010. See <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/the+justice+system/communit y+consultation/justice+-+review+of+identity+motivated+hate+crime+in+victoria+-+%28focus+on%29>.

imposes greater possible maximum sentences for certain offences if they are committed 'in circumstances of racial aggravation'.¹²⁰

157. Queensland, South Australia, Tasmania and Western Australia do not have an explicit reference to racial or religious hatred in their sentencing provisions, although they all state that any aggravating circumstance may or must be taken into account by a court when sentencing.¹²¹ The sentencing provisions in the Australian Capital Territory and at the Commonwealth level are more general still, as they require a court to consider 'the nature and circumstances of the offence'.¹²²
158. The approaches taken by the Commonwealth, State and Territory legislatures fail to implement Australia's obligation under article 4(a) of the Covenant to specifically criminalise and create offences of acts of racial hatred. Treating hate crimes as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases.¹²³

Case Study: Lenient sentence for racist killings¹²⁴

On 25 July 2009, five heavily intoxicated white men, aged 18 to 24, set out on a joy ride along the Todd River bed in Alice Springs, Northern Territory, where many Aboriginal people camp. The men drove at high speed through the campsites, terrorising the campers and firing an imitation pistol. An Aboriginal camper, Kwementyaye Ryder, responded by throwing a bottle at their vehicle. The men

¹²⁰ See *Criminal Code Act Compilation Act 1913* (WA) Appendix B ss 313 (Common assaults); 317 (Common assaults); 317A (Assaults with intent); 338B (Threats); and 444 (Criminal damage). See also s 80I for the definition of 'circumstances of racial aggravation'.

¹²¹ See *Penalties and Sentences Act 1992* (Qld) s 9(2)(g); *Criminal Law (Sentencing) Act 1988* (SA) s 29A(3)(b); *Sentencing Act 1997* (Tas) s 80; *Sentencing Act 1995* (WA) s 6(2)(c). New South Wales, Victoria and the Northern Territory also have such general sentencing provisions, in addition to their specific references to hate crimes: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(c); *Sentencing Act 1991* (Vic) s 5(2)(g); *Sentencing Act* (NT) s 5(2)(f). It is argued that with such provisions, 'courts have taken into account offences motivated by hatred or prejudice', and have found 'such cases to be of a more serious nature': Parliament of Victoria Parliamentary Library Research Service, *Sentencing Amendment Bill 2009* (Research Brief Number 7, October 2009) page 5, available at <http://www.parliament.vic.gov.au/research/2009RBSentencing.pdf>.

¹²² *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(a); *Crimes Act 1914* (Cth) s 16A(2)(a).

¹²³ Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *University of New South Wales Law Journal* 868, page 878.

¹²⁴ At present, the official judgment of the case is not available. This case study is based on the following articles: Lex Hall, 'Aboriginal 'antagonism' led to killing of Kwementyaye Ryder', *The Australian* (Sydney) 23 April 2010, available at <http://www.theaustralian.com.au/news/nation/aboriginal-antagonism-led-to-killing-of-kwementyaye-ryder/story-e6frg6nf-1225857433228> at 25 May 2010; Jano Gibson, *Five jailed for Racist Alice Springs Killing* (23 April 2010) ABC News <http://www.abc.net.au/news/stories/2010/04/23/2881262.htm> at 25 May 2010; Michael Brull, *Top blokes, Totally out of Character: When Five White Men beat an Aboriginal Man to Death* (14 May 2010) Overland <http://web.overland.org.au/2010/05/14/top-blokes-totally-out-of-character-when-five-white-men-beat-an-aboriginal-man-to-death/> at 25 May 2010.

angrily reacted by driving directly at Mr Ryder, who tried to run away. The men jumped out of the car and chased Mr Ryder who fell to the ground. The men proceeded to repeatedly kick Mr Ryder in the head and strike him with a bottle. Mr Ryder was left lying on the ground, where he died from a brain haemorrhage.

The men pleaded guilty to manslaughter, and were given lenient jail terms of between four and six years, with non-parole periods of between 12 months and four years. Justice Martin of the Supreme Court of the Northern Territory found that the manslaughter was on the 'lower end of the scale of seriousness' because it was impossible to know if Mr Ryder's fatal brain haemorrhage was caused by him hitting his head when he fell, or by the blows inflicted. Justice Martin acknowledged there was racial motivation for the crime, '*I have no doubt that if white people had camped in the riverbeds in tents, you would not have set out to harass them in the aggressive manner in which you set out to harass the Aboriginal people who were camped there.*' However, the judge did not consider the nature and seriousness in Alice Springs of manifest racism which has been continuously directed against the Aboriginal people, of which this incident was a culmination, and the sentences given were not proportionate to the brutality of the crime.

(b) Inciting Acts of Racial or Religious Hatred

159. All Australian jurisdictions except the Northern Territory have enacted legislation that prohibits incitement to racial hatred (or 'serious racial vilification').¹²⁵ However, only Queensland, Tasmania and Victoria have prohibited *religious* vilification.¹²⁶ Furthermore, the nature of the prohibition (whether acts of vilification attract civil or criminal penalties, or both) varies between the jurisdictions. Protection against racial and religious vilification in Australia can be summarised as follows:¹²⁷

Jurisdiction	Racial Vilification	Religious Vilification	Liability
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¹²⁵ *Racial Discrimination Act 1975* (Cth) s 18C; *Anti-Discrimination Act 1977* (NSW) ss 20C and 20D; *Anti-Discrimination Act 1991* (Qld) ss 124A and 131A; *Racial Vilification Act 1996* (SA) s 4 and *Civil Liability Act 1936* (SA) s 73; *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic) ss 7 and 24; *Criminal Code Act Compilation Act 1913* (WA) Appendix B ss 77-80D; and *Discrimination Act 1991* (ACT) ss 66 and 67.

¹²⁶ *Discrimination Act 1991* (Qld) ss 124A and 131A; *Anti-Discrimination Act 1998* (Tas) s 19; and *Racial and Religious Tolerance Act 2001* (Vic) ss 8 and 25. Although the New South Wales legislation defines 'race' as to include 'ethno-religious origin' (*Anti-Discrimination Act 1977* (NSW) s 4), this appears to be a narrow term that would exclude, for example, Muslims : see Gareth Griffith, *Sedition, Incitement and Vilification: Issues in the Current Debate* (NSW Parliamentary Library Research Service Briefing Paper Number 1/2006) section 6.3, available at [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/57ba30f38d3c969cca25710f0023442f/\\$FILE/Sedition%20FINAL.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/57ba30f38d3c969cca25710f0023442f/$FILE/Sedition%20FINAL.pdf).

¹²⁷ Adapted from Katharine Gelber, 'Hate Speech and the Australian Legal and Political Landscape' in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) 2, page 7.

Commonwealth	•		Civil only
New South Wales	•		Civil and Criminal
Queensland	•	•	Civil and Criminal
South Australia	•		Civil and Criminal
Tasmania	•	•	Civil only
Victoria	•	•	Civil and Criminal
Western Australia	•		Criminal only
Australian Capital Territory	•		Civil and Criminal
Northern Territory			N/A

160. At the Commonwealth level, there is no express protection against religious vilification. However, Sikhs and Jews are considered to be protected by the RDA as groups distinguished by 'ethnic origin'.¹²⁸ In contrast, it is unlikely that the protection in the Commonwealth provision would extend to vilification on the basis of Islamic faith.¹²⁹ Given extensive reports of discrimination and vilification against the Muslim community, this amounts to a significant gap in vilification laws.¹³⁰ Furthermore, Commonwealth legislation only provides civil remedies for racial vilification, such as damages and injunctions, but not criminal sanctions.
161. Therefore, although Australian jurisdictions have made efforts to pass racial and religious anti-vilification laws, these efforts have not completely fulfilled Australia's obligation under article 4(a) of the Convention to outlaw racial vilification.

¹²⁸ AHRC, above n 12, page 29.

¹²⁹ AHRC, above n 12, page 29.

¹³⁰ *Australian Non-Governmental Organisations' Submission to the Committee on the Elimination of Racial Discrimination* (January 2005) page 20.

Case study: Cronulla riots¹³¹

The Cronulla race riots occurred in Sydney in December 2005. The riots stemmed from an event at Cronulla beach on 4 December 2005, where young people of Middle Eastern descent assaulted a group of lifesavers. In the following days, text messages were sent to people around Sydney inviting people to join the fight for 'Australians' to reclaim their beaches. The media exacerbated the situation, broadcasting and re-printing samples of text messages, including, '*This Sunday every Aussie in the Shire get down to North Cronulla to help support Leb and wog bashing day*'.

On 11 December 2005, an estimated 5,000 people gathered at Cronulla beach to protest against the recent events. As the day progressed, the crowd became violent and many individuals of 'Middle Eastern appearance' were attacked. In following nights, retaliatory acts of violence and vandalism occurred throughout Sydney, resulting in extensive property damage, several assaults and one stabbing.

The events were extensively reported by the media. Tabloid newspapers and talkback radio generally provided a prejudicial portrayal of the events, exaggerating facts and giving disproportionately more air time to revenge rioters, then to original rioters.

Alan Jones of Sydney's 2GB Radio made various derogatory remarks against 'Middle Eastern people' on his regular talk-back slot, including, '*If ever there was a clear example that Lebanese males in their vast numbers not only hate our country and our heritage, this was it. They have no connection to us. They simply rape, pillage and plunder a nation that's taken them in.*' Mr Jones was later found to have breached the Australian Communications and Media Authority Code of Conduct, as his comments were likely to encourage violence or brutality and to vilify people of Lebanese and Middle-Eastern backgrounds on the basis of ethnicity.

On 24 December 2009, the New South Administrative Decisions Tribunal upheld a complaint of racial vilification against Mr Jones and 2GB, finding the presenter's comments were highly offensive, reckless and calculated to agitate and excite his audience. The Tribunal ordered that Mr Jones and 2GB issue a formal apology and pay the applicant damages in the sum of \$10,000. Further, 2GB was required to undertake a critical review of its policies and training regarding racial vilification.

A total of 16 people were arrested over the Cronulla riots. Charges were made over offences including malicious damage, assaulting a police officer, affray, offensive conduct, resisting arrest and numerous driving offences.

¹³¹ Case study drawn from: *Themes – Cronulla Riots* (2006) Comparative Studies of Australia <http://cts.hss.uts.edu.au/students06/Group%20Website%20Turning%20the%20Lights%20on/cronulla.html> at 3 May 2010; New South Wales Police, *Strike Force Neil, Cronulla Riots - Review of the Police Response Chronology (Volumes 2 and 3 of 4)* available at <http://www.abc.net.au/mediawatch/transcripts/ep38cronulla2.pdf> at 3 May 2010; Editorial, 'The Politics of Reaction' (2008) 32 *Criminal Law Journal* 329, pages 336-337; sample text message was printed in the *Sunday Telegraph* (11 December 2005) page 4; Scott Poynting, "'Thugs' and 'Grubs' at Cronulla: From Media Beat-ups to Beating up Migrants' in Scott Poynting and George Morgan (ed) *Outrageous! Moral*

D.2 Vilification of African Communities

162. African communities, particularly the Sudanese community, are among the fastest growing ethnic communities in Australia.¹³² Negative stereotyping and racial vilification of African Australians and persons of African descent have been recognised as barriers to social inclusion in the Australian community. This has been perpetuated through political comments as well as negative media reporting, and raises serious concerns under article 4 of CERD.
163. In 2007, the former Australian Government made a number of statements about the Sudanese community and its inability to integrate into mainstream Australian society.¹³³ Just prior to the election in November 2007, the former Minister for Immigration, the Hon Kevin Andrews MP, made unsubstantiated allegations that African refugees were involved in gangs, nightclub fights and drinking alcohol in parks at night.¹³⁴ This was preceded by the former Australian Government's announcement in August 2007 that it intended to cut African immigration from 70% of the 13,000 humanitarian quota in 2005 to 30% in 2007, and freeze all Sudanese admissions until mid 2008.¹³⁵ Mr Andrews' comments were sparked after a 19-year-old Sudanese man, Liep Gony, was beaten to death by a group of people. According to the Victorian Equal Opportunity and Human Rights Commission's *Rights of Passage report*, many young Sudanese Australians felt they were being publicly punished and shamed by Mr Andrews' comments.¹³⁶
164. Media reports about Sudanese Australians have also been predominantly negative, purporting high levels of criminal involvement.¹³⁷ For example, in October 2007, CCTV

Panics in Australia (2007) 65, pages 159-167; *Trad v Jones & Anor [No 3]* [2009] NSWADT 318, paras [84], [220] to [248]; Dylan Welch, 'Jones Rapped for Pre-Riot 'Scum' Remarks', *The Sydney Morning Herald* (Sydney) 10 April 2007, available at <http://www.smh.com.au/news/tv--radio/alan-jones-breached-code/2007/04/10/1175971070038.html?page=fullpage#contentSwap1> at 3 May 2010.

- ¹³² Refugee Council of Australia, *Australia's Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions* (2008), available at http://www.refugeecouncil.org.au/docs/resources/submissions/2008-09_intakesub.pdf.
- ¹³³ Alison Caldwell, 'Bligh rebuts Minister's 'Racist' Comments on Sudanese', ABC News (5 October 2007) available at <http://www.abc.net.au/news/stories/2007/10/05/2052475.htm>.
- ¹³⁴ Jewel Topsfield, David Rood and Daniella Miletic, 'Minister's African Dossier Renews Racial Tensions' *The Age* (Melbourne) 5 October 2007, available at <http://www.theage.com.au/articles/2007/10/04/1191091281217.html>.
- ¹³⁵ Connie Levett, 'Andrews Tempers Integration Remarks, Sudanese Group Says', *The Sydney Morning Herald* (Sydney) 31 October 2007, available at <http://www.smh.com.au/news/federalelection2007news/andrewstempers-integration-remarks-sudanese-group-says/2007/10/30/1193618883984.html>.
- ¹³⁶ Victorian Equal Opportunity & Human Rights Commission, *Rights of Passage: The Experiences of Australia-Sudanese Young People* (2008) (***Rights of Passage report***), available at http://www.humanrightscommission.vic.gov.au/pdf/rights_of_passage.pdf.
- ¹³⁷ Richard Kerbaj, 'Warning on African Refugee Gangs', *The Australian* (Sydney) 26 December 2006; Richard Kerbaj, 'Refugees 'Turning to Crime for Kicks'', *The Australian* (Sydney), 27 December 2006;

footage was misused by a number of commercial television networks to 'show' Sudanese youths stealing from a liquor store, which was not in fact the case.¹³⁸ These sorts of inaccurate and derogatory media reports perpetuate negative stereotyping, leading to poor public perception, discrimination and feelings of alienation. The *Rights of Passage report* describes the general fear of the media held by African Australians, as well as the feeling that they have been misrepresented. According to the Australian Research Council, such portrayals have resulted in verbal and physical backlashes, reluctance to report incidents to police and have created difficulties in the relationship between police and African Australians and people of African descent.¹³⁹

Proposed Recommendations for Concluding Observations (Article 4)

THAT Australia take the necessary legislative measures to ensure compliance with Article 4(a) of the Covenant by criminalising acts of racial hatred, incitement to acts of racial hatred and racial and religious vilification and THAT the Australian Government use any necessary intergovernmental mechanisms, such as the Council of Australian Governments, to ensure that the offences are consistent across all Australian jurisdictions.

THAT the Australian Government legislate to establish significant and enforceable criminal penalties for acts of racial or religious hatred, and THAT the Australian Government use any necessary intergovernmental mechanisms, such as the Council of Australian Governments, to ensure that such penalties are made consistent across all Australian jurisdictions.

THAT the Australian Government take effective measures, including educational measures and strong public statements, to make it clear that acts of racial hatred and racial and religious vilification are unacceptable and dangerous to the community as a whole and otherwise make statements that promote tolerance and diversity.

D.3 Cyber-Racism

165. 'Cyber racism' is becoming an important human rights issue in Australia and internationally. Cyber racism refers to material published on the internet which offends, insults, humiliates or intimidates people of a certain nationality. Offensive material can be in numerous forms, such as images, blogs, videos and comments on web forums like Facebook.

Richard Kerbaj, 'Police say Sudanese a Gang Threat', *The Australian* (Sydney), 5 January 2007; Neil Mitchell, 'Drunk and Driving', *The Herald Sun* (Melbourne), 1 February 2007.

¹³⁸ ABC TV, 'Ganging Up', *Media Watch, Ganging Up* (8 October 2007) available at <http://www.abc.net.au/mediawatch/transcripts/s2054150.htm>.

¹³⁹ Australian Research Council, *A Conversation on Trust: Community Policing and Refugee Settlement in Regional Australia – A Case Study of Tasmania* (2009) available at http://www.utas.edu.au/tiles/publications_and_reports/research_reports/research_reports_pdf/A%20Conversation%20on%20Trust.pdf.

166. The publication of racially offensive material on the internet may be unlawful under s 18C of the *Racial Discrimination Act 1975* (Cth), which prohibits a person from committing an act which will offend, insult or intimidate a group of people because of their race, colour or ethnic origin. Complaints of offensive material can be made to the AHRC for investigation and/or conciliation. However these 'unlawful acts' are not criminal offences, and do not carry penalties.¹⁴⁰
167. In Australia, there is increasing concern by members of the Aboriginal community about cyber racism. An example of highly offensive material on the internet is an American website called 'Encyclopedia Dramatica', which contains an article that provides numerous 'facts' about Aboriginal people.¹⁴¹ It describes Aboriginal people as 'the niggers of Australia' and as 'the most primitive animals on the planet' and contains other extremely offensive content relating to Aboriginal peoples.¹⁴²
168. The Government has indicated it will introduce compulsory internet filtering to block overseas sites containing criminal content, however it remains unclear as to whether this will also apply to racially offensive websites.¹⁴³
169. The Government needs to appropriately address the issue of cyber racism. The boundaries of the internet are limitless, and consequently, the dissemination of ideas of racial hatred and discrimination are infinite. Accordingly, traditional regulatory responses are inadequate. In order for the Government to completely comply with its obligations under article 4 of the Convention, it needs to establish specific punishable offences for serious instances of cyber racism.
170. While it is acknowledged that there are difficulties to identifying those responsible if they are overseas, it is important that there be institutions for accountability at least for persons within Australia and that the relevant individual, organisation or website is held responsible.

Proposed Recommendations for Concluding Observations (Article 4)

THAT the Australian Government legislate to prohibit the publication of material that is likely to cause serious racial or religious offense, hatred or intimidation and publishing such offensive material be a criminal offence with penalties enforceable against responsible persons or organisations.

THAT the Government develop cyber-safety strategies and new initiatives which educate the community (in particular adolescents, who are the main users of the internet) specifically on the issue of cyber racism.

¹⁴⁰ *Racial Discrimination Act 1975* (Cth) s 18C.

¹⁴¹ *Aboriginal*, Encyclopedia Dramatica <<http://encyclopediadramatica.com/Aboriginal>> at 6 May 2010.

¹⁴² *Aboriginal*, Encyclopedia Dramatica <<http://encyclopediadramatica.com/Aboriginal>> at 6 May 2010.

¹⁴³ *Green Light for Internet Filter Plans* (2009) ABC News <<http://www.abc.net.au/news/stories/2009/12/15/2772467.htm>> at 6 May 2010.

E. EQUAL TREATMENT IN THE ADMINISTRATION OF JUSTICE (ARTICLE 5(A))**E.1 Establishing Race Discrimination in Courts**

171. Although racial discrimination is prohibited in legislation in every Australian state and territory, it is extremely difficult to prove either direct or indirect discrimination in Australian courts,¹⁴⁴ and proving race discrimination has been particularly difficult.¹⁴⁵ This raises serious concerns about equality before the courts under articles 5(a) and protection of rights under article 4.
172. There are a number of reasons for the difficulty in proving racial discrimination in Australia.
173. First, in all Australian jurisdictions the complainant bears the entire onus of proving all elements of their racial discrimination claim.¹⁴⁶ This is quite different to schemes in other countries where the complainant must prove *prima facie* discrimination, at which point the burden shifts to the respondent to prove that there was no discrimination.¹⁴⁷
174. Secondly, a higher than usual standard of *evidence* has been applied to prove racial discrimination. Australian courts have, in some circumstances, held that given that the serious nature of accusations of racial discrimination and the gravity of the consequences of a finding of racial discrimination, the standard of evidence should be of a particularly high value commensurate with the allegations made.¹⁴⁸
175. A decision of the full Federal Court in 2008 now confirms that both the standard of proof and the standard of evidence in discrimination complaints should not, as a matter of course, be approached differently to other civil matters. The full Federal Court held that there should not be a presumption that race discrimination allegations are of such 'seriousness' that a higher standard of evidence is required. Instead, the gravity of the allegations is one of a number of matters for the court to take into account when determining whether the complainant has established a case on the balance of probabilities.¹⁴⁹

¹⁴⁴ Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008) page 146.

¹⁴⁵ Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review*, 535, page 535.

¹⁴⁶ See Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia', (2009) 31 *Sydney Law Review* 579, page 582, who states that the standard is specified in statutes and rules of procedure; see also Rees, Lindsay and Rice, above n 144, page 146.

¹⁴⁷ There is a shifting burden of proof in both the United States and the United Kingdom, see Rees, Lindsay and Rice, above n 144, page 146.

¹⁴⁸ See *Arumugam v Health Commission of Victoria* [1986] EOC ¶92-155, 330; approved in *Sharma v Legal Aid (Qld)* (2002) 115 IR 91, page 98 and *Victoria v Macedonian Teachers Association of Victoria Inc* (1999) 91 FCR 47, paras [14]-[21].

¹⁴⁹ *Qantas v Gama* [2008] FCAFC 69, paras [110] to [139].

176. In its 2005 Concluding Observations on Australia, the CERD Committee noted the particular difficulty of proving racial discrimination in Australia in the absence of direct evidence.¹⁵⁰ The Committee recommended that Australia 'envisage regulating the burden of proof in civil proceedings involving racial discrimination so that once an alleged victim has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for differential treatment.'¹⁵¹
177. Nothing has been done to give effect to the Committee's recommendation, despite recent amendments to the Disability Discrimination Act and Age Discrimination Act and complete overhauls of discrimination regimes of two states, namely South Australia and Victoria.
178. As part of its Human Rights Framework, the Australian Government proposes to harmonise federal anti-discrimination legislation (see part [A.1: Discrimination Law](#) above).¹⁵² This 'streamlining' announcement should relieve the burden on complainants in order to ensure that Australia ensures equality in courts and tribunals for all persons regardless of race.

Proposed Recommendations for Concluding Observations (Article 5)

THAT as part of its harmonisation of federal anti-discrimination laws, the Australian Government should amend the burden of proof in the RDA. The RDA should be amended to require the complainant to prove prima facie discrimination, at which point the burden shifts to the respondent to prove that there was not discrimination.

E.2 Aboriginal and Torres Strait Islander Peoples

(a) Policing

179. It is well documented that Aboriginal people are overrepresented in the criminal justice system in Australia (see part [F.1: Aboriginal and Torres Strait Islander People - Imprisonment](#) below). The causes of this overrepresentation are complex. Part of the reason for overrepresentation is the way in which Aboriginal people are policed, which suggests institutional discrimination against Aboriginal peoples. One survey showed that 23.4% of Aboriginal people reported experiencing race-based discrimination by police, compared with 6.1% of people from Anglo-Celtic and non-Anglo/Celtic background.¹⁵³ The treatment of Aboriginal people by police raises real concerns under article 5 in terms of the right to equal treatment

¹⁵⁰ CERD Committee, *Concluding Observations: Australia*, above n 94, para [15].

¹⁵¹ CERD Committee, *Concluding Observations: Australia*, above n 94, para [15].

¹⁵² Attorney-General's Department, above n 5, page 9.

¹⁵³ See discussion of Gallaher Survey, in Vic Health, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (December 2009) page 31, available at <http://www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources.aspx>.

before organs administering justice, as well as other civil rights such as the right to security of the person and protection by the state against violence and bodily harm.

180. Research in the Northern Territory following the increase in police after the Northern Territory Intervention (the **NAAJA report**) showed a number of concerning issues in how Aboriginal communities are policed. The most common complaints about police conduct in Aboriginal communities were about either over-policing or under-policing, namely:¹⁵⁴
- (a) police regularly entering houses without warrants or permission, and often conducting rough searches and viewing and handling sacred objects;
 - (b) police issuing fines or summons for people driving unregistered or unlicensed vehicles within the community, or on bush tracks, when people were going hunting;
 - (c) police searching bags;
 - (d) police being racially discriminatory with regards to conducting searches and enforcing the law, particularly the laws around alcohol; and
 - (e) police being unresponsive to reports of crime, including domestic violence.
181. In Victoria, Koori¹⁵⁵ people are almost 6 times more likely to come into contact with Victoria Police than the general population. Kooris receive 12 times the rate of OC or capsicum spray as the standard population. An analysis of complaints about police misconduct showed that compared to non-Aboriginal people, Koori people 'are 'over-policed' and are subjected to harassment in the form of constant scrutiny, checks, arrests and surveillance'.¹⁵⁶ At worst, mistreatment by police has ended in death of Aboriginal people (see case study below).
182. There is no comprehensive independent, effective and adequate system for the investigation of complaints about police in any Australian jurisdiction. Most complaints about police misconduct are investigated by other members of the same police force, and often by officers from the same police station. In Victoria, for example, only 1.2% of the most serious complaints of assault by police were substantiated as a result of police investigation.¹⁵⁷

¹⁵⁴ North Australian Aboriginal Justice Agency, *Aboriginal Communities and Police's Taskforce Themis: Case Studies in Remote Aboriginal Community Policing in the Northern Territory* (October 2009) page 11.

¹⁵⁵ 'Koori' or 'Koorie' is a term used by south-eastern Australian Aboriginal people to define their collective Aboriginality.

¹⁵⁶ These statistics are contained in the report of the Ethical Standards Department, Victoria Police and Indigenous Issues Unit, Department of Justice, *Koorie Complaints Project – 2006-2008 – Final Report* (2008) pages 7, 18 and 19.

¹⁵⁷ Tamar Hopkins, cited in the Aboriginal and Torres Strait Islander Legal Services, *Joint Submission to the Human Rights Consultation* (June 2009) page 29.

Case Study: Death in a country town

Mr Carter was a 33 year old Aboriginal man with a cognitive impairment, a mental illness and a substance abuse history. He lived in a rural town in Victoria. On 6 August 2006, Mr Carter learned that his brother had died suddenly. Police attended Mr Carter's girlfriend's home, following a complaint of disturbance, and Mr Carter was taken away in a police van. Mr Carter had been drinking heavily.

Mr Carter was taken 13 kilometres out of town by the police and left by police on the side of the Sturt Highway. Mr Carter was subsequently struck by a heavy transport vehicle and died. The Coroner ruled that the death was a suicide but the conduct of police and the investigation of the incident highlight problems with policing and the investigations system.

Further, during the Coronial inquest into Mr Carter's death, at least one other Aboriginal witness gave evidence of being taken out of town by police and left on the Sturt Highway near the airport. Evidence before the Coroner was that complaints made by Aboriginal people were considered to be a pointless exercise, and the Coroner found evidence that Aboriginal people feared retribution by the police if they complained about police conduct.¹⁵⁸

Case study: Freddo Frog Charge¹⁵⁹

A 12 year-old Aboriginal boy faced the Children's Court in Northam on 16 November 2009 charged with receiving a stolen Freddo Frog chocolate bar, allegedly stolen by his friend. The Freddo Frog cost 70 cents. The boy has no prior convictions and faced a further charge involving the receipt of a stolen novelty sign from another store, which read, 'Do not enter, genius at work.' The boy missed the first court appearance due to a misunderstanding about court dates and was then apprehended by police at 8.00am on a school day and taken into custody where he was imprisoned for several hours.¹⁶⁰ When the boy appeared before Justices of the Peace after spending most of the day in the police lock-up, he was released to bail with conditions that he remain at his home between the hours of 7pm and 7am and that he not attend the central business district of Northam except in the company of his mother or older brother. The charges were eventually withdrawn and costs awarded to the boy, despite police defending their actions as 'technically correct'. The Aboriginal Legal Service maintained the charges were scandalous and would not have occurred if the boy had come from a middle-class non-Aboriginal family in Perth.¹⁶¹

¹⁵⁸ Aboriginal and Torres Strait Islander Legal Services, above n 157, pages 231-34 and also the decision of the State Coroner of Victoria, delivered 13 May 2009.

¹⁵⁹ Aboriginal Legal Service of Western Australia, *Submission to the Parliament of Australia House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs: Inquiry into the High Level of Involvement of Indigenous Juveniles and Young adults in the Criminal Justice System* (December 2009) available at <http://www.aph.gov.au/House/committee/atsia/sentencing/subs/Sub019.pdf> at 22 May 2010.

¹⁶⁰ Farah Farouque, 'Stolen Freddo: Boy, 12, Charged', *The Age* (Melbourne), 16 November 2009, available at <http://www.theage.com.au/national/stolen-freddo-boy-12-charged-20091115-igec.html>

183. Separately, there has been an increase in State and Territory, as well as local laws that provide increased discretionary powers to police (see section below on stop and search powers). Evidence shows that increased discretionary powers will impact disproportionately on Aboriginal people and impede their equal access to public spaces. These are discussed under Article 5(f), access to public spaces - See [H.1: Access to Public Spaces – Aboriginal and Torres Strait Islander Peoples](#).
184. Where Aboriginal people die in police custody, the right to life and the right to security of the person, freedom from torture and cruel, inhuman and degrading treatment are also engaged. The issue of deaths in custody is discussed in detail in section [F.1\(c\): Aboriginal and Torres Strait Islander People – Deaths in Custody](#) below.

(b) Aboriginal Legal Assistance

185. Many Aboriginal peoples confront serious human rights issues in the justice system, in particular issues resulting from the disproportionate impact and application of certain criminal laws and disproportionately high incidence and impacts of incarceration as compared with non-Aboriginal people (see section [F.1\(a\): Aboriginal and Torres Strait Islander Peoples - Imprisonment](#)). These issues are further compounded by limited access to legal and interpretive services, both of which are often necessary to ensure a fair hearing and to enjoy the rights protected by Article 5(a) of CERD.
186. Australian Government funding to the Legal Aid Indigenous Australians program decreased by 6% in the decade to 2008, and by 40% (in real terms) to Aboriginal and Torres Strait Islander legal services.¹⁶² This is in contrast to a 120% increase to mainstream legal aid during the same time period.¹⁶³ Reductions in funding have occurred despite Australian parliamentary and governmental inquiries, the AHRC and the UN Human Rights Committee urging the Australian Government to increase funding to specialist Aboriginal services, and to work collaboratively with service providers and Aboriginal communities to ensure that funding is appropriate and strategically directed.¹⁶⁴

¹⁶¹ 'Freddo Frog Charges Withdrawn', *The Australian* (Sydney) 23 November 2009, available at <http://www.theaustralian.com.au/news/nation/freddo-frog-charges-withdrawn/story-e6frg6nf-1225802145515>

¹⁶² Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Access to Justice Inquiry Report* (2009) para [8.5].

¹⁶³ Senate Legal and Constitutional Affairs Committee, above n 162, para [8.27].

¹⁶⁴ See AHRC, *Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2006), available at http://www.hreoc.gov.au/social_justice/statistics/index.html; Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (3 April 2009); Attorney-General's Department, Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce, Attorney-General's Department* (September 2009); and Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), Recommendations 27 and 26-27. Inadequate funding persisted despite Senate Inquiries in 2003-4 and 2009 recommending urgent increases in funding to specialist services. The Government has

187. In May 2010, the Commonwealth Attorney-General announced an increase in funding to specialist services by \$34.9 million over the next four years.¹⁶⁵ While this has been welcomed by Aboriginal and Torres Strait Islander legal services,¹⁶⁶ there are concerns that the increase does not go far enough to address the systemic crisis in resourcing of, and access to, specialist services.¹⁶⁷

(c) Interpreting Services

188. The inadequate provision of interpreting services for Aboriginal peoples in the Australian justice system raises serious concerns in relation to Australia's obligations under Article 5(a) of CERD. Under Australian law, the provision of an interpreter is a matter of judicial discretion. In the criminal law context, a fair trial requires the accused to understand and hear the proceedings.¹⁶⁸ In civil proceedings, the provision of an interpreter is less certain.

189. A report released by Aboriginal Resource and Development Services has found that many Indigenous Australians who come into contact with the criminal justice system have little comprehension of what is happening and how the legal system operates.¹⁶⁹ It found:

Most of the language used inside a courtroom like bail, consent, remand, charge, alleged and accused leave the people confused, not sure of how they should respond, or even if they should response.¹⁷⁰

190. The 2009 Senate inquiry into access to justice acknowledged that language barriers inhibit Aboriginal peoples' access to justice and that access is neither adequately recognised nor properly resourced. The Inquiry recommended that the Australian Government provide additional funding for court-based interpreters and undertake consultations to seek solutions to the translation difficulties associated with some Aboriginal languages.¹⁷¹

not implemented the recommendations set out in the *Federal Attorney-General's Strategic Framework for Access to Justice in the Federal Justice System*.

¹⁶⁵ Australian Government, *Budget Paper*, above n 26.

¹⁶⁶ See, for example, Aboriginal Legal Rights Movement, 'ALRM welcomes Rudd Government's Legal Aid Funding' (Press Release, 14 May 2010), available at <http://www.alrm.org.au/mediareleases.php>.

¹⁶⁷ Aboriginal Legal Service of Western Australia, 'ALSWA Welcomes Announcement of Additional Funding', (Press Release, 13 May 2010), available at http://www.als.org.au/index.php?option=com_content&view=article&id=70:dennis-eggington-alswa-additional-funding&catid=13:media-releases&Itemid=46.

¹⁶⁸ *Re East; Ex parte Nguyen* (1998) 196 CLR 354.

¹⁶⁹ Aboriginal Resource and Development Services, *An Absence of Mutual Respect* (2008), available at <http://www.ards.com.au/print/LawBookletWeb.pdf>.

¹⁷⁰ Aboriginal Resource and Development Service, 'Justice Out of Reach' (Press Release, 28 May 2008), available at <http://www.ards.com.au/media/media28.htm>.

¹⁷¹ Senate Legal and Constitutional Affairs Committee, above n 162, paras [8.55] and [8.61].

Case studies: lack of interpreters¹⁷²

A 15 year old boy from a remote Aboriginal community in the East Kimberley in WA was charged with a sexual offence and refused bail. He spent 205 days in custody in a Perth detention centre prior to his matter being disposed of. The boy pleaded guilty and was sentenced to a community order. He had no prior convictions. He spoke the Aboriginal languages Kukatja and Gija as his first languages. English was his fourth or fifth language. One of the reasons for the delay in his matter being dealt with was caused by difficulty in locating an interpreter.

An 18 year old from a remote Aboriginal community in WA was charged with the wilful murder of his 14 year old girlfriend. Wilful murder was punishable by life imprisonment. The boy spoke Kukatja and Gija as his first language. English was his third language. His spoken English was very poor. The boy pleaded not guilty and went to trial. Several of the issues at trial were complex, including the post mortem findings as to the cause of death. There was no accredited Kukatja **interpreter** available to interpret at the trial. The trial proceeded with a prisoner from Broome regional prison sitting next to the boy in the dock undertaking the role of a de facto interpreter. The so called interpreter spent the majority of the trial asleep. The trial had to proceed because the boy had spent approximately 12 months on remand and there was no reasonable prospect of obtaining a suitable interpreter had the trial been adjourned for that reason.

(d) Transport to Court in Remote Northern Territory Communities

191. In the Northern Territory, the Legal Aid Commission has reported that securing safe transport to court for remote communities is a significant issue, which raises concerns in relation to Australia's compliance with Article 5(a) of CERD. Failure to appear in court generally results in the issue of a warrant for an offender's arrest, compounding the original offence. The Legal Aid Commission has also observed that in the absence of reliable transport to court appearances, due in part to the lack of public transport, individuals often have no alternative but to commit further offences by driving an unregistered and/or unroadworthy vehicle, unlicensed, in order to make an appearance at court. The Legal Aid Commission has reported an increase in the incidence of recorded traffic and driving offences since the boost to police numbers as a result of the Northern Territory Intervention.¹⁷³

¹⁷² Aboriginal Legal Service of Western Australia, *Submission to the Parliament of Australia House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs: Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System* (December 2009), available at <http://www.aph.gov.au/House/committee/atsia/sentencing/subs/Sub019.pdf> accessed 22 May 2010.

¹⁷³ Northern Territory Legal Aid Commission, *Report to Social Justice Commissioner: Transport to Court Issues* (2008).

Proposed Recommendations for Concluding Observations (Article 5)

THAT Australia require all police to be properly educated on their legal duties under anti-discrimination legislation and also provided with appropriate cross-cultural and anti-racism training. Police should also be educated on what racial profiling is and the impact that it has on affected communities.

THAT Australia use intergovernmental mechanisms to:

- develop legislation across jurisdictions that makes racial profiling unlawful; and
- develop standards for all police forces in Australia to make racist behaviour and failure to investigate allegations of crimes against racial minorities a disciplinary offence and, if necessary, an offence leading to dismissal; and
- ensure that all police cells, interview rooms and vehicles in Australia contain recording cameras and microphones.

THAT Australia ensure that a properly independent, adequate, accountable system be established to deal with complaints about police misconduct. The system should comply with Australia's procedural obligations under the right to life and the right to be free from torture and other cruel, inhuman and degrading treatment and at a minimum provide that complaints about police be heard by an independent agency staffed by people who are not themselves police.

THAT the Australian Government work with Aboriginal and Torres Strait Islander communities and specialist legal services to determine the minimum level of funding necessary to meet legal need and to ensure access to interpretive services and THAT the Federal Government take concrete measures, including by increasing funding, to improve access to culturally appropriate legal assistance services for family and civil law matters for Aboriginal and Torres Strait Islander peoples.

THAT the Federal Government consider options for improving access to culturally appropriate legal assistance services for civil law matters for Aboriginal and Torres Strait Islander peoples.

THAT the Attorney-General's Department fund work with Aboriginal and Torres Strait Islander legal assistance providers to improve the provision of access to justice information to Aboriginal and Torres Strait Islander peoples, including through direct contact, and building outreach services to connect existing services.

THAT the Australian Government, in consultation with remote Aboriginal communities and legal services, inquire, report and implement strategies to improve access to court by Aboriginal peoples in remote communities.

E.3 Policing African Communities

192. African communities, particularly the Sudanese community, are some of the fastest growing ethnic communities in Australia.¹⁷⁴
193. According to the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**), policing is consistently identified as one of the biggest issues confronting African young people.¹⁷⁵
194. There are very concerning findings from the VEOHRC that young Sudanese Australians experience excessive targeting from police which they believe to be due to their race. One 19-year-old Sudanese man said, 'I don't hang around the street as (I am) scared of police'. In particular, the report indicates young Sudanese Australians are:
- (a) regularly stopped and questioned by police;
 - (b) 'moved on' by police who provide no legitimate reason to do so;
 - (c) the subject of racist comments from police;
 - (d) searched in public;
 - (e) refused police details when they are requested;
 - (f) denied the right to silence in police investigations; and
 - (g) subject to police aggression when they try to assert their rights or ask questions.
- This is despite Victoria Police reporting that Sudanese Australians are generally underrepresented in crime statistics and the Springvale Monash Legal Service indicating that Sudanese Victorians are generally hard-working and law-abiding members of the community.¹⁷⁶
195. Recent studies have shown that a significant number of African young people have adverse experiences of interactions with the police. A 2010 report examining police practices in three regions of Melbourne found that African young people are over-policed *because they are African*.¹⁷⁷ This includes overuse of stop and search powers, excessive questioning by police, police inciting violence from African young people and, in some cases, unlawful police violence against those young people. The sense is that rather than being protected by the police, African young people feel they need some sort of protection from the police.¹⁷⁸

¹⁷⁴ Refugee Council of Australia, *Australia's Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions* (2008), available at http://www.refugeecouncil.org.au/docs/resources/submissions/2008-09_intakesub.pdf.

¹⁷⁵ *Rights of Passage report*, above n 136, pages 30-38

¹⁷⁶ *Rights of Passage report*, above n 136.

¹⁷⁷ Bec Smith and Shane Reside, Fitzroy Legal Service, *Boys, You Wanna Give Me Some Action?: Interventions into Policing of Racialised Communities in Melbourne: Report of the 2009/10 Racism Project* (2010)

¹⁷⁸ See Smith and Reside, above n 177, page 16.

Case Study: Police violence

“On a summer evening, a group of young [African] men were hanging out in their local park. Police approached the group and told them to leave the park by a certain time. The young men told the police that they didn’t intend leaving the park as it was still early, it was school holidays, and they wanted to keep hanging out. One of the police officers warned the group that the police would return again at the time they wanted the boys to leave. At the allotted time, two officers approached the group. Some of the young men decided to run away from the police. Others remained seated until they noticed one of the police officers running towards them, armed with his baton, at which time the rest of the group joined the others and ran across the park towards a group of civilians. The young men were following each other when someone in the group noticed one young man had been ‘dropped’ by one of the civilians. As it turns out the ‘civilians’ were actually police, all of whom were either completely out of uniform or had taken off their police shirts, and were wearing only white singlets. Upon realising this, the group started running in a different direction, however the out-of-uniform police had already grabbed and assaulted a 14-year-old boy.”¹⁷⁹

196. The same study found that police enforce particular notions of acceptable usage of public spaces which is not linked to whether or not young people are acting unlawfully. This leads to conflict between the police and young people, particularly for the many African people, living in public housing high rise towers, for whom the distinction between public and private space is blurred.

Case Study: Over-policing young African people in public spaces

“Culturally we tend to hang around in big numbers and not only culturally, because for me it really makes sense that I can hang around with my friends if I live on top of them. I can’t invite them to my house, but if I come downstairs, we can really see each other. We saw the flats as our own backyards honestly because we don’t have backyards, so coming downstairs, coming together, it was all fun, it was all good, until police started coming around and saying: ‘What are you guys up to? What are you doing?’ We were like: ‘We’re not really doing anything other than standing around.’ Some of the police didn’t like the idea of talking back to them, so suddenly we became... the police told us we were hostile.”¹⁸⁰

197. The routine harassment of, and police violence against, African young people is either under-reported to the relevant oversight bodies, or these bodies are not adequately investigating these incidents, or both.¹⁸¹ Finally, despite having a good understanding of their rights, young African tend not assert their rights for fear that to do so results in hostility and aggression.

¹⁷⁹ Smith and Reside, above n 177, page 15.

¹⁸⁰ Smith and Reside, above n 177, page 10.

¹⁸¹ Smith and Reside, above n 177, page 2.

This highlights that African people perceive that they are unable to make a complaint, which results from the lack of independent and effectively complaints systems in Australia that would accord with procedural obligations under the right to life and the right to be free from torture and other cruel, inhuman and degrading treatment.

Case Study: Fear of making complaints

One young African person described what happened after he attempted to make a complaint about a previous assault by police:

“Oh just slapping me in the head, calling me ‘black cunt’, one of them spat on me, and then they picked me up and one of the copper goes to me ‘What are you gonna do, what are you gonna do, what are you gonna do?’ He just started pushing me around, and the other guys were holding me back and then anyways they beat me up for about ten minutes, they kept me in there, they kept me in there and then they let me out at the end, they let me out of the back door. So I went to the front door and I said ‘I wanna make a complaint’ and the one that was at the reception goes to me ‘What happened?’ I’m like, ‘I was just at the back and the coppers were beating me up for no reason’. He goes to me, ‘Wait’. He went inside, he called one of the coppers that were beating me up. Another copper came in and goes to me, ‘If you don’t get out of here now, I’ll pull you back in.’ And I left.”¹⁸²

198. Racist treatment of African people as set out above raises concerns about equal treatment before organs administering justice, the right to be free from torture and other cruel inhuman and degrading treatment and liberty and security of the person issue under article 5 of CERD.
199. Separately, there has been an increase in State and Territory, as well as local laws that provide increased discretionary powers to police. The impact on African people is discussed under [Article 5\(f\), access to public spaces](#).

E.4 Counter-Terrorism Measures

200. Since 2001, Australia has passed over 40 pieces of legislation purportedly to counter the threat of terrorism in Australia, including increased powers for police and intelligence agencies and the creation of new terrorism offences. Although the legislation is not discriminatory on its face, in practice the increase in police powers and prosecutions under the new laws has been felt adversely and disproportionately by the Muslim, Kurdish, Tamil and Somali communities in Australia. This is a result of the extreme breadth of the offences created, which require investigating agencies to exercise discretion as to which potential offenders will be investigated.
201. As part of the Australian government’s raft of counter-terror laws, broad coercive powers were given to the Australian Federal Police and the Australian Security and Intelligence

¹⁸² Smith and Reside, above n 177, page 17.

Organisation (**ASIO**) to do a range of things, including to detain people without charge for extended periods of time.¹⁸³

202. One concern is that intelligence gathering agencies use the existence of the laws to coerce co-operation with investigations from particular communities, without needing to resort to actually exercising powers under the laws. The indirect effect of the laws is therefore that intelligence officers reportedly use powers to leverage individuals into informal interviews. Community legal centre lawyers in Melbourne have reported that ASIO officers request an informal 'chat' accompanied by an indication that they could obtain a questioning warrant.¹⁸⁴

Case Study: Kidnapping by ASIO Officers

ASIO officers themselves gave evidence of using words to the effect of 'we can go down the difficult path or a less difficult path' in the case of Izhar UI-Haque, who was questioned about training in Pakistan with a terrorist organisation. In that case the Supreme Court of New South Wales found that the questioning tactics of ASIO were 'grossly improper and constituted an unjustified and unlawful interference with the personal liberty of the accused'. The court also found that ASIO officers committed criminal offences of false imprisonment and kidnapping at common law.¹⁸⁵

203. Community lawyers in Melbourne also report that the Australian Federal Police and Australian Intelligence Security Organisation, when investigating instances of political violence, disproportionately focus on Australians with Tamil, Pakistani, Arab and East African ties through their families or countries of origin.¹⁸⁶ This is supported by anecdotal evidence from communities themselves. For example, the Islamic Council of Victoria has catalogued the following practices in relation to the Somali community whereby often unidentified but presumably federal policing/intelligence agents acting without providing any warrant:
- (a) constantly harass community members without disclosing the nature of the questioning;
 - (b) repeatedly question community members at all hours of the day;
 - (c) arrange but then do not attend meetings;

¹⁸³ Under Part 1C of the *Crimes Act 1914* (Cth) a person arrested for a terrorism offence may be detained without charge up to 24 hours. However, the actual time spent in detention may be significantly longer because, under s 23CA(8), certain periods may be disregarded from the investigation period. There is no limit on the amount of time that might be disregarded: *Crimes Act 1914* (Cth) ss 23CA(4)(b) and 23DA(7). Following amendments introduced under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) and the *ASIO Legislation Amendment Act 2006* (Cth), a person (including a non-suspect) can be detained without charge under an ASIO warrant for up to 168 hours, or 7 days: *Australian Security Intelligence Organisation Act 1979* (Cth) s 34S, 34G(1).

¹⁸⁴ Western Suburbs Legal Service, *Is Community A Crime?* (2009) page 7.

¹⁸⁵ *R v UI-Haque* [2007] NSWSC 1251, para [62].

¹⁸⁶ Western Suburbs Legal Service, above n 184.

- (d) prohibit people from speaking to others or else face charges; and
- (e) inform Muslim men that their wives are required for questioning.¹⁸⁷

204. While rarely used, where prosecutions under counter-terrorism laws have been pursued, all have been made against racial and religious minorities, namely Muslim people and Tamils.¹⁸⁸

Proposed Recommendations for Concluding Observations (Article 5(a))

THAT Australia immediately appoint the National Security Legislation Monitor and direct it to review Australia's counter-terror laws, particularly those laws that provide police and intelligence agencies with broad discretionary powers to detain and question people without charge, to ensure that the laws are consistent with Australia's human rights obligations and do not limit rights except for a legitimate purpose and only in a proportionate way. The racially discriminatory impact of police powers under counter-terror laws should be taken into account in that review.

THAT the Australian Government immediately establish an independent investigation into the allegations of unlawful questioning of members of Somali and other Muslim communities by intelligence gathering agencies in order to establish whether agencies have acted unlawfully in their questioning of community members. The investigation should be conducted by an entity with appropriately broad and strong powers to compel evidence, such as the Inspector-General of Intelligence and Security.

E.5 Migrant and Culturally and Linguistically Diverse Communities

205. The ability to understand language is crucial for accessing justice in terms of seeking and understanding legal advice, communicating with other parties and utilising the court system. The right to free access to an interpreter is generally available throughout Australia's criminal justice system,¹⁸⁹ in most Australian Tribunals¹⁹⁰ and in a limited range of civil disputes.¹⁹¹ However, funding of interpreter services in civil matters, particularly in Victoria, is limited

¹⁸⁷ Islamic Council of Victoria, *Submission to the Federal Attorney-General's National Security Legislation Discussion Paper* (18 September 2009) para [12], available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/966BB47E522E848021A38A20280E2386~SLB+-Islamic+Council+of+Victoria+October+2009.pdf/\\$file/SLB++Islamic+Council+of+Victoria+October+2009.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/966BB47E522E848021A38A20280E2386~SLB+-Islamic+Council+of+Victoria+October+2009.pdf/$file/SLB++Islamic+Council+of+Victoria+October+2009.pdf)

¹⁸⁸ See, eg, *R v Mallah* (2003); *R v Thomas* (2004); *R v Lodhi* (2006); *R v Khazal* (2006); *R v ul-Haque* (2006); *R v Benbrika* (2006). Charges have also been brought against two alleged members of the Liberation Tigers of Tamil Eelam: *R v Vinayagamoorthy & Yathavan*. Only one other charge, unrelated to membership of a political or religious group, appears to have been brought: *R v Amundsen* (2006).

¹⁸⁹ Law Institute of Victoria, *Interpreting Fund Scoping Project* (2010) sch 1, available at <http://www.liv.asn.au/getattachment/80358a3c-d0d5-460c-bbae-af9dccc3f8/Final-Report---Interpreting-Fund-Scoping-Project.aspx>.

¹⁹⁰ See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 63.

¹⁹¹ *Dietrich v The Queen* (1992) 177 CLR 292, page 301.

which raises concerns for CALD communities' rights under article 5(a). As a result, the organisation and funding of interpreter services falls to the parties requiring those services, who may not be able to do so for financial or other reasons. For the more than 186,000 Victorians who speak English 'not well' or 'not at all',¹⁹² as well as Indigenous Australians or people with hearing or speaking difficulties, this presents a substantial problem in defending themselves in or enforcing their legal rights through civil actions.¹⁹³ English difficulties can also discourage the pursuit of meritorious legal claims.¹⁹⁴ According to a 2010 report from the Law Institute of Victoria (**LIV**), there is significant unmet demand for interpreter services in Victoria which the report estimates are required by at least 30,000 Victorians in 80,000 civil matters every year.¹⁹⁵ In particular, the report highlights the need for interpreters in:

- (a) the provision of sometimes complicated legal advice for clients of community legal centres and other pro bono legal services;
- (b) the preparation and review of court documents and forms for clients of community legal centres; and
- (c) the initial meeting between legal aid panel lawyers and clients who may apply for legal aid.

206. At five Victorian community legal centres with the highest demand for interpreters, 72% of requests for interpreting services across all matters were not fulfilled. Given that 57% of work in Victorian community legal centres is civil in nature, the LIV considers this to be indicative of significant language barriers to civil justice.¹⁹⁶ Both the Victorian Law Reform Commission and the LIV have recommended that an interpreting fund be established to address this issue.¹⁹⁷

¹⁹² Australian Bureau of Statistics, *2006 Census of Population and Housing – Victoria (State), Proficiency in Spoken English / Language by Age for Time* (Series Cat No 2068.0), available at: <http://abs.gov.au/websitedbs/D3310114.nsf/home/Census+data>.

¹⁹³ Law Institute of Victoria, above n 189.

¹⁹⁴ Victorian Law Reform Commission (VLRC). *Civil Justice Review Report* (2008), available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/8137a400404a0bed9549fff5f2791d4a/VLRC+Civil+Justice+Review+-+Report.pdf?MOD=AJPERES>.

¹⁹⁵ Law Institute of Victoria, above n 189.

¹⁹⁶ Law Institute of Victoria, above n 189.

¹⁹⁷ Law Institute of Victoria, above n 189; Victorian Law Reform Commission, *Civil Justice Review Report* (2008), available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/8137a400404a0bed9549fff5f2791d4a/VLRC+Civil+Justice+Review+-+Report.pdf?MOD=AJPERES>.

F. OTHER CIVIL AND POLITICAL RIGHTS (ARTICLE 5(B) – (D))

F.1 Aboriginal and Torres Strait Islander Peoples

(a) Imprisonment

207. Aboriginal peoples in Australia are among the most highly incarcerated peoples in the world. Recent figures reveal that:
- (a) Aboriginal peoples were 13 times more likely as other Australians to be imprisoned in 2008;
 - (b) the imprisonment rate increased by 46% for Aboriginal women and by 27% for Aboriginal and Torres Strait Islander men between 2000 and 2008; and
 - (c) in the Northern Territory, Aboriginal peoples constitute 83% of the prison population, despite only making up 30% of the Territory's total population.¹⁹⁸
208. The factors contributing to high levels of imprisonment for Aboriginal peoples are varied and complex. The lack of appropriate non-custodial sentencing options in rural and remote areas, particularly in the Northern Territory,¹⁹⁹ coupled with the disproportionate impact of certain criminal laws to Aboriginal peoples (see for example part [F.1\(d\): Aboriginal and Torres Strait Islander peoples – Mandatory Sentencing](#)) have further compounded the to high rates of Aboriginal peoples' incarceration. These issues raise significant concerns in relation to Australia's obligations under Article 5(b) of CERD, and in relation to the right to health in Article 5(e).
209. Given Aboriginal peoples' overrepresentation in the prison population, unacceptable conditions in Australian prisons, including overcrowding and lack of access to adequate health care treatment, also have a disproportionate impact on Aboriginal peoples.²⁰⁰
210. Prison conditions vary between states, however overcrowding and substandard health care is a real problem in many Australian prisons. In Western Australia, the situation is acute,²⁰¹ and the Aboriginal Legal Service of WA has reported that prisoners are forced to 'double bunk' in prisons and sometimes sleep on mattresses on the floor, with temperatures regularly exceeding 40 degrees Celsius.²⁰² Prisons in South Australia, Victoria and New South Wales

¹⁹⁸ Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2008-08*, cited in Aboriginal and Torres Strait Islander Legal Services, above n 157, para [5.8].

¹⁹⁹ See Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2008-2009* (2009) page 4, available at <http://www.nt.gov.au/justice/policycoord/researchstats/index.shtml>; Evidence to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, 6 May 2010 (Magistrate Oliver), available at <http://www.aph.gov.au/hansard/rep/commtee/R12981.pdf>.

²⁰⁰ See also Grover, *Addendum: Mission to Australia*, above n 68, para [66].

²⁰¹ See Ombudsman Western Australia, *Report on Deaths in Prisons* (2000).

²⁰² Aboriginal Legal Service of Western Australia, *Submission to the Community Development and Justice Standing Committee Legislative Assembly Parliament of Western Australia — 'Making our Prisons Work:'*

have also reported over-crowding which has led to inappropriate placement of prisoners and conditions which have been described as ‘inhumane’.²⁰³ In 2008, the Committee against Torture recommended that the Australian Government undertake measures to reduce overcrowding.²⁰⁴

211. Additionally, reports have recently emerged in the Northern Territory about the growing number of intellectually disabled and mentally ill people who remain incarcerated in harsh prison conditions, even after having served their sentences, due to a lack of appropriate care facilities.²⁰⁵ The Special Rapporteur on the Right to Health has noted that despite the fact that Aboriginal peoples are overrepresented in the Australian prison system, and that this has a damaging impact on mental health, ‘forensic mental health services [in prisons] nevertheless systematically fail to meet [the needs of Aboriginal peoples]’.²⁰⁶
212. The Special Rapporteur has also observed that while Aboriginal peoples are overrepresented in the prison population, they are vastly under-represented in prison staff numbers. He recommended that the Australian Government implement programs to promote the recruitment of Aboriginal health and prison workers and to ensure culturally appropriate service delivery to prisoners.²⁰⁷

Inquiry into the Efficiency and Effectiveness of Prisoner Education, Training and Employment Strategies (April 2010), available at

[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/9A75B79A334556C848257713002472E6/\\$file/MOP+Sub18_ALSWA+\(vA254460\).pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/9A75B79A334556C848257713002472E6/$file/MOP+Sub18_ALSWA+(vA254460).pdf) at 23 May 2010

- ²⁰³ ‘Claims of Overcrowding in SA Prisons’, *ABC News*, 10 March 2008, available at <http://www.abc.net.au/news/stories/2008/03/10/2185116.htm>; Greg Skelton, ‘Overcrowding Pressures Prisons’, *The Advertiser* (Adelaide), 17 February 2008, available at <http://www.news.com.au/adelaidenow/story/0,22606,23228823-2682.00.html>; ‘Juvenile Prisoners Sharing One-Person Cells’, *ABC News*, 7 April 2008, available at <http://www.abc.net.au/news/stories/2008/04/07/2209444.htm?section=justin>; AHRC, *Submission to the Special Rapporteur*, above n 107, para [47].
- ²⁰⁴ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/1, (2008), para [23]. See also, *ABC News*, *Fears prison overcrowding to remain*, (4 March 2010), available at <http://www.abc.net.au/news/stories/2010/03/04/2836553.htm>.
- ²⁰⁵ Natasha Robinson, *Jailing of Mentally ill ‘appalling’ says NT Chief Justice*, *The Australian* (Sydney), 21 September 2009, available at <http://www.theaustralian.com.au/news/nation/jailing-of-mentally-ill-appalling-says-nt-chief-justice/story-e6frg6nf-1225777245772>. See also, Grover, *Preliminary Observations and Recommendations*, above n 98.
- ²⁰⁶ Grover, *Addendum: Mission to Australia*, above n 68, para [77].
- ²⁰⁷ Grover, *Addendum: Mission to Australia*, above n 68, para [81].

Case Study: Christopher Leo²⁰⁸

In December 2008, Chief Justice Martin of the Northern Territory's Supreme Court sentenced a 28 year old mentally ill Indigenous man to 12 months jail because 'he had no choice but to keep Leo behind bars...as there was no support or housing facilities in the Territory to make him safe outside of prison'. Mr Leo had already spent 16 months in Alice Springs prison for an aggravated assault in August 2007. He was found unfit to stand trial but was later found guilty in a special jury hearing. Mr Leo suffered tremendously in maximum security, including attempting to harm himself.

Case Study: Adrian Faulton²⁰⁹

Adrian Faulton, aged 25, is a severely intellectually disabled Indigenous man. Since the age of 15 he has committed mostly petty crimes. Mr Faulton is an example of a recurring offender who is the type of victim of the Northern Territory's mandatory sentencing laws. Despite Mr Faulton being unfit to plead, he has been locked in a small concrete cell in Darwin's Berrimah Prison due to the Northern Territory's under-resourced mental health services.

(b) Aboriginal Women in Prison

213. Aboriginal women prisoners are the fastest growing prison population, which raises significant concerns in relation to Australia's compliance with Article 5(b) of CERD.²¹⁰ In the decade to 2005, the Aboriginal women prisoner population increased by 420%.²¹¹ Since the 1991 Royal Commission into Aboriginal deaths in custody, the number of Aboriginal women in prison has increased threefold.²¹² As discussed in part [F.1\(a\)](#) above, there are inadequate health services provided to prisoners in many Australian prisons. More than half of women in jail have been diagnosed with a mental illness and over 89% of women prisoners are survivors of

²⁰⁸ Natasha Robinson, 'Hopeless Days of Man, Adrian Faulton, Lost in the Legal System', *The Australian* (Sydney) 20 December 2008, available at <http://www.theaustralian.news.com.au/story/0,25197,24826238-5006790,00.html>.

²⁰⁹ Natasha Robinson, 'Hopeless Days of Man, Adrian Faulton, Lost in the Legal System', *The Australian* (Sydney) 20 December 2008, available at <http://www.theaustralian.news.com.au/story/0,25197,24826238-5006790,00.html>.

²¹⁰ AHRC, *Statistical Overview*, above 164, ch 9(b).

²¹¹ This compares with an increase over the same decade of 110 per cent in the male Indigenous prison population, and of 45 per cent in the general male prison population. In March 2004, the incarceration rates of Indigenous women nationally were 20.8 times that of non-Indigenous women: AHRC, *Statistical Overview*, above 164, ch 9(b).

²¹² National Indigenous Drug and Alcohol Committee, *Bridges and Barriers: Addressing Indigenous Incarceration and Health* (2009), available at http://www.nidac.org.au/publications/pdf/nidac_bridges_and_barriers.pdf.

sexual assault.²¹³ Women in prison are not able to access adequate care and services, and prison staff are unable to ensure proper treatment for women with mental health issues.²¹⁴

(c) Deaths in Custody

214. The death of Aboriginal peoples in custody continues to be of serious concern, and raises significant issues in respect of Australia's compliance with Article 5(b) of CERD, despite recommendations of the Royal Commission into Aboriginal Deaths in Custody almost 20 years ago.²¹⁵ The Royal Commission was held in response to a growing public concern that deaths in custody of Aboriginal people were too common and poorly explained. The Royal Commission made 339 recommendations relating to improvements in the criminal justice system and, reducing the number of Aboriginal peoples in the Australian prison system, with the principal thrust being directed towards the elimination of disadvantage and the growth of empowerment and self-determination of Aboriginal peoples. However, many of the recommendations have never been implemented and in 2006, 54 people were reported to have died in custody or in custody-related operations, with 11 of those individuals being Aboriginal peoples.²¹⁶
215. In Western Australia, prisoner transport issues continue to raise significant concerns about Australia's compliance with Article 5(b) of CERD, particularly in relation to the number of Aboriginal deaths or injury as a result of prisoners being transported 'thousands of kilometres in unsafe and uncomfortable vehicles, often for minor offences'.²¹⁷ In Western Australia, the vast majority of prisoners transported, especially in regional and remote areas, are Aboriginal peoples.²¹⁸ The shocking ramifications of these practices are illustrated in the case of Mr Ward – see case study below.
216. The UN Committee against Torture has similarly expressed its concerns about prison conditions in Australia and has recommended that the Federal Government improve its

²¹³ Women's Report Card Project, Women's Rights Action Network Australia, *Our Rights, Our Voices: The National Community Report on Women's Human Rights In Australia* (2004) page 25, available at <http://www.wrana.org.au/WRC%20Project/Final%20National%20report.pdf>.

²¹⁴ Women's Report Card Project, above n 213, page 25.

²¹⁵ Commonwealth of Australia, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991) vols 1-5.

²¹⁶ J Joudo and J Curnow, 'Deaths in Custody in Australia: National Deaths in Custody Program Annual Report 2006, *Australian Institute of Criminology, Technical and Background Paper No 85* (2006) page xii, cited in AHRC, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2008), available at http://www.hreoc.gov.au/social_justice/statistics/index.html#fn142.

²¹⁷ Aboriginal and Torres Strait Islander Legal Services, above n 157, para [5.3].

²¹⁸ Office of the Inspector of Custodial Services (WA), *Thematic Review of Custodial Transport Services in Western Australia* (Report No 43, May 2007) page 1, cited in Aboriginal and Torres Strait Islander Legal Services, above n 157, para [5.3].

mechanisms to prevent and investigate deaths in custody.²¹⁹ Moreover, the UN Special Rapporteur on Indigenous Peoples expressed his concerns about the high rate of Aboriginal deaths in custody and encouraged the Government to fulfil its commitment to implementing the recommendations of the Royal Commission.²²⁰

Case Study: Sandfire Incident²²¹

In late 2006, a prison transport vehicle filled with 14 prisoners en route to Roebourne from Broome prison broke down not far from Sandfire Roadhouse, which is about half way between the two destinations. Due to inadequate vehicle design and emergency procedures, the prisoners were forced to remain in the vehicle for 20 hours, in a situation of extreme heat where the air conditioner was not able to be kept on. This incident resulted in the WA Minister for Corrective Services, Margaret Quirk, giving a speech in Parliament where she said:

It is intolerable that in this day and age people should be subjected to such inhumane conditions, and I have requested the department to scrutinise existing procedures to ensure that similar incidents do not occur in the future.²²²

Although this assurance was given, the changes and scrutiny needed was not implemented.

²¹⁹ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/1 (2008).

²²⁰ James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), UN Doc A/HRC/15 (4 March 2010) para [52].

²²¹ Case study is an extract from Aboriginal and Torres Strait Islander Legal Services, above n 157, para [5.3].

²²² Parliament of Western Australia, 2 November 2006, page 8153b, cited in Aboriginal and Torres Strait Islander Legal Services, above n 157, para [5.3].

Case Study: Mr Ward

On 27 January 2008, a respected Ngaanyatjarra Aboriginal elder, Mr Ward, was placed in the back of a prison transport van for up to four and half hours while temperatures outside exceeded 40 degrees Celsius. Mr Ward was being transferred from Laverton to Kalgoorlie in remote Western Australia to face a charge of driving under the influence. Mr Ward was found unconscious in the back of the van, having suffered heat stroke. He subsequently died in hospital. The van's air-conditioning system was faulty.²²³

A coronial inquest into Mr. Ward's death revealed systemic failings which contributed to the death. These included over policing, denial of bail, inhumane prisoner transport, lack of training of justices of the peace, police and private contractor staff, lack of governmental supervision of contractual duties and inadequate funding. Findings were delivered in June 2009, where the WA Coroner found that Articles 7 and 10 of the International Covenant on Civil and Political Rights had been breached.²²⁴

(d) Mandatory Sentencing

217. Mandatory imprisonment continues to operate in Western Australia and the Northern Territory. As the Aboriginal and Torres Strait Islander Legal Services state, 'it means that people who might not have otherwise been sentenced to a term of imprisonment are being incarcerated, with all the attendant destructive impacts (exposure to violence and abuse, dislocation from pro-social supports such as family and employment) that serving a sentence of imprisonment brings.'²²⁵
218. Mandatory sentencing laws have a disproportionate impact on Aboriginal people. This raises significant concerns in relation to Australia's compliance with Article 5(b) of CERD. Mandatory sentencing laws have an impact on a range of civil and political rights, including:
- (a) freedom from arbitrary detention and cruel punishment – mandatory sentencing laws limit judicial discretion in sentencing and prevent courts from taking account of the cultural background and responsibilities of offenders, and the economic and social difficulties that they face. Given the cultural and socio-economic situation of faced by many Aboriginal peoples, this leads to a disproportionate number of Aboriginal peoples imprisoned under mandatory sentencing provisions; and

²²³ Paige Taylor, 'Drink Driver Dies in Custody', *The Australian* (Sydney), 28 January 2008.

²²⁴ See http://www.safetyandquality.health.wa.gov.au/docs/mortality_review/inquest_finding/Ward_finding.pdf.

²²⁵ Aboriginal and Torres Strait Islander Legal Services, above n 157, para [5.12].

- (b) the rights of the child – three quarters of those sentenced in mandatory sentencing cases in Western Australia are young Aboriginal people.²²⁶
219. In the Northern Territory, mandatory sentencing applies in relation to property offences, sexual offences, offences of violence (even if the offence caused minor injury or, in the case of a repeat offence, no injury at all), drug offences and breaches of domestic violence orders.²²⁷ In 2007/8, the incarceration rates of Aboriginal people in the Northern Territory were 3.5 times the national rate of imprisonment.²²⁸ During that time Aboriginal people constituted 83% of the prison population in the Northern Territory.²²⁹
220. In Western Australia, Aboriginal people are, in relation to other Australians, disproportionately arrested, remanded in custody and sentenced, and the disparity is rising.²³⁰ Following legislative amendments in September 2009, mandatory imprisonment now applies to offences for the assault of police officers and public officers.²³¹ The CERD Committee has expressed its concerns about the ongoing use of mandatory sentencing in Western Australia and the disproportionate impact this law has on that state's Aboriginal population.²³² However, by 2009 the situation had become worse with the number of Aboriginal people in prison doubling since 2002.²³³

²²⁶ Australian Bureau of Statistics, *Prisoners in Australia*, ABS Catalogue No 4517.0 (2007), available at http://www.abs.gov.au/Ausstats/ABS@.nsf/Latestproducts/4517.0Main_Features22007?opendocument&abname=Summary&prodno=4517.0&issue=2007&num=&view .

²²⁷ See *Sentencing Act 1995* (NT) ss 78, 78BA, 78BB; *Misuse of Drugs Act 1990* (NT) s 37(2); *Domestic and Family Violence Act* (NT) s 121.

²²⁸ In the Northern Territory, the incarceration rate in 2007/08 was 568 per 100,000 adults, compared with the national average rate of imprisonment of 164 per 100,000 adults: Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2008-08*, page 3, cited in Aboriginal and Torres Strait Islander Legal Services, above n 157, para [5.8].

²²⁹ Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2008-08*, page 4, cited in Aboriginal and Torres Strait Islander Legal Services, above n 157, para[5.8].

²³⁰ Neil Morgan and Joseph Wallam, *Inspecting Custodial Settings* (Paper presented at the National Aboriginal and Torres Strait Islander Legal Service Conference, Perth, May 2009), cited in Aboriginal and Torres Strait Islander Legal Service, *Joint Submission to the National Human Rights Consultation*, 2009, [5.3].

²³¹ See *Criminal Code 1913* (WA) ss 297 and 318.

²³² CERD Committee, *Concluding Observations: Australia*, above n 94.

²³³ Neil Morgan and Joseph Wallam, *Inspecting Custodial Settings* (Paper presented at the National Aboriginal and Torres Strait Islander Legal Services Conference, Perth, May 2009), cited in Aboriginal and Torres Strait Islander Legal Services, above n 157.

Case Study: Violent Offences²³⁴

Simone is a 35 year old single mother from a remote community. She has 6 children in her care but works in the community's aged care facility. She was convicted of assault, after punching another female once to the forehead, after which a brief fight ensued. The victim suffered scratches to her head. She was sentenced to 2 months imprisonment. Her incarceration caused her to lose her job, and left her 6 young children without a mother.

Case Study: Theft²³⁵

In the space of two years, one 13 year old boy from the north of Western Australia received two sets of 12 month detention, two 12 month conditional release orders, and one supervised release order of six months. The offences he had committed were as a result of him stealing food from houses because he was hungry. He has had little family care.

(e) Juvenile Justice

221. Aboriginal juveniles are 28 times as likely to be detained as other Australian juveniles.²³⁶ Disturbingly, Aboriginal young people in juvenile justice are at least four times more likely to have an intellectual disability than the general population.²³⁷ This raises significant concerns in relation to Australia's obligations under Article 5(b) of CERD.
222. The AHRC's Social Justice Commissioner has called on the Australian and state governments to implement, and improve, existing programs that divert young Aboriginal people from incarceration²³⁸ Although some steps have been taken by the Australian Government, together with the states and territories, in addressing the over representation of young people in the criminal justice system,²³⁹ the Aboriginal juvenile detention rate nonetheless increased by 27% between 2001 and 2007.²⁴⁰

²³⁴ Case study is an extract from Aboriginal and Torres Strait Islander Legal Services, above n 157, para [5.3].

²³⁵ Helen Bayes, 'Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory' (1999) *University of New South Wales Law Journal* 54.

²³⁶ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009); and Australian Bureau of Statistics, 'Prisoners in Australia', *Population Distribution, Aboriginal and Torres Strait Islander Australians* (2007).

²³⁷ AHRC, 'Report Calls for Programs that Divert Young People from Incarceration' (Press Release, 14 November 2008), available at http://www.hreoc.gov.au/about/media/media_releases/2008/124_08.html.

²³⁸ AHRC, 'Report Calls for Programs that Divert Young People from Incarceration', above n 237..

²³⁹ See Royal Commission into Aboriginal Deaths in Custody, above n 215; addressed in Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [51].

²⁴⁰ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* and Australian Bureau of Statistics, 'Prisoners in Australia', *Population Distribution, Aboriginal and Torres Strait Islander Australians*, 2007.

223. Despite the AHRC's recommendations, the Australian Government has failed to fully implement appropriate standards of treatment in custody and post-custodial reintegration for the protection of Aboriginal young people in the criminal justice system.²⁴¹

(f) Native Title

224. The CERD Committee, the Human Rights Committee and the Special Rapporteur on Indigenous People have all recommended that Australia continue its efforts to improve the operation of the Native Title system and that it do so in consultation with Aboriginal peoples.²⁴² The Special Rapporteur recently observed that progressive loss of control over and access to traditional lands and natural resources by Aboriginal peoples is another 'crippling aspect' of racial discrimination against these communities.²⁴³

225. Despite these recommendations, access to and control over traditional lands continues to be a major human rights issue for Indigenous Australians. While there were significant judicial developments in the recognition of Indigenous land rights in the early 1990s, legislation now requires Indigenous Australians to satisfy onerously high standards of proof to obtain recognition of their relationship with their traditional lands. The *Native Title Act 1993* (Cth) requires claimants to demonstrate a continuing connection, under traditional laws and customs, with the land and/or waters, and to demonstrate that native title has not been extinguished by an inconsistent government act.

226. Even when native title is established, the Australian Government does not recognise the land interests as being equivalent to other Commonwealth property interests, which undermines security in title to land for Aboriginal traditional owners. Under the current native title system, the interest granted to traditional owners yields to, and is or can be extinguished by, other competing Commonwealth property interests such as freehold or pastoral leases.

227. The high evidentiary barrier required by the *Native Title Act 1993* (Cth) has been confirmed by the High Court of Australia.²⁴⁴ The strict requirement of continuous connection since colonisation is incompatible with the UN Declaration on the Rights of Indigenous Peoples, which provides at Article 26 that native title should exist simply by virtue of 'traditional ownership or other traditional occupation or use'.

228. The Aboriginal and Torres Strait Islander Social Justice Commissioner has repeatedly made reference to the significant evidentiary difficulties faced by Indigenous peoples seeking to

²⁴¹ Report of the Permanent Forum on Indigenous Issues: *International Expert Group Meeting (EGM) on Indigenous Children and Youth in Detention, Custody, Foster-Care and Adoption*, E/C 19/2010/CRP.8 (6 April 2010), [74].

²⁴² Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (3 April 2009) [16]; CERD Committee, *Concluding Observations: Australia*, above n 94, para [16]; Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [28].

²⁴³ Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [20].

²⁴⁴ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

establish the elements of native title in the *Native Title Act 1993* (Cth).²⁴⁵ The standard and burden of proof required places particular burdens on Indigenous people seeking to gain recognition and protection of their native title. The CERD Committee has also expressed concerns in relation to this high standard of proof.²⁴⁶

229. The Australian Parliament has passed the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2008*, which introduces a range of reforms to improve the way that Australia's federal courts and tribunals deal with native title claims. The reforms are aimed at reducing the cost and lengths of trials and will benefit native title claimants by providing a more centralised and flexible system. Under the reforms the courts are permitted to make an order about matters that extend beyond the strict application of native title, such as water allocation and agreed land uses between traditional owners and the Government.
230. In December 2008, the Commonwealth Attorney-General also released a discussion paper on possible minor amendments to the *Native Title Act 1993* (Cth) to encourage more negotiated settlements of native title claims. These amendments are aimed at complementing the institutional reform referred to above and include welcome proposals to reduce evidentiary burdens and obstacles for claimants and to make it easier for a court to hear evidence of Indigenous traditional laws and customs.²⁴⁷ Although these measures are relatively recent, an emerging concern is that the framework has not been supported by adequate funding and resourcing by the Australian Government.
231. While these developments are welcome, the fact remains that the standard and burden of proof currently required under the native title system places particular burdens on Indigenous people seeking to gain recognition and protection of their native title. The general failure of the native title system to provide robust land interests that provide security of title to Aboriginal peoples, of equivalent status to other Commonwealth land interests, undermines Aboriginal peoples' opportunity to full and free economic participation.

(g) Participation in Political Life

232. The National Congress is discussed in part [B.2: Aboriginal Representative Body](#) above. The absence of a representative Indigenous body has deprived Aboriginal peoples of the right to participate meaningfully in policy formulation and public debate and to be consulted on issues that affect them.

(h) Freedom of Movement

233. The Basics Card, which is used as part of the compulsory income management regime, has constrained the right to freedom of movement for affected Aboriginal people. As set out in (section [C.1\(a\): Northern Territory Intervention – Basics Card](#)), the Basics Card system limits

²⁴⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002* (2002) pages 22, 135-6.

²⁴⁶ CERD Committee, *Concluding Observations: Australia*, above n 94, para [17].

²⁴⁷ *Native title reform*, Attorney-General's Department (2009), available at http://www.ag.gov.au/www/agd/agd.snf/Page/Indigenoulawandnativetitle_Nativetitle_Nativetitereform.

the choice of retailers from which Aboriginal peoples can purchase food and other ‘priority items’, which means that individuals often have to travel over some distance to access a Basics Card retailer. Moreover, the limited number of designated retailers outside the Northern Territory makes it difficult for affected persons to access the portion of their income set aside for their ‘priority needs’ while interstate. These issues pose a significant challenge to Australia’s compliance with Article 5(d)(i) of CERD.

(i) Property Rights

234. The Northern Territory Intervention provides for the compulsory acquisition of leases by the Australian Government over townships on Aboriginal land held by Aboriginal Land Trusts or Land Councils and ‘Aboriginal community living areas’ held by Aboriginal associations and other specified areas.²⁴⁸ The five year leases give the Australian Government ‘exclusive possession and quiet enjoyment of the land’.²⁴⁹
235. Although the relationship in the five year lease regime is that of lessee and lessor, Aboriginal land owners do not possess the rights ordinarily enjoyed by lessors. The terms and conditions of the compulsory five year leases are able to be determined by the Australian Government. The present terms include:
- (a) no clear expressed liability to pay rent on the improved value of the land;²⁵⁰ and
 - (b) the ability to vary or terminate the lease without consultation with the Aboriginal landholders,²⁵¹ while the Aboriginal land owners are explicitly precluded from unilaterally terminating or varying the leases.²⁵²
236. The compulsory acquisition of Aboriginal townships vests all decision-making power about the use of the land in the Australian Government and thus deprives the traditional owners of the right to make decisions about the use of the land. This is contrary to the right of self-

²⁴⁸ *Northern Territory National Emergency Response Act 2007* (Cth) s 31(1). ‘Aboriginal land’ is land granted to Aboriginal Land Trusts in fee simple under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Aboriginal community living areas are created by grant to associations in fee simple under the *Land Acquisitions Act 1978* (NT).

²⁴⁹ *Northern Territory National Emergency Response Act 2007* (Cth) s 35(1).

²⁵⁰ *Northern Territory National Emergency Response Act 2007* (Cth) s 35(2). The Government has now, three-years later, signalled its intention to pay rent on the unimproved value of the land: Hon Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, ‘Compulsory Income Management to Continue as Key NTER Measure’ (Press Release, 23 October 2008) available at http://www.facsia.gov.au/internet/jennymacklin.nsf/print/nter_measure_23oct08.htm. The change in policy was largely due to a claim by a group of Northern Territory land owners to the High Court of Australia which challenged the constitutionality of the compulsory five-year lease regime: *Wurridjal v Commonwealth* [2009] HCA 2 (2 February 2009). Although the challenge was unsuccessful, the High Court held that the Aboriginal people whose land has been compulsorily acquired must be fairly compensated. To date, no compensation has been paid to affected people.

²⁵¹ *Northern Territory National Emergency Response Act 2007* (Cth) s 35(5), (6), (7) and (8).

²⁵² *Northern Territory National Emergency Response Act 2007* (Cth) s 35(4).

determination, which requires that Indigenous peoples be involved in any decision-making process affecting their land. The different needs and cultures of Aboriginal peoples also requires that decisions relating to each society are made separately and specifically.

Case Study: Dispossession of Land of Cultural Significance

Pursuant to powers granted in the Northern Territory Intervention, the Australian Government took over culturally sensitive areas of the Warlpiri nation, including a men's ceremonial area and a cemetery.²⁵³

Case Study: Desecration of Culturally Significant Site

In November 2007, a government contractor involved in the Northern Territory Intervention built a pit toilet on a culturally important site at Numbulwar, 600 kilometres south-east of Darwin.²⁵⁴

(j) Nuclear Waste Sites

237. Under the *Commonwealth Radioactive Waste Management Act (CRWMA)*, the Northern Territory Government or Aboriginal Land Councils can nominate areas for assessment as a potential radioactive waste dump site in the Northern Territory.²⁵⁵ Significantly, a nomination is still considered valid, even if due process is not observed, and traditional Aboriginal owners are not fully informed or do not consent to the proposal.²⁵⁶
238. On 23 February 2010, the Federal Resources Minister, the Hon Martin Ferguson MP, announced that he intended to pursue plans for a national radioactive waste repository at Muckaty in the NT, despite strong opposition from environmental and Indigenous groups.²⁵⁷

²⁵³ Lindsay Murdoch, 'Stop Interfering: Angry Elders Take a Stand against Changes', *The Sydney Morning Herald* (Sydney), 25 October 2007, available at <http://www.smh.com.au/news/national/stop-interfering-angry-elders-take-a-stand-against-changes/2007/10/24/1192941153373.html>.

²⁵⁴ 'Claims pit toilet built on NT cultural site', *ABC News*, 12 November 2007, available at <http://abc.net.au/news/stories/2007/11/12/2088464.htm>.

²⁵⁵ *Commonwealth Radioactive Waste Management Act 2005* (Cth) s 3A.

²⁵⁶ *Commonwealth Radioactive Waste Management Act 2005* (Cth) s 3A(2A).

²⁵⁷ Australian Conservation Foundation, 'Wasted Opportunity: Minister Gets it Wrong on Radioactive Dump' (Press Release, 23 February 2010), available at http://www.acfonline.org.au/articles/news.asp?news_id=2703.

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239. The contract for the site assessment was purportedly signed between the Northern Land Council, Muckaty Land Trust and the former Howard Government.²⁵⁸ It is alleged that the Ngapa clan consented to the establishment of the waste dump, in return for \$12 million.²⁵⁹ However, this document has not been made public, and remains classified as commercial in confidence.²⁶⁰
240. There is no widespread community consent to this proposal. Significantly, other traditional Aboriginal owners of land in and around Muckaty assert that they were excluded from the anthropological investigations undertaken for the nomination, and effectively shut out of the consultation process.²⁶¹
241. The adverse affects if the proposal goes ahead include the potential for ‘ongoing disputation and social problems’ among Aboriginal peoples in the area, and the alteration of their perception of their relationship with the land.²⁶² Other risks include the long term effects of radioactive waste, which mobilises into the external environment and is potentially linked to causes of cancer and gene mutation.²⁶³
242. Currently, a *National Radioactive Waste Management Bill 2010* (Cth) is before the House of Representatives. If passed, the Bill will repeal the CRWMA.²⁶⁴ However, the Bill retains many elements of the CRWMA. Significantly, the Bill provides the Minister with the power to override any and all State/Territory laws which might impede the planned radioactive waste dump (including key federal environmental and heritage laws), and still allows for a nomination to be valid without the consent of traditional Aboriginal owners.²⁶⁵

²⁵⁸ Lindsay Murdoch, ‘Muckaty clans challenge plan for waste dump’, *Sydney Morning Herald* (Sydney), 13 April 2010, available at http://www.treatypublic.net/content/muckaty-clans-challenge-plan-waste-dump-0?quicktabs_2=4.

²⁵⁹ Murdoch, ‘Muckaty clans challenge plan for waste dump’, above n 258.

²⁶⁰ Lindsay Murdoch and Tom Arup, ‘Land owners out of mind, out of site’, *Sydney Morning Herald* (Sydney), 27 February 2010, < <http://www.smh.com.au/national/land-owners-out-of-mind-out-of-site-20100226-p95w.html>> at 6 May 2010.

²⁶¹ Iskhandar Razak and Jane Bardon ‘McCarthy challenges NLC to debate Muckaty dump’ ABC, 6 April 2010 <<http://www.abc.net.au/news/stories/2010/04/06/2864872.htm>>; Murdoch, ‘Muckaty clans challenge plan for waste dump’, above n 258.

²⁶² Murdoch and Arup, ‘Land Owners Out of Mind, Out of Site’, above n 260.

²⁶³ David Sweeney, Australian Conservation Foundation, cited by Stephen de Tarczynski, *Rights-Australia: Plan for Nuclear Waste Dump Faces Backlash’ Global Issues* (26 April 2010), available at <http://www.globalissues.org/news/2010/04/26/5363>.

²⁶⁴ *National Radioactive Waste Management Bill 2010* (Cth), sch 1.

²⁶⁵ *National Radioactive Waste Management Bill 2010* (Cth), ss 11(1), 4(4), 7(4)

243. Further, the Bill expressly preserves the Mackaty site as an approved site and excludes the application of any procedural requirements relating to the existing approval and nomination.²⁶⁶
244. At present, the process of radioactive waste management lacks transparency and accountability.

²⁶⁶ Explanatory Memorandum, National Radioactive Waste Management Bill 2010 (Cth) page 2; *National Radioactive Waste Management Bill 2010 (Cth)* sch 2.

Proposed Recommendations for Concluding Observations (Articles 5(a)-(d))

THAT the Australian Government ratify OPCAT and ensure that it receives domestic implementation, including by provision of an independent inspectorate for Australia's prison system.

THAT the Australian Government take immediate steps to reduce overcrowding in prisons and ensure the provision of healthcare to prisoners in the Australian prison system.

THAT the Australian Government, in partnership with Aboriginal peoples', implement programs to promote the recruitment of Aboriginal health and prison workers and to ensure culturally appropriate service delivery to prisoners.

THAT the Australian Government, in consultation with Aboriginal communities, take immediate steps to review the recommendations of the Royal Commission into Aboriginal Deaths in custody, identify those which remain relevant and commence a program of implementation.

THAT the Australian government use the necessary inter-governmental mechanisms, such as the Council of Australian Governments, to direct a review of all mandatory sentencing legislation in the Northern Territory and Western Australia and take all necessary steps and measures to ensure that such legislation does not adversely impact on the rights of Aboriginal and Torres Strait Islander peoples in a manner that is disproportionate and discriminatory.

THAT Australia take steps to address the disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system by implementing the recommendations of various reports and inquiries, including the Royal Commission into Aboriginal Deaths in Custody, the 'Little Children are Sacred' report, requiring implementation of the measures outlined in the National Indigenous Law and Justice Framework and by immediately implementing a policy of Justice Reinvestment.

THAT the Australian Government amend the compulsory five year lease scheme under the Northern Territory Intervention to ensure that affected individuals and communities are fairly compensated and can vary or terminate leases.

THAT the Australian Government review and amend the *National Radioactive Waste Management Bill 2010* (Cth) to ensure nominations of sites for a potential radioactive waste dump cannot be made without the consent of Traditional Aboriginal owners and following prescribed procedures, and THAT all exemptions relating to previous nominations and approvals of sites are removed.

THAT the Australian Government establish a consensual process of selection for nuclear waste sites, where all affected communities have an equal opportunity to participate and contribute to the consultation process.

THAT the Australian Government amend the *National Radioactive Waste Management Bill 2010* (Cth) to remove any sections which provide the Commonwealth with the power to override state or territory laws which impede on a planned radioactive waste dump.

F.2 Indian Communities

245. In May 2009, thousands of Indian students and supporters protested in Melbourne over a series of racially motivated assaults on Indian students. The protest commenced outside the Royal Melbourne Hospital, in support of a 25 year old Indian patient who had been viciously attacked and stabbed with a screwdriver by a group of teenagers.²⁶⁷
246. In response to these assaults, the Australian Prime Minister, Kevin Rudd, expressed regret for the attacks but failed to acknowledge that the acts were racially motivated.²⁶⁸ In the view of the former Race Discrimination Commissioner, Tom Calma, 'the attacks against international students have clear underpinnings of racial prejudice'.²⁶⁹ However, there is a serious failure from both the Victorian Government and police, to acknowledge that such attacks can be attributed to racism.
247. Violence against Indian students has continued, with the brutal murders of two Indian youths on 29 December 2009 and 3 January 2010. One of the youths was stabbed to death, while the other died horrifically, with his body found burnt in a ditch.²⁷⁰
248. Finally, on 21 January 2010, Victoria's Chief Commissioner of Police, Simon Overland admitted that 'there is no question, regardless of the motives, Indian students have to a degree been targeted in robberies and that is not OK'.²⁷¹ However, while acknowledging that Indians in Melbourne were 'disproportionately targeted', he still maintained 'they were no more likely to be assaulted'. Further, the Victorian police continue to insist that there is no evidence to suggest that specifically, the recent murders or burning of a Sikh temple in Melbourne's outer suburbs, were racially motivated.²⁷²

²⁶⁷ 'Thousands Rally against Racism in Melbourne' *The Times of India* (Delhi), 1 July 2009, available at <http://timesofindia.indiatimes.com/Racial-attacks-Indians-hold-rally-in-Australia/articleshow/4599752.cms>.

²⁶⁸ 'Rudd says Indian Student Attackers will be Brought to Justice' *Thaindian News* (Bangkok) 1 June 2009, available at http://www.thaindian.com/newsportal/world-news/rudd-says-indian-student-attackers-will-be-brought-to-justice_100199311.html.

²⁶⁹ AHRC, 'Attacks on International Students have Racial Underpinnings' (Press Release, 2 June 2009) available at http://www.hreoc.gov.au/about/media/media_releases/2009/43_09.html.

²⁷⁰ Nick O'Malley, 'Killing reveals another kind of race problem', *The Sydney Morning Herald* (Sydney) 8 January 2010, available at <http://www.smh.com.au/national/killing-reveals-another-kind-of-race-problem-20100107-lwu9.html>.

²⁷¹ 'Simon Overland admits Indians are Targeted in attacks' *The Australian* (Sydney), 21 January 2010, available at <http://www.theaustralian.com.au/news/nation/simon-overland-admits-indians-are-targeted-in-attacks/story-e6frg6nf-1225821804456>.

²⁷² Ibid.

249. On 24 February 2010, politicians, police and thousands of Australians sat in Indian restaurants across Australia in a mass dining protest against racial attacks.²⁷³ While action such as this is a 'step' in the right direction, the Government and police (both at a state and federal level) need to acknowledge the violence against Indian communities and the impact that such violence has on the Indian community's rights to liberty and security under article 5.
250. Further, mere acknowledgement is not enough, the Government and the police need to take a harder stance on racially motivated acts of violence.²⁷⁴ In accordance with its obligations under articles 2, 4 and 5 of the Convention, the Government should legislate to make racially motivated acts of violence a specific offence which carries enforceable punishments.

F.3 International Students

251. Racially motivated acts of violence do not just affect the Indian community. International students in Australia come from over 200 countries and are vulnerable to violence and discrimination as they are often young and are living away from their home and support networks.²⁷⁵
252. In November 2009, the Australian Senate's Education, Employment and Workplace Relations Committee inquired and reported into the welfare of international students.²⁷⁶ The inquiry was held in response to discrimination in the provision of education and employment and increased media reports on attacks against Indian and other international students (see parts [F.2](#) and [F.3](#) below, which discuss violence against the international students and the Indian community).²⁷⁷

²⁷³ 'National 'vindaloo against violence' protest, *news.com.au*, 24 February 2010, <<http://www.news.com.au/breaking-news/national-vindaloo-against-violence-protest/story-e6frku0-1225834052826>> at 7 May 2010.

²⁷⁴ Further, it is problematic that the magnitude of actual assaults is difficult to ascertain, as most racist attacks are not reported, and cannot accordingly be reflected in crime statistics; Australian Broadcasting Corporation, 'Student protests threaten Australian reputation' *Lateline*, 10 July 2009, <<http://www.abc.net.au/lateline/content/2008/s2594905.htm>> at 7 May 2010.

²⁷⁵ The Academy of the Social Sciences, the Australian Human Rights Commission and Universities Australia, 'Racism, exclusion and poverty: key factors reducing international student safety' summary from workshop held in March 2010 <http://www.universitiesaustralia.edu.au/documents/policies_programs/international/activities/AOSS-final.pdf> at 20 April 2010.

²⁷⁶ Senate Education, Employment and Workplace Relations Committee's Inquiry into the Welfare of International Students, *Information about the Inquiry*, <http://www.aph.gov.au/Senate/committee/eet_ctte/international_students/info.htm> at 28 April 2010.

²⁷⁷ See Greg Sheridan, *Blind eye to racism*, *The Australian* (Sydney), 4 June 2009, <<http://www.theaustralian.com.au/news/opinion/blind-eye-to-racism/story-e6frg6zo-1225720665242>>; see also Lauren Wilson, *Simon Overland admits Indians are targeted in attacks*, *The Australian* (Sydney), 14 March 2009, <<http://www.theaustralian.com.au/news/nation/simon-overland-admits-indians-are-targeted-in-attacks/story-e6frg6nf-1225821804456>>.

253. However, when outlining the background to the inquiry, the report focused on the ‘damaging effect’ the ‘incidents’ had on Australia’s international reputation as a safe destination for overseas students.²⁷⁸ Significantly, the report failed to acknowledge that violence against international students was racially motivated, and instead, attributed it to ‘lack of personal safety awareness’.²⁷⁹
254. The failure to acknowledge the racial basis for such attacks resulted in the Senate Inquiry’s final report making recommendations which failed to get to the crux of the issue, such as that international students be provided with personal safety information.²⁸⁰
255. Submissions were made to the Senate inquiry to improve cultural competency training for police officers and to implement consistent hate crimes legislation, with corresponding penalties, across Australia.²⁸¹ Recommendations were also made to encourage federal, state and territory governments to undertake public awareness and anti-violence campaigns.²⁸²
256. However, the Senate Inquiry’s final report did not make any recommendations to the Australian Government that would translate into strengthened enforceable hate crime penalties under the *Racial Discrimination Act 1975* (Cth), or which meaningfully addressed police competency in dealing with racially motivated crime.²⁸³

Proposed Recommendations for Concluding Observations (Articles 2, 4 and 5)

THAT the Australian Government use any necessary inter-governmental mechanisms, such as the Standing Committee of Attorneys General, to develop strong policies requiring police to acknowledge and respond to racist violence, including increasing police presence in areas where there are frequent attacks on international students and other vulnerable people.

THAT Australia take the necessary legislative measures to ensure its compliance with Article 4(a) of the Covenant by criminalising acts of racial hatred, incitement to acts of racial hatred and racial and

²⁷⁸ Australian Senate, *Welfare of International Students*, September 2009, p 25
<http://www.apf.gov.au/Senate/committee/eet_ctte/international_students/report/index.htm>.

²⁷⁹ ‘The majority of evidence given to the committee indicated that the incidents were more likely to be opportunistic robberies, with the attackers targeting owners of laptop computers who did not have an appropriate level of personal safety awareness, as opposed to attacks based on race’: Australian Senate, *Welfare of International Students*, September 2009, p 28
<http://www.apf.gov.au/Senate/committee/eet_ctte/international_students/report/index.htm>.

²⁸⁰ Australian Senate, *Welfare of International Students*, September 2009, p 25-6
<http://www.apf.gov.au/Senate/committee/eet_ctte/international_students/report/index.htm>.

²⁸¹ Australian Federation of International Students and Federation of Ethnic Communities’ Council of Australia, *Submission to the Senate Inquiry into the Welfare of International Students*, 2009
<http://www.fecca.org.au/Submissions/2009/submissions_2009035.pdf>.

²⁸² Australian Federation of International Students and Federation of Ethnic Communities’ Council of Australia, *Submission to the Senate Inquiry into the Welfare of International Students*, 2009
http://www.fecca.org.au/Submissions/2009/submissions_2009035.pdf>.

²⁸³ Australian Senate, *Welfare of International Students*, September 2009,
<http://www.apf.gov.au/Senate/committee/eet_ctte/international_students/report/index.htm>.

religious vilification and THAT the Australian Government use any necessary intergovernmental mechanisms, such as the Council of Australian Governments, to ensure that the offences are consistent across all Australian jurisdictions.

THAT the Australian Government legislate to establish significant and enforceable criminal penalties for acts of racial or religious hatred, and THAT the Australian Government use any necessary intergovernmental mechanisms, such as the Council of Australian Governments, to ensure that such penalties are made consistent across all Australian jurisdictions.

THAT the Australian Government take effective measures, including educational measures such as public awareness and anti-violence campaigns, to make it clear that acts of racial hatred and racial and religious vilification are unacceptable and dangerous to the community as a whole and otherwise make statements that promote tolerance and diversity.

THAT Australia require all police in the jurisdiction to be properly educated on their legal duties under anti-discrimination legislation and also provided with appropriate cross-cultural and anti-racism training.

F.4 Asylum Seekers, Refugees and Non-Citizens

257. Australia discriminates in its treatment of particular asylum seekers, depending on their status at the time they make their application for protection. If a protection applicant, within Australia or excised territory, does not hold a valid Australian visa at the time they make their protection application they are deemed to be an 'unlawful non-citizen'.
258. 'Unlawful' arrivals are predominantly from countries where there are inadequate resources for assisting refugees to leave through approved refugee resettlement programs, inadequate government and administration to provide visas, or the asylum seeker faces risks in applying to leave their country of origin through official channels.²⁸⁴
259. For various reasons, it is more likely that asylum seekers originating from particular countries in the Asia Pacific region will arrive onshore, by boat and without visas. These reasons include:
- (a) delays in processing by regional UNHCR offices;²⁸⁵
 - (b) geographic proximity coupled with low levels of ratification of the Refugee Convention within the region,²⁸⁶ and

²⁸⁴ For example, of approximately 2000 asylum seekers waiting for UNHCR processing in Indonesia, approximately 900 are Afghan asylum seekers, J Taylor, *Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia*, Wordpress, 2009, p5.

²⁸⁵ Commonly, processing of asylum seekers' applications to the UNHCR in Indonesia takes in excess of a year and, once a positive refugee determination is made, further delays are experienced in the resettlement process, see J Taylor, *Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia*, Wordpress, 2009, p26.

²⁸⁶ States Parties to the 1951 Convention and its 1967 Protocol, Basic Documents, 1 October 2008, available at <http://www.unhcr.org/3b73b0d63.html>.

- (c) large numbers of refugees in Indonesia awaiting relocation.²⁸⁷
260. Recently there has been a significant increase in the number of protection applicants, from Afghanistan in particular, but also from Sri Lanka, Iran and Pakistan.²⁸⁸ The majority of asylum seekers in Australia originate from Afghanistan, Sri Lanka and China.²⁸⁹
261. Consequently, policies that disadvantage ‘unlawful’ arrivals have a discriminatory impact, not only against non-citizens but between non-citizens. These policies are discussed below.
262. Australia’s treatment of asylum seekers described below is not only directly discriminatory on the basis of nationality, it is unjustifiable and disproportionate discrimination against non-citizens and a failure of Australia to discharge its obligations under CERD. In particular it is a failure to ensure the security of non-citizens with regard to arbitrary detention and humane treatment whilst in detention.²⁹⁰

(a) Mandatory Immigration Detention

263. Since 1992, successive Australian Governments have maintained a policy of mandatory detention of ‘unlawful non-citizen’ asylum seekers, including children.²⁹¹ In effect the policy applies to the great majority of asylum seekers who arrive in Australia or excised territories by boat (‘excised territories are discussed below at [F.4\(b\): Asylum Seekers, Refugees and Non-Citizens – Excision from Migration Zone](#)). By contrast, asylum seekers who arrive in Australia on a valid visa and apply for protection while that visa is still valid are not subject to mandatory detention.
264. This regime results in detention that is manifestly arbitrary in that:
- (a) there is no consideration of the particular circumstances of each detainee’s case;
 - (b) detention is not demonstrated or evidenced to be the least invasive means of achieving the government’s policy objectives; and
 - (c) substantive judicial review of the lawfulness of detention is non-existent or inadequate.
265. Asylum seekers who arrive without a valid visa, in Australia or in excised territories are likely to remain in detention for the duration of their application and any merits or judicial review

²⁸⁷ J Taylor, *Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia*, Wordpress, 2009, p5.

²⁸⁸ UNHCR News Stories, 20 April 2010; see also UNHCR Monthly data sheet Jan-Mar 2010,.

²⁸⁹ UNHCR Monthly data sheet Jan-Mar 2010, at <http://www.unhcr.org/statistics/Latest-monthly-asylum-data.zip>

²⁹⁰ CERD Committee, *General Recommendation No. 30: Discrimination Against Non-Citizens*, (1/10/2004), [19].

²⁹¹ The Special Rapporteur on health noted that children continue to be detained on Christmas Island, albeit in community detention: see Grover, *Addendum: Mission to Australia*, above n 68, para [96].

process. The length of this period is variable, but periods of detention of twelve months or more are common.²⁹²

266. Australia's policy of mandatory immigration detention has received extensive criticism both domestically and internationally. The AHRC has repeatedly called for mandatory detention to be repealed,²⁹³ and the same recommendation has been made by a number of international human rights bodies, including the Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, and the Committee on Economic, Social and Cultural Rights.²⁹⁴
267. There has been some softening of the practice of mandatory detention since 2005. Some changes worth noting include:
- (a) an amendment to the *Migration Act* which creates a 'principle' that a child will only be detained within an immigration detention facility 'as a measure of last resort'²⁹⁵ and, if detained, they are detained in detention facilities other than 'immigration detention centres' (however, 'immigration detention centres' are defined in such a way as to allow for children to be detained in locked, guarded facilities such as residential housing units);²⁹⁶
 - (b) the introduction of the Removal Pending Bridging Visa which can be used to release people from immigration detention where they have not been granted a visa but there is no current likelihood of their removal to another country; and
 - (c) the introduction of residential housing facilities and residence determinations.

²⁹² In June 2008, of the 377 people in immigration detention, 131 had been detained for 12 months or more, 86 had been detained for 18 months or more, and 53 had been detained for two years or more. In September 2008 of the 281 people in detention, 109 had been detained for 12 months or more, 69 had been detained for 18 months or more, and 42 had been detained for two years or more. See AHRC, 2008 Immigration Detention Report, http://www.hreoc.gov.au/human_rights/immigration/idc2008.html (2008). In 2009 the AHRC visited detainees on Christmas Island. Of the 733 immigration detainees on Christmas Island at the time, the majority had been there for less than three months. However, 114 detainees (16 percent) had been there for more than three months, and 15 had been there for six months or longer. See, http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html (2009).

²⁹³ See, eg, AHRC, 2008 *Immigration Detention Report, Summary of Observations following visits to Australia's immigration detention facilities*, available at http://www.hreoc.gov.au/human_rights/immigration/idc2008.html.

²⁹⁴ Human Rights Committee, *Concluding Observations: Australia*, above n 68; Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008); Committee on the Rights of the Child, *Concluding observations: Australia*, [64], UN Doc CRC/C/15/add.268 (2005); Committee on Economic, Social and Cultural Rights, above n 95, para [25].

²⁹⁵ This principle is now recognised in the Migration Act, following the passage in 2005 of the Migration Amendment (Detention Arrangements) Act 2005 (Cth).

²⁹⁶ AHRC, 2008 *Immigration Detention Report, Summary of Observations following visits to Australia's immigration detention facilities*, available at http://www.hreoc.gov.au/human_rights/immigration/idc2008.html.

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268. In July 2008, the current Australian Government announced proposed reforms to Australia's immigration policy. The Minister for Immigration and Citizenship announced 'seven key immigration values', including the principle that detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.²⁹⁷
269. To date the reforms amount to no more than unenforceable policy. This was highlighted in the recent 'freeze' of processing Afghani and Sri Lankan claims for asylum (see below).
270. In June 2009 the Government introduced the *Migration Amendment (Immigration Detention Reform) Bill 2009* (Cth) (**Detention Bill**) to parliament, purportedly to implement the policy in legislation.²⁹⁸ However, the Bill still provides for mandatory and effectively indefinite detention. According to the AHRC the 'bill provides insufficient mechanisms to protect against indefinite or otherwise arbitrary detention..., in particular the lack of review by a court of the initial decision to detain and the justification for ongoing detention'.²⁹⁹

(b) Excision from the Migration Zone

271. Asylum seekers who arrive in parts of Australia that are excised from the 'migration zone' are subject to mandatory detention offshore, predominantly on Christmas Island, and do not have the full rights to apply for refugee status or to have any decisions reviewed as applicants for protection on the mainland. Indeed, the fundamental purpose of offshore processing is to deny individuals rights which they may have otherwise been entitled to on mainland Australia.
272. Amendments to the *Migration Act 1958* (Cth) (**Migration Act**) in 2001 excised many of Australia's northern islands from the 'migration zone'. As a result, individuals seeking to enter Australia without documentation were moved to offshore processing facilities, previously in Nauru or Papua New Guinea, to have their claims assessed. This policy was known as the 'Pacific Solution'. The current Australian Government ended the Pacific Solution, but retains a policy whereby asylum seekers intercepted in 'excised offshore places' have their claims assessed on Christmas Island.³⁰⁰ This policy has the effect of further discriminating against asylum seekers arriving by boat, which, as discussed in paragraph 260 above, will apply primarily to asylum seekers originating from Afghanistan, Sri Lanka and China.³⁰¹

²⁹⁷ Senator Chris Evans, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (Speech delivered at the Australia National University, Canberra, 29 July 2008).

²⁹⁸ The Detention Bill has not yet been passed and incorporated into the *Migration Act* or its regulations.

²⁹⁹ AHRC, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, available at http://www.hreoc.gov.au/legal/submissions/2009/20090731_migration.html (2009), [9].

³⁰⁰ AHRC, *Immigration detention and offshore processing on Christmas Island*, http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html#s2 (2009).

³⁰¹ UNHCR Monthly data sheet Jan-Mar 2010, at <http://www.unhcr.org/statistics/Latest-monthly-asylum-data.zip>

273. The Committee against Torture noted that ‘excised’ offshore locations, notably Christmas Island, are still used for the detention of asylum seekers who are subsequently denied the possibility of applying for a visa, except if the Minister exercises discretionary power.³⁰²
274. Unauthorised arrivals who, as a result of the excision legislation, never entered Australia, have their asylum claims processed under a different system to asylum seekers on the mainland. While their claims are determined under a refugee determination process consistent with UNHCR guidelines, they do not have access to the same review and appeal rights available to asylum seekers on the mainland applying for protection under Australian refugee law.³⁰³ If an asylum seeker in an excised area is denied refugee status, there is no right of independent review; they are excluded from accessing the Refugee Review Tribunal, and have very limited access to Australian courts or any appropriate legal forums to challenge the legality of their detention.³⁰⁴
275. Christmas Island is 2600km from Perth and significantly closer to Indonesia than the Australian mainland. The remote location of Christmas Island significantly impedes the ability of lawyers, medical staff, advocacy groups and other community organisations to provide support to detainees. The AHRC, in its recent report on this issue, raised grave concerns about these effects of the policy of excision and recommended that Australia completely abolish its system of excision of territories and offshore detention and processing.³⁰⁵

³⁰² Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, [12], UN Doc CAT/C/AUS/CO/3 (2008).

³⁰³ The asylum seekers are limited to “a ‘non-statutory’ process governed by guidelines that are not legally binding”: AHRC, *Immigration detention and offshore processing on Christmas Island*, http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html#s2 (2009).

³⁰⁴ AHRC, *Immigration detention and offshore processing on Christmas Island*, http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html#s2 (2009).

³⁰⁵ AHRC, *Immigration detention and offshore processing on Christmas Island*, http://www.hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html#s3 (2009).

Case Study: Indefinite Detention without Due Process

Mr S is one of six Tamil refugees from Sri Lanka currently detained on Christmas Island. He is one of 78 refugees rescued last year by the Australian customs vessel *Oceanic Viking*.

At the time, Prime Minister Rudd undertook to provide the 78 people, who had been declared refugees by the UNHCR, with resettlement within 12 weeks. 72 people were resettled, but Mr S, along with 3 others, was declared a security threat by ASIO. They – along with the two children, aged 2 and 6, of one of the women also declared a security threat – are being detained on Christmas Island because Australia will not take them and cannot find a third country willing to take them, in the circumstances of the adverse security assessment.³⁰⁶

The UNHCR does not grant refugee status to anyone who has committed war crimes or crimes against humanity. It determined that these people were all refugees.³⁰⁷

ASIO never interviewed the four adults or explained why they were considered dangerous. ASIO will not reveal the basis on which the adverse assessments were made,³⁰⁸ so will not have the opportunity to challenge the decision. Furthermore, as a result of being held on Christmas Island they will not have access to Australian courts or tribunals. This is despite an earlier finding of the Australian Federal Court that detainees being held in similar circumstances had a right to discovery revealing why ASIO considered them a security risk.³⁰⁹

(c) Suspension of Asylum Claims

276. On 9 April 2010, the Australian Government signalled what appears to be a return to more draconian policies when the Immigration Minister announced a policy to suspend processing of protection visa applications from Sri Lankans for three months and from Afghans for six months.³¹⁰ At the end of these periods, the suspension will be reviewed.³¹¹ Asylum seekers will remain in detention during the suspension and will not have their asylum claims

³⁰⁶ Y Narushima, "Security risk' refugees left in limbo", *The Age*, 22/04/10.

³⁰⁷ Y Narushima, 'Call to end ASIO check on refugees', *The Age*, 14/01/10.

³⁰⁸ Y Narushima, 'Call to end ASIO check on refugees', *The Age*, 14/01/10.

³⁰⁹ *Parkin & Ors v O'Sullivan* [2006] FCA 1413.

³¹⁰ Chris Evans MP, Stephen Smith MP and Brendan O'Connor MP, *Changes to Australia's Immigration Processing System*, <http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm> (2010).

³¹¹ Announcement made by Chris Evans, Minister for Immigration, 'Suspension on processing of all new applications from asylum seekers from Sri Lanka and Afghanistan' (Speech delivered at Parliament House, Canberra, 9 April 2010).

processed.³¹² This raises concerns about the rights of asylum seekers to a fair hearing, to be free from arbitrary detention and to humane treatment whilst in detention, each of which is protected under article 5. This decision was said to be based on the 'evolving' situation in those countries, the implication being that those countries were becoming safer and the applications for refugee status by many asylum seekers originating from them would be unlikely to succeed.

277. In an open letter to the Minister for Immigration and Citizenship, Human Rights Watch noted that this policy violates the 1951 Refugee Convention and the 1967 Protocol not to discriminate in the treatment of refugees.³¹³ They criticised the Australian Government for the policy, stating:

It is quite astounding that a presumption about future refusals based on how the situation might evolve in their home countries, will result in extending mandatory detention for members of these two nationality groups who arrive irregularly by boat, and will prevent other refugees from these nationalities from enjoying their rights and benefits as refugees because of the failure of the government to recognize their status.

278. The AHRC has expressed serious concern that this suspension could 'result in the indefinite detention of asylum seekers, including families and children already in distress.'³¹⁴ Further, President Branson considered that 'new asylum seekers from Sri Lanka and Afghanistan are now in a situation of considerable uncertainty' as there is no guarantee the suspension will be lifted'.³¹⁵
279. The males affected by the suspension will be taken to the re-opened remote Curtin Detention Centre, while they wait for the suspension to end before their applications for refugee status will be processed. The policy announcement has been met with severe disapproval from human rights groups, including Human Rights Watch, Amnesty International and the AHRC.³¹⁶ The development raises particular concerns in relation to Article 5 of CERD because of its discriminatory effect of suspending and potentially removing the rights of Sri Lankan and Afghani asylum seekers to access tribunals and other organs administering justice.

³¹² Chris Evans, 'Suspension on processing of all new applications from asylum seekers from Sri Lanka and Afghanistan' (Speech delivered at Parliament House, Canberra, 9 April 2010).

³¹³ Human Rights Watch, Open Letter to the Minister for Immigration and Citizenship, 15 April 2010.

³¹⁴ *Suspension of processing asylum seekers raises serious concerns* (9 April 2010), Australian Human Rights Commission <http://www.hreoc.gov.au/about/media/media_releases/2010/29_10.html> at 4 May 2010.

³¹⁵ *Suspension of processing asylum seekers raises serious concerns* (9 April 2010), Australian Human Rights Commission <http://www.hreoc.gov.au/about/media/media_releases/2010/29_10.html> at 4 May 2010.

³¹⁶ AHRC, *Suspension of processing asylum seekers raises serious concerns*, http://www.hreoc.gov.au/about/media/media_releases/2010/29_10.html (2010).

280. On 18 April 2010, Chris Evans announced that Curtin Immigration Detention Centre, the most remote mainland detention centre in Australia, would be re-opened to house the detainees whose claims for asylum have been frozen. This centre is more than 2,200km from Perth, over 28 hours by road. All of the logistical and isolation difficulties outlined in relation to Christmas Island also apply to those detained at Curtin. This centre was closed in 2002 after much public pressure and several findings highlighting the damage caused to detainees held in such remote conditions. The centre was the scene of many self-harm incidents, attempted suicides and riots, reports of detainee abuse were provided to the media.³¹⁷ The decision to re-open the centre has been met with outrage, as Curtin Immigration Detention Centre is considered by many to have been one of the least hospitable and most inappropriate facilities used by the former Government as an Immigration Detention Centre.³¹⁸ Amnesty International has stated:

The Afghan and Sri Lankan asylum seekers who will be placed in Curtin will undoubtedly include survivors of torture and trauma, and will urgently need medical and mental health assistance.

Detaining these highly vulnerable people in a detention centre more than 2,200 kilometres away from Perth will add to the uncertainty they are already experiencing. The extreme remoteness of Curtin will limit their access to health, counselling and legal services, and greatly increase the negative psychological impact of prolonged detention.³¹⁹

281. Professor Richard Harding visited Curtin in 2001 and presented his findings to the International Corrections and Prisons Association later that year, he stated; 'in summary, the conditions that exist at the Curtin Centre are almost intolerable. Such evidence as exists indicates things are little better at the other Centres. Yet these things are also largely invisible, except when riots occur. Let me emphasise: it is no coincidence that riots do occur in a system that lacks accountability.'³²⁰

282. As well as the deprivation of liberty, there are various detrimental impacts of prolonged immigration detention, particularly on the physical and mental health of asylum seekers. President Branson stated that the prolonged detention of children could have serious and long lasting effects on their mental health.³²¹ It is unclear how the Government is handling those

³¹⁷ <http://www.abc.net.au/7.30/stories/s221765.htm>

³¹⁸ AFP, World News Australia, *UN Troubled by Asylum Seeker Treatment*, <http://www.sbs.com.au/news/article/1239497/UN-troubled-by-asylum-seeker-treatment> (2010); Simon Santow, ABC News, *Asylum seekers sent to Curtin 'hell-hole'*, <http://www.abc.net.au/news/stories/2010/04/19/2876159.htm> (2010).

³¹⁹ Amnesty International Australia, *Remote Curtin detention centre was closed for a reason*, 19 April 2010, available at <http://www.amnesty.org.au/news/comments/22884/>.

³²⁰ Western Australia's Inspector of Custodial Services, Professor Richard Harding, extract from a speech he gave to the International Corrections and Prisons Association on 30 October 2001.

³²¹ *Suspension of processing asylum seekers raises serious concerns* (9 April 2010), Australian Human Rights Commission <http://www.hreoc.gov.au/about/media/media_releases/2010/29_10.html> at 4 May 2010.

Afghan and Sri Lankan children seeking asylum who have arrived since 9 April 2010.

Detention in Port Augusta would be contradictory Australian legislation that children will only be detained as a matter of last resort³²² and to Australia's obligations under the Convention on the Rights of the Child.³²³

283. This suspension is problematic as it explicitly prohibits the processing of applications from asylum seekers on the basis of nationality, directly impacting on asylum seekers from Sri Lanka and Afghanistan. Specifically, it denies these asylum seekers their right to be free from arbitrary detention, freedom of movement and residence within Australia, rights as refugees and rights to proper health care and legal advice.

(d) Refoulement of Non-Citizens

284. Australia has non-refoulement obligations pursuant to its ratification of a number of international human rights treaties.³²⁴ However, the fundamental principle of non-return to face torture or death has not yet been enacted in Australian domestic law.

285. For example, the *Migration Act* does not prohibit the return of a non-citizen to a place where that person would be at risk of torture or ill-treatment. This is of particular concern given that:

- (a) the Australian Government has disclaimed any responsibility for the subsequent torture or cruel treatment of persons who are removed;
- (b) Australia regularly deports asylum seekers to countries that are not signatories to the *Convention relating to the Status of Refugees* (such as Malaysia and Thailand) and to so called 'safe third countries' (such as China) in which the use of torture and other cruel or degrading treatment remains widespread; and
- (c) there is substantial evidence that asylum-seekers who have been returned by Australia to their country of origin have been tortured and even killed.³²⁵

³²² Section 4AA(1) of the Migration Act 1958

³²³ Article 37 of the Convention on the Rights of the Child provides that detention of a child 'shall only be used as a measure of last resort and for the shortest appropriate period of time' and that a child deprived of liberty 'shall be treated with humanity and respect for the inherent dignity of the human person'.

³²⁴ Australia has non-refoulement obligations under the International Covenant on Civil and Political Rights (**ICCPR**); the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (**Optional Protocol on the Abolition of the Death Penalty**); the Convention on the Rights of the Child (**CRC**); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**).

³²⁵ See, eg, Australian Refugee Rights Alliance, 'Deportations to China: Australian RSD Processes that Return People to Persecution' (Draft Discussion Paper, 2007), available at http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=156; Edmund Rice Centre for Justice & Community Education, *Deported to Danger II: The Continuing Study of Australia's Treatment of Rejected Asylum Seekers* (2006), available at http://www.erc.org.au/index.php?module=documents&JAS_DocumentManager_op=downloadFile&JAS_File_id=153; Refugee Health Research Centre and Asylum Seeker Project, *Removing Seriously Ill Asylum Seekers from Australia* (2007), available at <http://www.latrobe.edu.au/rhrc/documents/removing.pdf>

286. The Committee against Torture recently cautioned Australia that under no circumstances should the Australian Government resort to diplomatic assurances as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.³²⁶
287. The legislative gap and Australia's practice of refoulement are clearly contrary to Australia's obligations to non-citizens under CERD, which include the obligations to ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment.³²⁷
288. Australia's failure to explicitly incorporate the obligation of non-refoulement into domestic legislation has been criticised by the Committee against Torture, the Human Rights Committee, the UN Special Rapporteur on Counter-Terrorism and a Committee of the Australian Senate.³²⁸
289. Despite these concerns, the fundamental principle of non-return to face torture or death has not yet been enacted in Australian domestic law.
290. The *Migration Amendment (Complementary Protection) Bill 2009* (Cth), currently before the Australian parliament, will significantly improve and strengthen Australia's current complementary protection regime. However, there remain a number of concerns with specific aspects of the Bill, including that the Bill:
- (a) sets out a list of grounds upon which Australia will grant protection obligations which is narrower than the grounds for protection under international law;
 - (b) requires that risks be 'necessary and foreseeable' and constitute 'irreparable harm', in a manner that does not accurately reflect the position under international human rights law;
 - (c) imposes a requirement of intent in the definition of cruel, inhuman or degrading treatment; and

³²⁶ Committee against Torture, *Concluding Observations: Australia*, UN Doc CAT/C/AUS/CO/1 (15 May 2008), [16].

³²⁷ CERD Committee, *General Recommendation No 30: Discrimination Against Non Citizens*, Paragraph VI 27.

³²⁸ *Concluding Observations of the Committee against Torture: Australia*, [15], UN Doc CAT/C/AUS/CO/1 (2008); Martin Scheinin, Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN HRC, 4th sess, Item 2, [62], [72], UN Doc A/HRC/4/26/Add.3 (2006); Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), [8]; Senate Legal and Constitutional References Committee, Parliament of Australia, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000), available at http://www.aph.gov.au/senate/committee/legcon_cte/completed_inquiries/1999-02/refugees/report/index.htm (Recommendation [2.2]).

- (d) excludes protection for certain classes of people, particularly those who arrive in excised offshore places and those who are stateless, despite the absolute and non-derogable nature of Australia's protection obligations and the relevant provisions of the International Covenant on Civil and Political Rights and the Convention against Torture.³²⁹

291. At present, Australia's failure to adequately legislate the right of non-refoulement raises concerns in relation to Article 5(b). If the *Migration Amendment (Complementary Protection) Bill 2009* (Cth) is passed into legislation, it will improve Australia's compliance with Article 5, but will not completely address all deficiencies.

Case Study: Breach of Obligation of Non-Refoulement to China³³⁰

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

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

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

In June 2008, Mr Zhang committed suicide, reportedly to avoid further persecution and torture.

³²⁹ ALRC, *ALRC Submission to the Senate Standing Committee on Legal and Constitutional Affairs*, http://www.hreoc.gov.au/legal/submissions/2009/20090930_migration_complementary.html#Heading59 (2009); HRLRC, *The Right to Protection and the Obligation of Non-Refoulement: Submission to the Senate Legal and Constitutional Affairs Committee regarding the Migration Amendment (Complementary Protection) Bill 2009*, <http://www.hrlrc.org.au/files/Complementary-Protection-Bill-HRLRC-Submission.pdf> (2009).

³³⁰ Case study drawn from the following sources: Asylum Seeker Resource Centre, 'Chinese Man Still at Risk of Being Deported and Facing Torture' (12 September 2007), available at <http://www.asrc.org.au/humanrights/2007/09/12/chinese-man-still-at-risk-of-being-deported-and-facing-torture>; AAP, 'Deported Chinese Man "Interrogated"', *The Epoch Times*, 29 June 2007, available at <http://en.epochtimes.com/news/7-6-29/57048.html>; ABC, 'China Dissident Commits Suicide after Forcible Deportation', *ABC News*, 16 June 2008, available at <http://www.abc.net.au/news/stories/2008/06/16/2275279.htm>.

Case Study: Breach of Obligation of Non-Refoulement to Gaza³³¹

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

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

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

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

(e) Stateless People

292. Australian law does not provide adequate protection for stateless people, leaving those people vulnerable to breaches of a range of their fundamental human rights.³³²
293. Stateless people can be indefinitely detained under Australian law. The High Court of Australia has confirmed that there is no constitutional protection for stateless people that would prevent them from being held indefinitely in immigration detention, even if there is no real likelihood of the removal of that person in the reasonably foreseeable future.³³³ The detention 'ad infinitum' of stateless people in Australia was recently criticised by the Committee against Torture.³³⁴

³³¹ Case study drawn from the following sources: AAP, 'Asylum Seeker Shot Dead in Gaza', *The Age* (Melbourne), 2 August 2008, available at <http://news.theage.com.au/national/asylum-seeker-shot-dead-in-gaza-20080801-3ood.html>; AAP, 'Investigation into Deportee's Death', *The Sydney Morning Herald* (Sydney), 2 August 2008, available at <http://www.smh.com.au/news/national/investigation-into-deportees-death/2008/08/02/1217097596349.html>.

³³² Although Australia is a party to both the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, neither of those conventions have been incorporated into domestic law.

³³³ *Al-Kateb v Godwin* (2004) 219 CLR 562.

³³⁴ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [11], UN Doc CAT/C/AUS/CO/3 (2008).

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294. This situation is clearly also inconsistent with Australia's obligations under CERD, which include the obligations: (a) to guarantee equality between citizens and non-citizens in the enjoyment of their rights to the extent recognised under international law; (b) only to discriminate between citizens and non-citizens for a legitimate aim and in a proportionate manner; (c) to 'reduce statelessness'; and (d) to ensure the security of non-citizens particularly with regard to arbitrary detention.³³⁵
295. Once in immigration detention, there are very limited avenues through which stateless people might gain protection in Australia or be released from detention. Moreover, those avenues are subject to the exercise of Ministerial discretion, which is non-compellable and non-reviewable in the courts. First, a stateless person can apply for protection as a refugee, although statelessness is not enough, in itself, to attract refugee status or protection in Australia.³³⁶ If a stateless person is not found to be eligible for protection as a refugee, they can request that the Minister for Immigration exercise his or her discretion under section 417 of the Migration Act to grant a visa if it is 'in the public interest' to do so. Secondly, a stateless person might be eligible for release from detention under the Removal Pending Bridging Visa (**RPBV**) which was introduced in May 2005.³³⁷ Persons on RPBVs can live in the community and access a range of support services, including Centrelink payments and Medicare, however they do not have certainty of status, family reunion, the right to international travel or effective nationality. The very nature of their visa implies their departure from Australia, yet this is without the prospect of having a safe country to lawfully enter and reside in. This insecurity is akin to that which was imposed under the now scrapped system of Temporary Protection Visas (**TPVs**). University of New South Wales Professor of psychiatry, Derrick Silove citing a 2004 study into TPVs stated: 'The study's preliminary findings show that refugees placed on TPVs have a 700% increase in risk for developing depression and post-traumatic stress disorder compared to refugees with permanent protection visas.'³³⁸
296. In July 2008, the current Australian Government announced proposed reforms to Australia's immigration policy. Despite the Government's stated policy that arbitrary and indefinite detention is unacceptable, the Australian Government has not proposed any legislative

³³⁵ CERD Committee, *General Recommendation No.30: Discrimination Against Non Citizens*, 01/10/2004, see in particular paragraphs 3, 4, 16 and 19.

³³⁶ A stateless person must still establish a present well-founded fear of persecution for a Refugee Convention reason in order to be afforded protection: *Savvin v MIMA* (1999) 166 ALR 348.

³³⁷ This visa allows non-citizens in immigration detention who have exhausted other mechanisms to apply for a visa may be eligible for the RPBV if the Minister is satisfied that the person cannot be removed at the time but will cooperate in being removed should removal become possible: DIAC, 'Fact Sheet 85: Removal Pending Bridging Visa', Produced by the National Communications Branch, Department of Immigration and Citizenship, Canberra. Revised 30 January 2007. <http://www.immi.gov.au/media/fact-sheets/85removalpending.htm> [accessed 21 April 2010].

³³⁸ http://www.unsw.edu.au/news/pad/articles/2004/jan/TPV_HealthMNE.html

amendments that would protect stateless people from being indefinitely detained and has effectively maintained a policy of indefinite mandatory immigration detention.³³⁹

297. In June 2009, the Government introduced the *Migration Amendment (Immigration Detention Reform) Bill 2009* (Cth) (**Detention Bill**) to parliament.³⁴⁰ The Bill will not prevent the ongoing or indefinite detention of stateless people. According to the AHRC the ‘bill provides insufficient mechanisms to protect against indefinite or otherwise arbitrary detention..., in particular the lack of review by a court of the initial decision to detain and the justification for ongoing detention’.³⁴¹
298. In September 2009, the *Migration Amendment (Complementary Protection) Bill 2009* (Cth) (**CP Bill**) was introduced to parliament to give effect to Australia’s non-refugee international protection obligations. The Government itself has stated that the issue of statelessness will not be specifically addressed through a complementary protection regime.³⁴² The AHRC has called on the government to the Government identify options for the resolution under the Migration Act of claims by people who are stateless.³⁴³
299. In 2010, the Australian Government has signalled a return to more draconian policies in relation to mandatory detention and the processing of asylum seekers applications (see [F.4\(c\): Asylum Seekers, Refugees and Non-Citizens – Suspension of Asylum Claims](#)). Australia’s failure to protect stateless persons from arbitrary detention is in breach of Australia’s obligations under Articles 1 and 5 of CERD.

(f) Deportation of Long Term Residents

300. Section 501 of the *Migration Act 1958* (Cth) (Migration Act) provides that non-citizens can be removed from Australia if they do not satisfy the Minister for Immigration that they are ‘of good character’. This might be on the basis that they have been convicted of an offence or found not guilty on the grounds of mental impairment. Once a visa is cancelled on s 501 grounds, a

³³⁹ For example one of the Government’s stated ‘seven key immigration values’, includes that ‘[d]etention that is indefinite or otherwise arbitrary is not acceptable’: Chris Evans, ‘New Directions in Detention – Restoring Integrity to Australia’s Immigration System’ (Speech delivered at the Australian National University, Canberra, 29 July, 2008).

³⁴⁰ The Detention Bill has not yet been passed and incorporated into the *Migration Act* or its regulations.

³⁴¹ AHRC, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, available at http://www.hreoc.gov.au/legal/submissions/2009/20090731_migration.html (2009), [9].

³⁴² Department of Immigration and Citizenship, *Draft Complementary Protection Model*, October 2008, http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_0809/diac_qon/46_qon_21_oct_08_att.pdf, [accessed 22 April 2010]. This was confirmed by the AHRC’s submissions on the CP Bill, see AHRC, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, available at http://www.hreoc.gov.au/legal/submissions/2009/20090930_migration_complementary.html (2009).

³⁴³ AHRC, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, available at http://www.hreoc.gov.au/legal/submissions/2009/20090930_migration_complementary.html (2009), [52].

person becomes an 'unlawful non-citizen'³⁴⁴ and must be placed in immigration detention³⁴⁵ until their deportation.

301. In its March 2010 report, the AHRC noted that 'of 25 people in immigration detention as of May 2008 whose visas had been cancelled under section 501, all but one of them had lived in Australia for more than 11 years. Seventeen of them had lived in Australia for more than 20 years. The majority of them were 15 years old or younger when they first arrived in Australia.'³⁴⁶
302. A person awaiting removal under s 501 may be held in prolonged or indefinite detention. The Commonwealth Ombudsman has noted that '[i]t is not uncommon for some s 501 detainees to spend more time in immigration detention than they did in correctional detention.'³⁴⁷
303. The AHRC raises concerns about the potential of s 501 visa cancellations and deportations to violate human rights where people are:
- (a) removed from their long-term place of residence, to a place where they do not speak the language or have any social or family connections;
 - (b) returned to a country in violation of Australia's *non-refoulement* obligations;
 - (c) separated from children against considerations of the best interests of the child;
 - (d) separated from family in violation of the right to respect for privacy, family and home life;
 - (e) subjected to prolonged and indefinite detention;
 - (f) only entitled to limited merits and judicial review of decisions made by a delegate of the Minister and to limited judicial review, not merits review, of any decision of the Minister; or
 - (g) deported on the basis of a character assessment based on a person's acquittal of criminal charges on the grounds of mental impairment or insanity.³⁴⁸

³⁴⁴ *Migration Act 1958* (Cth), ss 13,14.

³⁴⁵ *Migration Act 1958* (Cth), ss 189(1), 196(1).

³⁴⁶ Australian Human Rights Commission, *Background paper: Immigration detention and visa cancellation under section 501 of the Migration Act*, p.2, March 2010 at http://www.humanrights.gov.au/human_rights/immigration/501_migration_2010.pdf, citing Question 423, Senate Hansard (17 June 2008) pp 2625-2626 at <http://www.aph.gov.au/HANSARD/senate/dailys/ds170608.pdf>.

³⁴⁷ Commonwealth and Immigration Ombudsman, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), p.11, at <http://www.aph.gov.au/house/committee/mig/detention/subs/sub126.pdf> (August 2008).

³⁴⁸ Australian Human Rights Commission, *Background paper: Immigration detention and visa cancellation under section 501 of the Migration Act*, p.2, March 2010 at pp 11-23 at http://www.humanrights.gov.au/human_rights/immigration/501_migration_2010.pdf.

Case Study: Stefan Nystrom

Stefan Nystrom was born in Sweden in 1973. His mother, a permanent resident of Australia, was pregnant and had travelled to Sweden to visit family members. When it became clear that it would be difficult to return to Australia because of her advanced state of pregnancy, his mother stayed in Sweden for Mr Nystrom's birth. When he was 25 days old, Mr Nystrom travelled with his mother to Australia and, until recently, had not left Australia since.

In November 2006, at the age of 32 years, Mr Nystrom's residency visa was cancelled because of his failure to pass the 'character test' specified in section 501(6) of the *Migration Act* due to his 'substantial criminal record'. Prior to being notified that the Minister for Immigration intended to cancel his visa in 2004, Mr Nystrom believed he was an Australian citizen. He was deported to Sweden on 29 December 2006 by the former Australian Government.

Despite being a Swedish citizen by accident of birth, Mr Nystrom does not speak Swedish and has no relevant ties or connections with Sweden (or indeed any country other than Australia). The deportation has resulted in his permanent separation from his mother, father, sister (who is an Australian citizen) and her children.³⁴⁹

³⁴⁹ Case study provided by the Human Rights Law Resource Centre. This case is currently the subject of an individual communication to the Human Rights Committee under the *First Optional Protocol to the ICCPR: Nystrom v Australia*, Communication No 1557/2007 (2007).

Proposed Recommendations for Concluding Observations (Article 5)

THAT the Australian Government end its policy and practice of mandatory detention of asylum seekers and ensure, through all necessary legislative and administrative measures, that the detention of asylum seekers is truly a measure of last resort, is not arbitrary and is subject to both merits review and judicial review.

THAT Australia immediately close all detention facilities at Christmas Island and the Curtin Immigration Detention Centre.

THAT the Australian Government provide equal rights to all asylum seekers to apply for protection as a refugee in Australia and for review of any decisions made, regardless of how the asylum seeker arrived in Australia.

THAT the Australian Government immediately remove the suspension on processing visa applications from asylum seekers from Sri Lanka and Afghanistan, and THAT the Australian Government review its policies and procedures regarding asylum seekers to eliminate any discrimination in the visa application process.

THAT Australia immediately legislate to incorporate *all* of Australia's obligations of non-refoulement in international law into domestic law.

THAT Australia provide protection for stateless people in accordance with Australia's obligations under the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

THAT the Australian Government immediately end the policy and practice of removing long-term residents under s 501 of the Migration Act and immediately amend the law to ensure that such removals would be unlawful.

F.5 Counter-Terrorism

(a) Border Security and the Right to Privacy

304. In 2010, the Australian Government reaffirmed its 'robust' approach to counter-terrorism in the Counter-Terrorism White Paper, *Securing Australia, Protecting our Community*. The White Paper identifies 'a global violent jihadist movement' as 'the primary terrorist threat to Australia' and outlines Australia's counter-terrorism strategy, which includes, among other things, introduction of a biometric (fingerprint and facial image) based visa system for non-citizens from ten overseas countries.³⁵⁰

305. The collection of biometric data is a serious intrusion on the right to privacy, and as the Special Rapporteur on Counter-Terrorism recently stated, the intrusion can be permanent where information is stored in centralised databases.³⁵¹ It is of particular concern that the Australian

³⁵⁰ Department of the Prime Minister and Cabinet, *Securing Australia, Protecting our Community* (2010).

³⁵¹ M Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc A/HRC/13/37, [22] 28 December 2009.

Government has chosen only to collect the biometric data of persons from ten countries. Whilst the countries chosen are not publicly available, the United States has strengthened its own airport checks for citizens from countries including Afghanistan, Iraq and Somalia, which may be an indicator of countries the Australian Government may similarly identify.³⁵²

Proposed Recommendations for Concluding Observations (Article 5)

THAT the Australian Government acknowledge that the policy of collecting biometric data is an intrusion on the right to privacy and that collecting biometric data based on location or nationality could have discriminatory effects. The Australian Government should ensure that any collection of biometric data is compliant with the human rights to privacy and non-discrimination, in particular that it the collection is only done for a legitimate purpose and only where necessary and proportionate.

(b) Proscription of Organisations and Freedom of Association

306. The Government's ability to proscribe organisations as 'terrorist organisations' has had a disproportionately adverse impact on Muslim and Kurdish people in Australia.
307. Organisations can be proscribed if they are directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs) or the organisation 'advocates' the doing of a terrorist act. 'Advocates' is extremely broadly defined.³⁵³ There is only limited opportunity for judicial review of a decision to proscribe an organisation, which only covers the legality of the decision and not the merits.³⁵⁴
308. Where an organisation is proscribed as a 'terrorist organisation', it is an offence for a person to knowingly and intentionally be a member of the organisation.³⁵⁵ Further, there are various offences for involvement with a proscribed organisation; for example, it is an offence to be associated with the organisation and to provide 'support' to an organisation (s 102.7 and

³⁵² *Australia toughens visa checks* (23 February 2010) *News Asia-Pacific* <<http://english.aljazeera.net/news/asia-pacific/2010/02/201022391617481508.html>> at 6 May 2010.

³⁵³ Section 102.1(1A); in this Division, an organisation advocates the doing of a terrorist act if, among other things, the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

³⁵⁴ Law Council of Australia, *Review of the power to proscribe organisations as terrorist organisations – Submission to the Parliamentary Joint Committee on Intelligence and Security* (9 February 2007), <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=339BD36B-1E4F-17FA-D2A1-FC6AB8560664&siteName=lca> at 20 May 2010; Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is confined to review of the legal process by which the decision was made. The absence of merits review is particularly concerning given the serious consequences of proscription, including potential infringement of fundamental rights such as freedom of expression and the potential criminalisation of association.

³⁵⁵ *Criminal Code Act 1995* (Cth), s 102.3.

- 102.8 of the *Criminal Code Act 1995* (Cth)).³⁵⁶ Listing acts as a significant condemnation by public authorities of the political, religious or ideological goals of the organisation in question. Proscription raises concerns regarding the right to freedom of expression, the right to freedom of association, the right to freedom from discrimination and minority rights.
309. Currently, 18 organisations are listed as terrorist organisations, with all but one of those organisations being self-identified Islamic organisations. The other is the Kurdistan Workers Party (PKK).³⁵⁷ The disproportionate representation of Islamic organisations amongst those listed suggests a discriminatory application of the laws by the executive.
310. The listing of the PKK has been very controversial, with a minority report of the Parliamentary Joint Committee on Intelligence and Security stating that the listing had no security benefits for Australia, was not consistent with ASIO criteria and would have a 'potentially catastrophic impact on Australia's Kurdish community'.³⁵⁸ The effect on the Kurdish community of listing the PKK has been reported to be:
- (a) Increased scrutiny by law enforcement authorities of the Kurdish community, including police presence at community conferences on Kurdish issues suggesting an inherent link between Kurds and terrorism.
 - (b) Fear amongst Kurds about sending money to family members or giving charitable assistance overseas, lest the charity be somehow identified or connected with the PKK.
 - (c) Threats from police that political conduct somehow amounts to terrorism, including asserting that placards depicting jailed Kurdish leader Abdullah Ocalan were a contravention of anti-terrorism laws.³⁵⁹
 - (d) Increased feelings of isolation and frustration by Kurdish people, in particular, feelings that they are being marginalised in terms of access to government institutions and departments.³⁶⁰
311. These types of matters stifle the ability of Kurds to fully express their cultural and political identities.

³⁵⁶ The NSL Discussion Paper proposes to amend this to 'material' support; see Dr Patrick Emerton, *Submission to the Australian Government on the National Security Legislation Discussion Paper 2009* Monash University <<http://www.ag.gov.au>> at 6 May 2010.

³⁵⁷ *What Governments are doing – Listing of Terrorist Organisations* (2010) Australian Government <<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>> at 6 May 2010.

³⁵⁸ Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)* (2006) 39.

³⁵⁹ Western Suburbs Legal Service, *Is Community A Crime?* (2009), 10 to 11.

³⁶⁰ *Review of the re-listing of Hamas' Brigades, PKK, LeT and PIJ as terrorist organisations*, Parliamentary Joint Committee on Intelligence and Security (November 2009), 19.

312. Muslim people, including Somalis, have also expressed concerns and uncertainty about their ability to give financial assistance to overseas charitable organisations. Donating to charity is an integral aspect of the Muslim faith, but the financing of terrorism and terror related offences have rendered this practice difficult and disconcerting for Muslims.³⁶¹
313. In 2006, the Sheller Committee considered the current process of proscription and recommended, inter alia, that the process be reformed to:³⁶²
- (a) provide notification, if it is practicable, to a person, or organisation affected, when the proscription of an organisation is proposed;
 - (b) provide the means, and right, for persons and organisations, to be heard in opposition, when proscription is considered; and
 - (c) provide for the establishment of a committee to advise the Attorney-General on cases that have been submitted for proscription of an organisation.

Proposed Recommendations for Concluding Observations (Article 5)

THAT the Australian Government adopt the recommendations of the Sheller Committee to safeguard the rights of people affected by the proscription of terrorist organisations, in particular by providing procedural fairness, including providing access to a full and judicial merits review, and increasing transparency and public confidence in the decision making process for the proscription of organisations as terrorist organisations.

F.6 Muslim Women

314. Australia's counter-terrorism laws have had a particularly adverse effect on Muslim women. A report by the Islamic Women's Welfare Council of Victoria, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria* (the **Race, Faith and Gender report**) documents the experiences of Muslim women in Victoria and perceptions about Muslim women held by non-Muslim Victorians.³⁶³ Muslim women described feeling vulnerable to racism because they are female, but beyond gender, two factors were found to increase women's susceptibility to abuse, they are wearing the hijab and skin colour.³⁶⁴ These findings reflect and support those of the AHRC in other projects.³⁶⁵

³⁶¹ Western Suburbs Legal Service, *Is Community A Crime?* (2009), 10.

³⁶² Security Legislation Review Committee, *Report of the Security Legislation – Review Committee* (June 2006) 9.

³⁶³ Islamic Women's Welfare Council of Victoria, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria* (2008) (**Race, Faith and Gender report**)

³⁶⁴ Islamic Women's Welfare Council of Victoria, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria* (2008) (**Race, Faith and Gender report**), 56

³⁶⁵ AHRC, above n 12 and Human Rights and Equal Opportunity Commission, *Living Spirit: A dialogue on human rights and responsibilities* (2006) (**Living Spirit report**).

315. According to the Race, Faith and Gender report, 80% of the 302 Muslim women who participated in the study felt unsafe and unwelcome in Australia generally. This in turn affected their freedom of movement, sense of safety and sense of control and agency over their lives, leading Muslim women to prioritise safety above well-being, independence and other rights. Women reported that they were reluctant to leave their homes or travel alone. One woman said, 'I have had many people yell at me and call me names and in the end you decide that you don't want to go out anymore. We are becoming prisoners in our own homes'. This sort of withdrawal from public life can lead to negative health effects, particularly in the area of mental health. Women also expressed the fear that living in public housing tenancy is not safe for them. Almost half of the women participating in the study also felt that their religion limited their employment opportunities, and expressed particular concern for the impact on their daughters' education and work opportunities. The report indicates that generally, Muslim women did not feel that public authorities such as police and public transport staff were responsive to their concerns or able to provide effective protection.³⁶⁶
316. In a separate study involving Muslim women in Sydney, all participants described having experienced some form of verbal or physical abuse, including being shoved, being told to return to their country and having their hijab pulled off.³⁶⁷
317. Incidents of racism against Muslim women have fluctuated with media coverage of Muslim-related terrorism. According to one Muslim woman, 'It only takes one incident in the world concerning terrorism before Muslim women are attacked again'. The perceived relationship between Muslim women and terrorism, when fortified by media reports, led to increased incidents of racism and even violence, as well as the belief that Muslim women are 'acceptable targets for anger over terrorist attacks by Muslims'.³⁶⁸

³⁶⁶ Islamic Women's Welfare Council of Victoria, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria* (2008) (**Race, Faith and Gender report**), 44.

³⁶⁷ Carolyn Whitten and Susan Thompson (2007) *When Cultures Collide: Planning for the Public Spatial Needs of Muslim Women in Sydney – Social City 1*, cited in Islamic Women's Welfare Council of Victoria, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria* (2008) (**Race, Faith and Gender report**)

³⁶⁸ Islamic Women's Welfare Council of Victoria, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria* (2008).

Case Studies: Vilification and Discrimination of Muslim Women³⁶⁹

“I was having coffee with my friend [who is Macedonian] at a TAB venue when, suddenly, this middle aged Australian man started yelling and screaming at her about why Muslim women wear the hijab” – Turkish woman

“One day, when I went to my friend’s home on the tram, a man came and asked where I come from. I said Somalia, he yelled at me to go home: ‘Go back to your country!’ He threatened to cut my throat and then told me we should get out. At that point the tram driver called me to sit next to him.” – Young woman from Horn of Africa

“I was walking and a car...turned...round to me and tried to run me over. [It] ... came up on to the footpath. When... I ran into a pub, they started yelling ‘Fuck Muslims, fuck blacks, go back to your country.’ There were three men...they opened [the] car doors, came at me and swore and yelled. I was furious, but also worried, and afraid.” - Somalia woman

“My son wanted to go to the city, so I told him I’d come with him but he said ‘No way you’re veiled, it’s not safe. What if someone were to harass us?’ I’m even afraid to go to the city myself because there [is] a lot of trouble there” – Lebanese woman

Proposed Recommendations for Concluding Observations (Article 5)

THAT Australia recognise the compounded discrimination experienced by Muslim women in Australia and take the following measures to address that discrimination:

- fund a support program to provide information, support and counselling to Muslim women and their children;
- train public officers, particularly police and public transport staff, to better understand Islam and the experiences of Muslim woman and also to identify and deal with racism; and
- develop a community awareness strategy aimed at developing awareness of the Muslim community and also awareness within the Muslim community of racism and its effects.

³⁶⁹ All case studies are taken from Islamic Women’s Welfare Council of Victoria, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria* (2008)

G. ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ARTICLE 5(E))

G.1 Aboriginal and Torres Strait Islander Peoples

(a) Education

318. Despite recognition by the Australian Government that significant investment is still required to improve education for Aboriginal peoples,³⁷⁰ under-spending on Aboriginal peoples' education continues to be a serious problem. This poses a significant challenge to Australia's compliance with Article 5(e)(v) of CERD.
319. As part of the Close the Gap Initiative (set out in part [B.4: Close the Gap Policies](#) above), the Australian Government aims to halve the gap in reading, writing and numeracy achievements for Aboriginal children; and halve the gap for Aboriginal students in year 12 attainment or equivalent rates by 2020.³⁷¹ While this initiative is strongly welcomed it remains to be seen whether the investment is sufficient and whether the implementation of these reforms will be done in adequate consultation with Aboriginal communities.
320. Currently, Aboriginal children have lower levels of access to education, from pre-school through to tertiary levels. In 2006, school attendance and retention rates for Aboriginal students were consistently lower across all age groups than non-Indigenous children of the same age. The disparity was particularly pronounced for 17 year old children, with 35% of Indigenous 17 year old children attending secondary school, compared with 66% of non-Indigenous 17 year old children.³⁷² In 2006, 19% of Aboriginal peoples reported Year 12 as their highest level of school completed, compared to 45% of the non-Indigenous population.³⁷³

³⁷⁰ Commonwealth Government, *Common Core Document forming part of the reports of State Parties* incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights, June 2006, available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_CommonCoreDocument [575]-[579].

³⁷¹ Australian Government, 'Closing the Gap on Indigenous Disadvantage: The Challenge for Australia', February 2009, 5 at http://www.fahcsia.gov.au/sa/indigenous/pubs/general/Documents/closing_gap_Indigenous_disadvantage/closing_the_gap.pdf.

³⁷² Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians*, 2006.

³⁷³ Sapna Dogra, *Australian Indigenous people – A Statistical Snapshot Based on the Australian Bureau of Statistics (2006 report)*, 'Your Legal Rights' (Quarterly Newsletter Magazine of Aboriginal Legal Rights Movement Inc), Edition 19, September 2009, 17.

321. The failure to provide adequate education to Aboriginal children is further compounded by the fact that 24% of Aboriginal communities are in remote Australia.³⁷⁴ Aboriginal children in rural or remote areas have, on average, much lower rates of school attendance and retention than Aboriginal children living in urban areas.³⁷⁵ According to the AHRC, it is estimated that 2,000 Aboriginal school-age children have no access to school.³⁷⁶
322. Recently, the Australian Government has introduced 'parental responsibility' programs which link children's attendance at school with the payment of welfare. Northern Territory Intervention measures enforce school attendance by withholding welfare payments from Aboriginal parents (mostly mothers) whose children do not attend school.³⁷⁷ Further, the Australian Government is also trialling a system which makes payments of benefits conditional on a recipient taking adequate steps to ensure their child's school enrolment and attendance.³⁷⁸ It is estimated that if the participation rate of Aboriginal school students in the Northern Territory was 100%, at least another 660 teachers would be needed.³⁷⁹ However, the punitive approach to attendance has not yet been accompanied by adequate funding of schools and communities. In any case, research from Cape York income quarantining trials suggest that improved school attendance is principally attributable to case management, rather than income management.³⁸⁰

Bilingual Education

323. In 2009 the Northern Territory Government implemented a new policy requiring the first four hours of education in all Northern Territory schools be conducted in English.³⁸¹ This is a clear threat to the maintenance of Aboriginal language and culture, and also impacts on the right to education of Aboriginal children.

³⁷⁴ Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians* (2006), available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4705.0Main+Features12006?OpenDocument>.

³⁷⁵ Productivity Commission, Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2007* (2007), section 6.

³⁷⁶ AHRC, *Submission to the Special Rapporteur*, above n 107, para [95].

³⁷⁷ This now applies to all Indigenous communities in the Northern Territory (*Social Security Act 2007* (Cth) schedule 1) and may be expanded to many other Indigenous communities.

³⁷⁸ This is currently being trialled for 12 months in 6 locations in the Northern Territory, with a recent decision by Government to extend these trials for a further 12 months.

³⁷⁹ M Kronemann, Australian Education Union, *Education is the Key: An Education Future for Indigenous Communities in the Northern Territory* (2007).

³⁸⁰ Northern Territory Council of Social Service (NTCOSS), *Submission to the Senate Community Affairs and Legislation Committee inquiry into changes to the Social Security arrangements, and the restoration of the Racial Discrimination Act*, 2010, p4.

³⁸¹ Northern Territory Government, 'Education Restructure Includes Greater Emphasis on English', Media Release, 14 October 2008, available at <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=4599&d=5>.

324. The UN Committee on Economic, Social and Cultural Rights has recommended that the Australian Government preserve and promote bilingual education at schools.³⁸² Students who speak Aboriginal and Torres Strait Islander languages at home but attend schools that teach only in English are more likely to fail or drop out than those taught by a bilingual or trilingual teacher.³⁸³
325. Investment in bilingual education is essential to preserve Aboriginal and Torres Strait Islander languages and culture. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has claimed that more than 100 languages in Australia are in danger of extinction.³⁸⁴ Similarly, the *National Indigenous Languages Survey Report 2005* revealed that only 145 out of 250 known Indigenous language still spoken, and of these, less than 20 are not currently considered endangered.³⁸⁵
326. In response, the Federation of Indigenous and Torres Strait Islander Languages has petitioned the Australian Government to improve measures to preserve native languages and is seeking a national inquiry into the issue.³⁸⁶

(b) Health

327. Aboriginal peoples do not enjoy the right to health equally with non-Indigenous Australians which raises concerns regarding Australia's compliance with Article 5(e)(iv). Many Aboriginal peoples do not have the benefit of equal access to primary health care and many communities lack basic needs, such as adequate housing, safe drinking water, electricity and effective sewerage systems. The UN Special Rapporteur on Health recently observed that 'the gap between the everyday lives of mainstream and Indigenous Australia, the latter being affected heavily by ill-health, disability and death, was striking and confirmed the existence of stark inequalities'.³⁸⁷
328. The crisis in Aboriginal peoples' health in Australia is reflected in the following statistics:³⁸⁸

³⁸² Committee on Economic, Social and Cultural Rights, *Considering the Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 42nd session, Geneva, 4-22 May 2009, [33].

³⁸³ M Kronemann, Australian Education Union, *Education is the Key: An Education Future for Indigenous Communities in the Northern Territory* (2007) 20.

³⁸⁴ ABC News, 'Indigenous languages under threat, UN finds', 21 February 2009, available at <http://www.abc.net.au/news/stories/2009/02/21/2497718.htm>.

³⁸⁵ Australian Institute of Aboriginal and Torres Strait Islander Studies in association with the Federation of Aboriginal and Torres Strait Islander Languages, *National Indigenous Language Survey Report 2005*, Australian Government Publication, 4, available at http://www.arts.gov.au/data/assets/pdf_file/0006/25637/NILS_Report_2005.pdf.

³⁸⁶ ABC News, 'Govt petitioned to preserve Indigenous languages', 18 November 2008, available at <http://www.abc.net.au/news/stories/2008/11/18/2423386.htm>.

³⁸⁷ Grover, *Addendum: Mission to Australia*, above n 68, para [36].

³⁸⁸ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009), available at <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009>.

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- (a) Life expectancy for Aboriginal peoples is 67.2 years for males (compared with 78.7 for other Australian men) and 72.9 years for females (compared with 82.6 years for other Australian females).³⁸⁹
 - (b) Aboriginal people are hospitalised for potentially preventable conditions at five times the rate of other Australians and are twice as likely as other Australians to be hospitalised, generally.³⁹⁰
 - (c) The oral health of young Aboriginal people in the Northern Territory is eleven times worse than other Northern Territory young people.³⁹¹
 - (d) The crisis in Aboriginal peoples' access to, and conditions of, housing (see part [G.1\(e\): Aboriginal and Torres Strait Islander Peoples – Housing and Homelessness](#)) has facilitated the spread of diseases such as skin and respiratory infections, eye and ear infections, diarrhoeal diseases and rheumatic fever,³⁹²
 - (e) Aboriginal children have significantly poorer outcomes across a number of areas, as compared with non-Aboriginal children, including higher rates of infant mortality (including 2-3 times more likely to die in the first year of life), chronic and preventable illnesses (including 30 times more likely to suffer from malnutrition) and lower rates of adult supervision and care.³⁹³
329. Aboriginal peoples' health services are severely under funded by Australian governments and have been for decades. While the \$1.6 billion investment in Aboriginal health as part of the Close the Gap campaign is welcome³⁹⁴ (see part [B.4: Close the Gap Policies](#)), reports from bodies such as the Australian Medical Association suggest that these funds are inadequate.

³⁸⁹ Australian Government, *Closing the Gap: Prime Minister's Report*, 2010, p 13. Note also that life expectancy for Aboriginal peoples is between eight and 15 years less than that of indigenous populations in Canada, the United States of America and New Zealand: AHRC, *Statistical Overview*, above 164, ch 4(e).

³⁹⁰ Australian Bureau of Statistics, *The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, 2008.

³⁹¹ ABC Online, 'Aboriginal dental health 11 times worse', 3 June 2010, available at <http://www.abc.net.au/news/stories/2010/06/03/2917637.htm?site=indigenous&topic=latest>.

³⁹² Grover, *Addendum: Mission to Australia*, above n 68, para [38].

³⁹³ Australian Medical Association, *AMA Report Card Series 2008 – Indigenous and Torres Strait Islander Health, Ending the Cycle of Vulnerability: The Health of Indigenous Children* (2008), 1, available at <http://www.ama.com.au/system/files/node/4335/AMA+Indigenous+Health+Report+Card+2008.pdf>. The study found that Aboriginal children are, in comparison with non-Aboriginal children, more likely to be stillborn, be born pre-term, to have low birth weight or die in the first month of life, two to three times more likely to die in the first year of life, eleven times more likely to die from respiratory causes, at a much higher risk of suffering from infections and parasitic diseases, nearly 30 times more likely to suffer from nutritional anaemia and malnutrition up to four years of age, and cared for by substantially fewer adults, who had serious health risks themselves.

³⁹⁴ Human Rights Commission, 'Health equality for Indigenous Australians a step closer: Close the Gap Coalition welcomes COAG funding' (Press Release, 30 November 2008).

The AMA emphasised that rectifying the health gap in children can only be done by comprehensively addressing the broader contextual factors that affect Aboriginal peoples and working in collaboration with, and improving funding for, Aboriginal community-controlled primary health care services.³⁹⁵ The CERD Committee, the Special Rapporteur on Indigenous Peoples and the Special Rapporteur on the Right to Health have similarly recommended that Australia improve the provision of culturally appropriate and accessible health services for Aboriginal peoples, with the full partnership of Aboriginal peoples in the design and delivery of services.³⁹⁶

330. The UN Special Rapporteur on Health recommended that given the shortfall in access to health by Aboriginal peoples, the Australian Government must increase its health investment not only to clinical care, but to preventative programmes, health promotion, rehabilitation, public health measures and capacity building of individuals and communities on health-related matters.³⁹⁷ The Special Rapporteur also noted with concern that Aboriginal peoples being only 1% of the current health workforce compounds access to appropriate services that meet the needs of Aboriginal peoples.³⁹⁸
331. The Northern Territory Intervention has also had a deleterious impact on the health of affected Aboriginal communities. The Special Rapporteur on Indigenous People noted that the Intervention fails to meet basic standards of a 'right-to-health' approach as it lacks 'a transparent plan with clear benchmarks and indicators, monitoring and accountability' and community participation and engagement.³⁹⁹ The Special Rapporteur on Health was similarly critical of the Australian Government's approach, noting that aspects of the Intervention significantly undermined the efforts of existing health agencies working with these communities.⁴⁰⁰

³⁹⁵ Australian Medical Association, *AMA Report Card Series 2008 – Indigenous and Torres Strait Islander Health, Ending the Cycle of Vulnerability: The Health of Indigenous Children* (2008), 6, available at <http://www.ama.com.au/system/files/node/4335/AMA+Indigenous+Health+Report+Card+2008.pdf>. Other recommendations include improving data management of Indigenous health information and capacity building to support the development of local initiatives to improve health outcomes. Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [34]; Grover, *Addendum: Mission to Australia*, above n 68, para [56].

³⁹⁶ CERD Committee, *Concluding Observations: Australia*, above n 94; Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [34]; Grover, *Addendum: Mission to Australia*, above n 68, para [56].

³⁹⁷ Grover, *Addendum: Mission to Australia*, above n 68, para [52].

³⁹⁸ Grover, *Addendum: Mission to Australia*, above n 68, para [55].

³⁹⁹ Grover, *Addendum: Mission to Australia*, above n 68, para [62].

⁴⁰⁰ Grover, *Addendum: Mission to Australia*, above n 68, para [61]. The Special Rapporteur noted that 'the view was expressed that Government-appointed practitioners unknown to communities, who were brought in to complete child health checks, created fear amongst clients and sometimes duplicated services already provided. Medical practitioners who had devoted significant time to establishing relationships and building trust within these communities, often for decades, expressed their feelings of disappointment and

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332. A recent study by the Australian Indigenous Doctors' Association found that certain Intervention measures have had a profound long-term negative impact on psychological health, social health and wellbeing and cultural identity.⁴⁰¹ Indeed, the Federal Government's own *Closing the Gap in the Northern Territory Monitoring Report*, which provides analysis of data pre- and post-dating the Northern Territory Intervention, makes the following significant findings:
- (a) alcohol, substance abuse and drug related incidents have not increased significantly from 2006-07,⁴⁰² and
 - (b) malnutrition of children aged between 0 and 5 years increased from 2006-07 to 2007-08.⁴⁰³
333. Similarly, the UN Special Rapporteur on Health has noted that Northern Territory Intervention measures regarding the prohibition on alcohol consumption (see part [B.1: Northern Territory Intervention](#)) have shifted alcohol-related risks (including binge drinking and violence) to places outside the Intervention's prescribed areas, rather than reducing risks.⁴⁰⁴
334. In terms of mental health, Aboriginal peoples are twice as likely as other Australians to report high or very high levels of psychological distress and are hospitalised for mental disorders at twice the rate of other Australians.⁴⁰⁵ A 2010 report confirmed that Aboriginal peoples continue reporting unacceptably high rates of discrimination (which includes current and historical discrimination) in a range of settings, including work and education, which has been identified as a factor in poor health, particularly mental health.⁴⁰⁶ Disturbingly, the study

powerlessness arising from not being consulted prior to the implementation of this aspect of the Intervention'.

⁴⁰¹ Australian Indigenous Doctors' Association, *Health Impact Assessment of the Northern Territory Emergency Response*, 2010, at x.

⁴⁰² Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: January 2009-June 2009, Whole of Government Monitoring Report*, 96.

⁴⁰³ Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory: January 2009-June 2009, Whole of Government Monitoring Report*, 17. Data was obtained from a client survey of 76 people subject to income management and focus groups involving 167 stakeholders. Data was collected from only 4 locations. Participants in the survey were chosen from only 4 locations and were not randomly selected. As at 31 March 2009 the report stated that there were 15,125 people subject to income management.

⁴⁰⁴ Grover, *Addendum: Mission to Australia*, above n 68, para [63].

⁴⁰⁵ Australian Bureau of Statistics, *The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008*, xxii.

⁴⁰⁶ Vic Health, above n 153, pages 10 and 21. See also, Grover, *Addendum: Mission to Australia*, above n 68, para [8].

found that 93% of Aboriginal people surveyed had experienced race-based discrimination in institutional and every day settings.⁴⁰⁷

335. The UN Special Rapporteur on Health has also observed that the widespread social exclusion, hurt and loss in Aboriginal communities contributes to increased incidents of intentional injury, with hospitalisation for injury due to assault at 8 and 35 times higher for Aboriginal men and women, respectively.⁴⁰⁸

(c) Access to Water

336. Access to clean water is unreliable for many Aboriginal peoples living in remote communities, which raises concerns in relation to the right to an adequate standard of living and also the right to health under article 5(e) of CERD. Figures from a 2006 survey of Aboriginal communities show a positive increase in the number of communities connected to town water (rising from 186 in 2001 to 209 in 2006).⁴⁰⁹

337. People living in communities that are not connected to town water rely on various small scale systems of water delivery, including bores, soaks, ponds and cartage. Access to safe, potable water is variable but 2006 statistics for discrete Aboriginal communities not connected to town water show that, in the preceding twelve months:

- (a) nearly 50 per cent of communities experienced interrupted water supply (182 communities)
- (b) 68 communities had no treatment of drinking water

338. The CESCR's 2009 Concluding Observations on Australia recommended that the Australian Government take steps to improve Aboriginal peoples' access to safe drinking water and sanitation.⁴¹⁰

(d) Access to Food

339. Despite one of the key stated aims of compulsory income management (which is set out in section [C.1: Northern Territory Intervention – Basics Card](#)) being to increase access to food for people in Aboriginal communities, the regime has, in some cases, hindered access to food. Factors include:

- (a) The purchase of food can only be made from Government-approved and specially licensed stores, which must keep detailed records of all supplies made. This means that small community stores may be closed down, or that people must travel long distances to access food.

⁴⁰⁷ Vic Health, above n 153, page 19.

⁴⁰⁸ Grover, *Addendum: Mission to Australia*, above n 68, para [34].

⁴⁰⁹ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2007* (2007) 10.4.

⁴¹⁰ Committee on Economic, Cultural and Social Rights, *Concluding Observations: Australia*, above n 68, para [27].

- (b) Errors have occurred in the scheme, including insufficient store vouchers being to Aboriginal persons under income management. This has meant that some people have received vouchers for food that were valued at a lower amount than that they were actually entitled to.⁴¹¹
- (c) The restrictions on shops approved to receive quarantined money and the slow process for approval of other spending reduce Aboriginal peoples' ability to provide their own sustenance. For example, money for repairs to four wheel drive vehicles that are required for hunting, as well as other hunting supplies, is difficult or impossible to get approved. This effectively removes Aboriginal peoples' right to use their land for food or to access their traditional sources of food, and poses a significant challenge to Australia's compliance with Article 5(e)(vi).
340. Compulsory income management also hinders the rights of Aboriginal peoples to make decisions about sources of food, or to make economic decisions about where to spend their money. These are rights that are particularly important to Aboriginal peoples, who are often living on their traditional lands and also relates to their right to self-determination. Furthermore, a recent study has challenged the Australian Government's claims that compulsory income management can help change people's spending habits, revealing that the sale of healthy food (particularly fruit and vegetables), tobacco and soft drinks did not change as a result of income management.⁴¹²

(e) Social Security

341. The Northern Territory Intervention's compulsory income management regime (outlined in [C.1: Northern Territory Intervention – Basics Card](#)) has had a deleterious effect on affected Aboriginal peoples' access to social security, which poses a significant challenge to Australia's compliance with Articles 5(d)(i), 5(e)(iv), 5(e)(vi) and 5(e)(f) – including freedom of movement, access to food, and the right to health.

(f) Housing and Homelessness

342. Aboriginal peoples experience significant barriers to accessing appropriate and adequate housing and are overrepresented in the homeless population. This represents a significant breach of Australia's obligations under Article 5(e) of CERD. Factors which contribute to the crisis in Aboriginal peoples' housing include lack of affordable and culturally appropriate housing, lack of appropriate support services, significant levels of poverty and underlying discrimination and lack of funding in the provision of housing services.⁴¹³ Indeed, the

⁴¹¹ For example, Rachel Willika of Eva Valley in the Northern Territory received a \$50.00 store voucher for food when she was entitled to \$147.00: see R Willika, 'Christmas Spirit in the Northern Territory', *ABC News* (15 June 2008) available at <http://www.abc.net.au/news/stories/2008/01/15/2138459.htm>.

⁴¹² Julie K Brimblecombe, et al, *Impact of Income Management on Store Sales in the Northern Territory*, Menzies School of Health Research, 2010, available at <http://www.menzies.edu.au/research/research-news/welfare-quarantining-may-not-lead-healthier-purchases-indigenous-community-st>.

⁴¹³ 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), UN Doc.

situation of Aboriginal housing in Australia was described by the UN Special Rapporteur on Adequate Housing a 'humanitarian tragedy'.⁴¹⁴

343. Aboriginal peoples are half as likely as other Australians to own their home.⁴¹⁵ Aboriginal peoples are more likely to live in social housing than non-Indigenous households⁴¹⁶ and are five times more likely to live in dwellings with structural problems.⁴¹⁷ In 2006, 27% of Aboriginal peoples were reported to be living in overcrowded conditions and 51 permanent dwellings had no organised sewerage supply.⁴¹⁸ Further, Aboriginal peoples are significantly over-represented in the homeless population. Overall, 2.4% of people identified as Indigenous at the 2006 Census and 9% of the homeless were Aboriginal peoples.⁴¹⁹ A 2005 study conducted by the Australian Institute of Health and Welfare found that the rate for Aboriginal peoples' homelessness was 18 per 1,000, which is 3.5 times higher than the rate of homelessness in the general population.⁴²⁰
344. Under the National Affordability Housing Agreement, which commenced in January 2009, Australian governments have committed to a Remote Indigenous Housing National Partnership. This initiative provides \$1.94 billion over 10 years to reform housing and infrastructure arrangements in remote Indigenous communities and is part of the Australian

A/HRC/4/18/Add.2, 11 May 2007, [80]. See also, Dan O'Sullivan, *Indigenous housing crisis*, news.com.au, 2 June 2010: Aboriginal housing service providers have reported an increase in demand for housing from clients in crisis, which has not been supported by additional funding from Government..

⁴¹⁴ M Kothari, Special Rapporteur on the Right to Adequate Housing, *Report of the Special Rapporteur on the Right to Adequate Housing on Mission to Australia*, UN Doc A/HRC/4/18/Add.2 (11 May 2007).

⁴¹⁵ Australian Government, *Indigenous Home Ownership Issues Paper*, 24 May 2010, available at http://www.fahcsia.gov.au/sa/indigenous/pubs/housing/indig_home_ownership/Documents/Indigenous_Home_Ownership_Issues_Paper.pdf, p. 9.

⁴¹⁶ *Australian Indigenous people – A Statistical Snapshot Based on the Australian Bureau of Statistics (2006) Report*, reproduced in Your Legal Rights (Quarterly Newsletter Magazine of Aboriginal Legal Rights Movement Inc), Edition 19, September 2009, 17.

⁴¹⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2009) pp 283-312, http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/app2.html. 35 per cent of Aboriginal and Torres Strait Islander households live in dwellings that have structural problems, and 55 per cent of Aboriginal and Torres Strait Islander households renting mainstream or community housing reported that their dwellings had structural problems.

⁴¹⁸ Australian Bureau of Statistics, *The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008*, 39, cited Grover, *Addendum: Mission to Australia*, above n 68, para [38].

⁴¹⁹ Overall, 2.4 per cent of people identified as Indigenous at the 2006 Census, but 9 per cent of the homeless were Indigenous: Australian Bureau of Statistics, *Counting the Homeless, 2001*, ABS Catalogue No 2050.0 (2003) ix.

⁴²⁰ Australian Institute of Health and Welfare, 'Indigenous Housing Needs 2005, a Multi-measure Needs Model' (2005) *Australian Government*, 1-65, 44.

Government's 'Close the Gap' initiative.⁴²¹ The Australian Government has also released a discussion paper to canvass ways to improve support services to provide Indigenous-specific home loan finance schemes and to pursue land tenure reforms to enable individual ownership of homes on community-held land.⁴²²

345. Whilst the improvements in Aboriginal peoples' housing are welcome, the AHRC has emphasised the importance of consultation with Aboriginal peoples to ensure that housing is culturally appropriate.⁴²³ Direct consultation with members of remote Aboriginal communities will be vital in ensuring that housing and infrastructure improvements made under the National Partnerships are culturally appropriate and adequate.
346. The UN Special Rapporteur on Indigenous People noted with concern that the National Partnership on Remote Indigenous Housing envisages communities 'handing over control of their community to the Government for housing to be provided and managed' for at least 40 years.⁴²⁴ In effect, Aboriginal people will lose control of tenancy management – and although the lease agreements are voluntary, the Government will not provide housing without one.⁴²⁵

⁴²¹ Australian Government, 'Closing the gap on Indigenous disadvantage: The challenge for Australia' (February 2009), 21, available at http://www.fahcsia.gov.au/indigenous/closing_the_gap/closing_the_gap.pdf.

⁴²² Australian Government, *Indigenous Home Ownership Issues Paper*, 24 May 2010, available at http://www.fahcsia.gov.au/sa/indigenous/pubs/housing/indig_home_ownership/Documents/Indigenous_Home_Ownership_Issues_Paper.pdf, p 13-17.

⁴²³ Australian Human Rights Commission, 'Review of Australia's Fourth Periodic Reports on the Implementation of the International Covenant on Economic Social and Cultural Rights', Australian Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights, 17 April 2009, 40.

⁴²⁴ Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [42].

⁴²⁵ Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [42].

Case Study: Aboriginal Land Tenure at Risk

'Numerous [Aboriginal] people, especially community leaders, expressed feeling pressured or even 'bribed' into handing over ownership and control of their lands to the Government in exchange for much needed housing services. ... [T]hese concerns [were expressed] even in communities that have negotiated leases with the Government, such as the Groote Eylandt communities of Angurugu, Umbakumba, and Milyakburra. In addition ... housing construction and upgrade services have, by and large, been delivered in a manner that bypass locally-run Aboriginal construction companies, missing the opportunity to provide jobs and training to [Aboriginal] people for the delivery of these services'.⁴²⁶ This is despite the State governments being required to use at least 20% Indigenous employment as part of the construction of housing.⁴²⁷

(g) Work Rights

347. Aboriginal peoples experience significant disadvantages in their right to work which raises significant concerns in relation to Australia's compliance with Article 5(e)(i) of CERD. This is reflected in the following statistics:
- (a) In 2006, the unemployment rate for Aboriginal peoples was 20%, approximately three times higher than the rate for other Australians.⁴²⁸
 - (b) In 2006, the median weekly income for Aboriginal peoples was \$278, compared with \$471 for other Australians.⁴²⁹
 - (c) Aboriginal women are more likely to be working in low income jobs, with over 60% of Aboriginal women on a gross weekly income of \$399 or less (including 41.6% receiving less than \$250 gross each week) [insert a comparison to the average wage in Australia].⁴³⁰

⁴²⁶ Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [43].

⁴²⁷ Media Release from Office of the Prime Minister, Hon Kevin Rudd and Minister for Families, Housing, Community Services and Indigenous Affairs, Hon Jenny Macklin, *Renegotiation of National Partnership Agreement on Remote Indigenous Housing*, 7 December 2009.

⁴²⁸ Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander peoples 2006*, (2006) 66.

⁴²⁹ Australian Bureau of Statistics, *2006 Census of Population and Housing, Community Profile Series, Indigenous Profile* (2007) 104.

⁴³⁰ Australian Bureau of Statistics, *2006 Census of Population and Housing, Selected Person Characteristics by Indigenous Status by Sex* (2006, revised 14 November 2007).

- (d) It has been found that Aboriginal peoples must submit 35% more applications for entry-level positions to obtain the same number of interviews as an Anglo-Saxon person.⁴³¹
348. Aboriginal peoples' unequal access to work is compounded by the abolition of the Community Development Employment Projects (**CDEP**) program. Since 1977, the program has employed 8,000 Aboriginal peoples in about 50 separate community controlled organisations.⁴³² Although the Australian Government plans to create 2,000 jobs in service delivery, the large majority of former CDEP workers will be forced into unemployment. The CDEP program has been important to Aboriginal communities particularly those in very remote areas where there may be little choice or opportunity to gain employment.⁴³³ Further, community organisations relying on CDEP workers will lose their ability to provide services to their communities: at least one Aboriginal council is concerned that there will not be enough jobs available to employ former CDEP participants.⁴³⁴ It is concerning that there was no consultation with affected communities and CDEP employers about this decision.⁴³⁵
349. In February 2009, the Council of Australian Governments signed a National Partnership Agreement for Indigenous Economic Participation, which involves complementary investment and effort by the Commonwealth, state and territory governments to improve opportunities for Indigenous workforce participation. The measures include increasing public sector employment to reflect Indigenous working age population share by 2015; building Indigenous workforce strategies into implementation plans for all COAG reforms contributing to the closing the gap targets; and strengthening government procurement policies to maximise Indigenous employment.⁴³⁶

⁴³¹ Booth, A, Leigh, A and Varganova, E, *Does Racial and Ethnic Discrimination Vary Across Minority Groups? Evidence From a Field Experiment*, Australian National University, p.9.

⁴³² Department of Families, Community Services and Indigenous Affairs, *Factsheet: Jobs and Training for Indigenous People in the Northern Territory – Changes to CDEP* (2007) available at http://www.facsia.gov.au/nter/docs/legis_factsheet_05.htm.

⁴³³ See, eg, the 2001 census which reported that 69 per cent of CDEP participants were from very remote areas: Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* (2001), available at <http://www.abs.gov.au/ausstats/abs@.nsf/ProcutsbyTopic/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument>.

⁴³⁴ See report on ABC Radio National *Breakfast* programme, 21 April 2009 <http://www.abc.net.au/rn/breakfast/stories/2009/2548148.htm>.

⁴³⁵ See report on ABC Radio National *Breakfast* programme, 21 April 2009 <http://www.abc.net.au/rn/breakfast/stories/2009/2548148.htm>.

⁴³⁶ Department of Education, Employment and Workplace Relations, *Indigenous Employment and Business*, available at <http://www.deewr.gov.au/Indigenous/Employment/Pages/default.aspx>.

Case Study: Withdrawal of CDEP

Yarrabah community in Queensland has reported losing \$7 million in assistance previously received under the CDEP program, although the Government claims it has been shifted to other employment services and job assistance programs.⁴³⁷

(h) Stolen Wages

350. 'Stolen wages' is a term used to refer to the wages of Indigenous workers whose paid labour was controlled by the Government under the 'Protection Acts' of the 19th and 20th centuries. That legislation enabled states and territories to determine the employers for whom Aboriginal people could work and also to control the conditions of employment such as duration and wages earned. In many cases, Indigenous people did not receive any wages at all, or received insufficient wages.
351. Practices under Protection Acts arguably constituted slavery and certainly raise serious concerns in relation to rights of Aboriginal people to work.⁴³⁸ Practices included:⁴³⁹
- (a) failing to pay wages and entitlements to Indigenous workers;
 - (b) deliberately paying lower wages to Indigenous workers than non-Indigenous workers;
 - (c) withholding the wages and entitlements of Indigenous workers in government trust and savings accounts; and
 - (d) failing to provide safe and healthy working conditions.
352. In 2006, the Senate Legal and Constitutional Affairs Committee found that Aboriginal peoples suffered stolen wages in every Australian jurisdiction.⁴⁴⁰ The report, entitled *Unfinished Business: Indigenous Stolen Wages*, made extensive recommendations for redress for stolen wages.⁴⁴¹ However, no coordinated response to Aboriginal peoples' stolen wages has been initiated by the Australian Government, despite the Senate Committee finding that '[i]t would be an abrogation for moral responsibility to delay any further, particularly with the knowledge

⁴³⁷ Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [39].

⁴³⁸ Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006), Chapter 1, available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/index.htm.

⁴³⁹ Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006), Chapter 1, available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/index.htm.

⁴⁴⁰ Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006), available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/index.htm, xiii-xiv.

⁴⁴¹ Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006), available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/index.htm, xiii-xiv.

that the age and infirmity of the Indigenous people affected by these practices limits their capacity to pursue claims [in the courts].⁴⁴²

353. There is no scheme or process currently in operation anywhere in Australia that calls on State or Territory governments to account for the monies held by them on behalf of Indigenous people. Rather, the schemes require the claimant to contact the authorities and register a claim, and then provide additional evidence as to the quantum and legitimacy of that claim.⁴⁴³ Only two States have established any sort of scheme to address the wages stolen from Aboriginal peoples and schemes in both States fall well short of adequate or appropriate compensation or reparation. The Queensland Government has only offered a one off payment of up to \$4,000 (which is made 'without prejudice')⁴⁴⁴ and the New South Wales scheme has been criticised for placing too high an evidentiary burden on claimants.⁴⁴⁵

⁴⁴² Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006), available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/index.htm, [1.15].

⁴⁴³ Public Interest Advocacy Centre, *Stolen Wages in NSW*, 2009. As the schemes are 'evidence-based', it allows claimants for whom insufficient records are found to make submissions to the authorities about trust monies they believe they are owed

⁴⁴⁴ The Queensland Scheme's website is http://www.atsip.qld.gov.au/datsip/work_savings.cfm. See Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006), available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/index.htm, 95-7.

⁴⁴⁵ The New South Wales Scheme's website is <http://www.atfrs.nsw.gov.au>. See Brian Gilligan, Terri Janke and Sam Jeffries, *Aboriginal Trust Fund Repayment Scheme Panel Report* (2004) 1.2. The New South Wales Scheme is limited to repayment of monies held on trust for individuals by the New South Wales Government. Documentary evidence of the existence of a trust account must be provided. However, government and institutional record keeping was poor, sometimes incorrect or false, and has been inadequately preserved. Where no records were created, or have been lost or destroyed, a claim under the New South Wales Scheme will fail, regardless of any oral evidence that is available. Similarly, if money did not pass through a trust account, either because no account was established, or no money was paid, claims for that money will fail: See New South Wales Scheme website, <http://www.atfrs.nsw.gov.au>, see also Aileen Teo, 'Stolen Wages Update: Establishment of the NSW Aboriginal Trust Fund Repayment Scheme'6(9) *Indigenous Law Bulletin* 12 (2005).

Case Study: Forced Labour, Exploitation and Stolen Wages

Bruce arrived at Caring Home for Aboriginal Boys when he was seven years old and lived there until he was 14. From the day he arrived, Bruce worked from 4:30am to 8:30am chopping wood, milking cows and cleaning. Between 9am and 3pm he went to school. From 4pm to 7pm he worked at a neighbouring farm.

While working at Caring Home, Bruce's leg was broken and he chopped off three toes on his right foot while cutting wood. While working at the neighbouring farm, Bruce broke his hand. He did not receive compensation for any of the injuries he suffered while working.

The manager of Caring Home sometimes imposed additional work on Bruce as punishment for trivial matters, made him 'run the gauntlet' and sexually abused him. The 'gauntlet' comprised of two rows of boys who were forced to beat another boy forced to run between the rows. If the boy did not try hard enough (in the view of the manager) to hurt another boy, he was required to run the gauntlet himself.

Bruce was not paid for any of the work he did between the ages of seven and 14. From the age of 14 to 21, the New South Wales Government sent Bruce to work at a factory in a nearby town, where he privately boarded.

The government required the employer to pay most of Bruce's wage into a government account, his board to be paid direct to the boarding house and a small amount to be paid to Bruce as pocket money. Bruce did not receive any pocket money while employed by the factor and when he turned 21 he was refused access to the New South Wales Government account containing his wages.⁴⁴⁶

⁴⁴⁶ This case study is drawn from real life experiences of clients at the Public Interest Advocacy Centre, Sydney.

Proposed Recommendations for Concluding Observations (Article 5(E))

THAT the Australian Government take immediate steps to ensure that Aboriginal and Torres Strait Islander peoples have an equal opportunity to be as healthy as non-Indigenous Australians, including by ensuring that the Close the Gap measures include enough funding to ensure equal access to primary health care and that it meet the basic health needs of Aboriginal and Torres Strait Islander communities through the provision of adequate housing, safe drinking water, electricity and effective sewerage systems.

THAT Australia, in consultation with Aboriginal communities, review and implement the recommendations contained in the *Unfinished Business: Indigenous Stolen Wages* report, including the establishment of a national compensation plan.

THAT the Australian Government ensure that Aboriginal and Torres Strait Islander peoples are consulted to realise the culturally specific housing needs of Aboriginal and Torres Strait Islander peoples and THAT Australia fully implement the recommendations of the Special Rapporteur on the Right to Adequate Housing contained in the Report on the Special Rapporteur's Mission to Australia, particularly with respect to Aboriginal and Torres Strait Islander peoples.

THAT the Australian Government, in consultation with Aboriginal communities, hold a national inquiry into the issue of bilingual education for Aboriginal peoples, with a view to improving measures to preserve native languages and THAT the Australian Government consult with Aboriginal and Torres Strait Islander communities to develop and implement bilingual education programs.

THAT Australia fully implement the recommendations of the Special Rapporteur on the Right to Health contained in the Report on the Special Rapporteur's Mission to Australia, particularly those which promote improved health outcomes for Aboriginal and Torres Strait Islander peoples generally, under the Northern Territory Intervention and in the prison system.

THAT, as a matter of urgency, Australia take immediate steps to address the serious disadvantage in accessing all levels of education experienced by Aboriginal and Torres Strait Islander children.

G.2 International Students

354. The international student population in Australia has grown significantly over the last years, reaching 560,000 people in 2009.⁴⁴⁷ In relation to its total population, Australia has the highest proportion of international students in the world. Further, international education is an industry which adds around \$15 billion per annum to the Australian economy.⁴⁴⁸

⁴⁴⁷ The Academy of the Social Sciences, the Australian Human Rights Commission and Universities Australia, 'Racism, exclusion and poverty: key factors reducing international student safety' summary from workshop held in March 2010
<http://www.universitiesaustralia.edu.au/documents/policies_programs/international/activities/AOSS-final.pdf> at 20 April 2010.

⁴⁴⁸ Study by Monash and Melbourne Universities, 'The Social and Economic Security of International Students in Australia: Study of 200 student cases Summary report'

355. With the growing number of international students in Australia, the AHRC has received reports of 'increasing levels of hostility towards international students' over the last five years.⁴⁴⁹ One university study on the conditions of international students found that 50% of international students experience discrimination while in Australia.⁴⁵⁰
356. The issues facing international students raise concerns in relation to their equal enjoyment of the rights to work, housing and education.

(a) Employment

357. Up to 40% of international students in Australia are engaged in the Australian workforce.⁴⁵¹ International students have experienced problems at work such as exploitation or discriminatory treatment.⁴⁵² For example, nearly 60% of international students in Victoria could be receiving below minimum wage rates. An international student was paid \$1.26 an hour by a security firm during the Australian Open in 2008.⁴⁵³
358. A lack of knowledge of employment rights and obligations, as well as the limitation to working no more than 20 hours work per week while their courses are in session, can result in international students who need to work more hours being vulnerable to exploitation by

<<http://www.education.monash.edu.au/centres/mcrie/docs/researchreports/202-interviews-updated060605.doc>> at 28 April 2010.

⁴⁴⁹ Australian Human Rights Commission, media release, 'Attacks on international students have racial underpinnings', 2 June 2009 <http://www.hreoc.gov.au/about/media/media_releases/2009/43_09.html> at 19 April 2010.

⁴⁵⁰ Study by Monash and Melbourne Universities, 'The Social and Economic Security of International Students in Australia: Study of 200 student cases Summary report' <<http://www.education.monash.edu.au/centres/mcrie/docs/researchreports/202-interviews-updated060605.doc>> at 28 April 2010.

⁴⁵¹ Human Rights Commission media release, 'Human rights of international students a major issue' 5 November 2009 <http://www.humanrights.gov.au/about/media/media_releases/2009/107_09.html> at 20 April 2010.

⁴⁵² Tom Arup, 'Foreign Students Being Exploited', *The Age*, 12 June 2008 <<http://www.theage.com.au/national/foreign-students-being-exploited-20080611-2p5c.html>> at 10 April 2010; the study by Monash and Melbourne Universities, 'The Social and Economic Security of International Students in Australia: Study of 200 student cases Summary report' <<http://www.education.monash.edu.au/centres/mcrie/docs/researchreports/202-interviews-updated060605.doc>>.

⁴⁵³ Tom Arup, 'Foreign Students Being Exploited', *The Age*, 12 June 2008 <<http://www.theage.com.au/national/foreign-students-being-exploited-20080611-2p5c.html>> at 10 April 2010; Ben Schneiders, 'Justice secured for underpaid guard', *The Age*, 14 August 2009, p. 3 <<http://www.theage.com.au/national/justice-for-underpaid-guard-20090813-ejus.html>> at 3 May 2010.

employers.⁴⁵⁴ There are reports of students who work over 20 hours 'being caught up in illegal and exploitative workplaces where they may be paid well below the minimum wage.'⁴⁵⁵

359. It can also be difficult for international students to obtain work in the first place because of discrimination issues.,

360. A study undertaken by the Australian National University indicates that entry-level job applicants from minority groups are likely to suffer significant discrimination at the application stage. It was found that 'in order to get as many interviews as an Anglo applicant...a Chinese person must submit 68% more applications, an Italian person must submit 12% more applications, and a Middle Eastern person 64% more applications.'⁴⁵⁶ Discrimination can also occur on a procedural level, for example, internships are difficult to obtain as most companies, as a matter of policy, require applicants to be Australian citizens or permanent residents.⁴⁵⁷

(b) Housing

361. Finding accessible and affordable accommodation is particularly difficult for many international students, who risk living in overcrowded and low income housing without being properly informed about Australian tenancy rights or regulations.⁴⁵⁸

362. The Tenants' Union of Victoria (**TUV**) has reported a growing number of complaints from international students regarding severe overcrowding in rental properties.⁴⁵⁹ In one complaint, 48 Nepalese students were living in a six bedroom property; and in another, 12 international students were living in a single room.⁴⁶⁰

⁴⁵⁴ Further, student visa holders found to be working in excess of their limited work rights are subject to mandatory visa cancellation; see *Fact sheet 50 – Overseas Students in Australia*, Department of Immigration and Citizenship <<http://www.immi.gov.au/media/fact-sheets/50students.htm>> at 7 May 2010.

⁴⁵⁵ FECCA and AFIS submission to the senate inquiry into the welfare of students <http://www.fecca.org.au/Submissions/2009/submissions_2009035.pdf> at 3 May 2010.

⁴⁵⁶ Booth, A, Leigh, A and Varganova, E, *Does Racial and Ethnic Discrimination Vary Across Minority Groups? Evidence From a Field Experiment*, Australian National University, p.9.

⁴⁵⁷ See for example *Internships – can I participate*, Shell <http://www.shell.com/home/content/careers/student_graduate/how_do_i_apply/internships/internships_04042008.html> at 7 May 2010.

⁴⁵⁸ Institute for Cultural Diversity, 'Racism, exclusion and poverty: key factors reducing international student safety' 18 April 2010 <http://www.culturaldiversity.net.au/index.php?option=com_content&view=article&id=474:racism-exclusion-and-poverty-key-factors-reducing-international-student-safety&catid=18:research-articles&Itemid=108> at 19 April 2010.

⁴⁵⁹ Parliament of Australia Senate inquiry, 'Welfare of International Students', 26 November 2009, ch 3.48, <http://www.aph.gov.au/SENATE/committee/eet_ctte/international_students/report/c03.htm#anc5> at 21 April 2010.

⁴⁶⁰ Parliament of Australia Senate inquiry, 'Welfare of International Students', 26 November 2009, ch 3.48, <http://www.aph.gov.au/SENATE/committee/eet_ctte/international_students/report/c03.htm#anc5> at 21 April 2010.

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363. The TUV has also indicated the existence of increasing occurrences of 'online rental scams'.⁴⁶¹ These scams involve international students being lured into the promise of cheap inner-city rent, resulting in them depositing the first month's rent and bond into an international bank account of the owner in order to view the property.⁴⁶²
364. Further, most international students live in 'on campus' accommodation, which are associated with their schools and universities. The *Residential Tenancies Act 1997* (Vic) (**RTA**), which governs tenancy rights in Victoria, does not apply to accommodation situated in premises which are used for educational purposes, or which are affiliated with educational institutions (eg the accommodation is owned/leased by an educational institution).⁴⁶³ Most tenancy laws in other states contain similar exemptions.⁴⁶⁴
365. This means that international students who live in accommodation affiliated with an educational institution are unable to access the same tenancy rights available under the RTA, for example, the right to apply to the Victorian Civil and Administrative Tribunal for an order declaring a term of a tenancy agreement as 'harsh or unconscionable'.⁴⁶⁵ Further, owners of such accommodation will not be subject to the obligations and liability under the RTA, such as the obligation on rooming house owners to obtain each existing residents' consent before increasing room capacity.⁴⁶⁶

(c) Education

366. The Australian Senate's Education, Employment and Workplace Relations Committee acknowledged in their recent inquiry that 'the quality of education and training provided to international students is just as important as their welfare'.⁴⁶⁷ However, the standard of the international education system has been subject to severe scrutiny, particularly in light of recent events.
367. In late 2009, a company that owned four private colleges in Melbourne and Sydney went into voluntary administration, leaving 'stranded' 2000 students, including foreign students studying for VCE exams.⁴⁶⁸ This was one of nine Victorian colleges which were closed in the period

⁴⁶¹ Australian Senate, *Welfare of International Students*, September 2009, p 35
<http://www.apf.gov.au/Senate/committee/eet_ctte/international_students/report/index.htm>.

⁴⁶² Australian Senate, *Welfare of International Students*, September 2009, p 36
<http://www.apf.gov.au/Senate/committee/eet_ctte/international_students/report/index.htm>.

⁴⁶³ *Residential Tenancies Act 1997* (Cth), s 27.

⁴⁶⁴ Australian Senate, *Welfare of International Students*, September 2009, p 35
<http://www.apf.gov.au/Senate/committee/eet_ctte/international_students/report/index.htm>.

⁴⁶⁵ *Residential Tenancies Act 1997* (Cth), s 28.

⁴⁶⁶ *Residential Tenancies Act 1997* (Cth), s 94B.

⁴⁶⁷ Australian Senate, *Welfare of International Students*, September 2009, p 92
<http://www.apf.gov.au/Senate/committee/eet_ctte/international_students/report/index.htm>.

⁴⁶⁸ See for example; Sushi Das, 'College Collapses hit VCE', *The Age* November 6 2009
<<http://www.theage.com.au/national/education/college-collapses-hit-vce-20091105-i085.html>> at 3 May

between July and November 2009, affecting a total of 2,695 international and domestic students.

368. The collapse of several colleges in Australia has affected thousands of international students, creating uncertainty over refunds of course fees and options to transfer to new courses.⁴⁶⁹
369. There is also concern that international students are experiencing unsatisfactory education, with reports of private education colleges which primarily cater to international students, offering substandard services and operating against consistent national standards.⁴⁷⁰
370. A 'confidential report' on a Melbourne private college, which catered to 330 international students (mainly from India), revealed that students records were not properly kept, teachers' qualifications were not certified and an equivalent three year apprenticeship was being provided in just 40 weeks.⁴⁷¹

G.3 African Communities – Employment

371. According to the VEOHRC's *Rights of Passage report*, African Australians face numerous incidences of discrimination in employment. These include difficulty in finding or maintaining employment, denial of employment benefits, lack of occupational health and safety protections, feelings of exploitation and over-scrutiny. The report indicates that often African Australians feel these problems are based on racial stereotyping.⁴⁷² The AHRC has

2010; 'International students shafted by private college collapse', National Union of Students, February 16, 2010, <http://www.unistudent.com.au/site/index.php?option=com_content&view=article&id=270:international-students-shafted-by-private-college-collapse&catid=44:latest-news&Itemid=50> 3 May 2010; Sushi Das 'Indian students struggle for free refunds' *The Age* 3 May 2010 <<http://www.theage.com.au/national/education/indian-students-struggle-for-fee-refunds-20100502-u1i9.html>> at 3 May 2010.

⁴⁶⁹ See for example; Sushi Das, 'College Collapses hit VCE', *The Age* November 6 2009 <<http://www.theage.com.au/national/education/college-collapses-hit-vce-20091105-i085.html>> at 3 May 2010; 'International students shafted by private college collapse', National Union of Students, February 16, 2010, <http://www.unistudent.com.au/site/index.php?option=com_content&view=article&id=270:international-students-shafted-by-private-college-collapse&catid=44:latest-news&Itemid=50> 3 May 2010; Sushi Das 'Indian students struggle for free refunds' *The Age* 3 May 2010 <<http://www.theage.com.au/national/education/indian-students-struggle-for-fee-refunds-20100502-u1i9.html>> at 3 May 2010.

⁴⁷⁰ Sushi Das, 'College in Gross Breach of Standards', *The Age*, July 23, 2009 <<http://www.theage.com.au/national/education/college-in-gross-breach-of-standards-20090722-dtl2.html>> at 19 April 2010.

⁴⁷¹ Sushi Das, 'College in Gross Breach of Standards', *The Age*, July 23, 2009 <<http://www.theage.com.au/national/education/college-in-gross-breach-of-standards-20090722-dtl2.html>> at 19 April 2010.

⁴⁷² *Rights of Passage report*, above n 136.

recognised that 'visual difference' can be a barrier to employment for African Australians.⁴⁷³ Other employment difficulties arise indirectly as a result of low education and literacy skills, particularly among African migrants and refugees. While levels of education among African refugees vary, 64% state that they require an English language interpreter.⁴⁷⁴

Proposed Recommendations for Concluding Observations (Article 5)

THAT the Australian Government take measures, including public awareness campaigns, to prevent discrimination in employment

THAT the Australian Government remove condition 8105 of Student visas, which restricts visa holders' hours of work per week to 20 hours while their course is in session.

THAT the Australian Government remove the exemption of accommodation affiliated with education institutions from residential tenancy legislation across all Australian jurisdictions, so that all landlords and tenants have equal access to the same rights and obligations under tenancy laws.

THAT the Australian Government ensures that education regulators undergo initial and regular audits on private educational providers to ensure compliance with educational regulations and guidelines, and THAT strict penalties are enforced on the relevant educational provider where there is non-compliance.

G.4 Refugees and Asylum Seekers

(a) Health in Immigration Detention

372. For asylum seekers in detention, the right to health is compromised by their ability to access health services as well as by the fact of detention itself.
373. As stated in part [F.4: Asylum Seekers, Refugees and Non-Citizens – Mandatory Immigration Detention](#) above, despite the Government's promise that immigration detention will only be used as a last resort, it remains – in law and practice – the first resort for many asylum seeker arrivals. The fact of detention, particularly detention in remote locations, makes the provision of basic health services more difficult.
374. The Australian government has continued to detain and process applications for asylum on Christmas Island, 2600km from the nearest Australian capital city.⁴⁷⁵ The AHRC has

⁴⁷³ Australian Human Rights Commission, *African Australians: a report on human rights and social inclusion issues* (2009) available at http://www.hreoc.gov.au/africanaus/AFA_2009.html.

⁴⁷⁴ Australian Research Council, *A Conversation on Trust: Community Policing and Refugee Settlement in Regional Australia – A Case Study of Tasmania* (2009) available at http://www.utas.edu.au/tiles/publications_and_reports/research_reports/research_reports_pdf/A%20Conversation%20on%20Trust.pdf.

⁴⁷⁵ Australian Human Rights Commission, *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities* (2008), p 70.

emphasised that ‘the island’s isolation makes it difficult for external groups from the mainland to monitor what is going on there, and the island community is so small that detainees find it very hard to access basic services’.⁴⁷⁶ In his recent visit, the Special Rapporteur on Health noted the lack of specialist mental health and psychiatric services on Christmas Island, which in conjunction with the ‘prison like’ environment presented ‘exacerbating factors for poor mental health’.⁴⁷⁷ The AHRC has previously stated that the detention centre on Christmas Island ‘looks and feels like a high-security prison’ and ‘is a harsh facility with excessive levels of security’.⁴⁷⁸

375. The correlation between poor mental health and length of immigration detention has been established, showing that people detained for over 24 months had poor mental and physical health, with 3.6 times higher rate of new mental illness than those released within six months.⁴⁷⁹ Prolonged and indefinite detention of asylum seekers, who are kept in a state of uncertainty as to when they will be released or indeed whether they will be allowed to stay in Australia, also has a detrimental effect on the mental health of detainees.⁴⁸⁰

(b) Work Rights

376. Previously, asylum seekers living on bridging visas in the community could have their right to work restricted or prohibited as a condition of their visa. This rule was changed in July 2009 to allow most asylum seekers on bridging visas to work during the period in which their visa application is determined, including for the duration of any appeal processes and up until any request for the Minister to exercise his or her discretion a first time.

377. However, an asylum seeker will still lose their right to work if:

- (a) they fail to renew their visa when requested (thereby becoming invalid) which, given the complexities of the system and limited access to adequate legal representation, could occur despite an asylum seeker’s best efforts; or
- (b) they wish to make a second request for the exercise of Ministerial discretion to allow them to stay in Australia, which is an entitlement in Australia’s migration system.⁴⁸¹

⁴⁷⁶ Australian Human Rights Commission, ‘New report highlights ongoing problems in immigration detention’ (Press release, 13 January 2009).

⁴⁷⁷ Grover, *Addendum: Mission to Australia*, above n 68, para [98].

⁴⁷⁸ Australia Human Rights Commission, *2008 Immigration Detention Report*, available at http://www.hreoc.gov.au/human_rights/immigration/idc2008.html.

⁴⁷⁹ Grover, *Addendum: Mission to Australia*, above n 68, para [92].

⁴⁸⁰ Australian Human Rights Commission, ‘Review of Australia’s Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights’, Australian Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights, 17 April 2009, 141.

⁴⁸¹ Department of Immigration and Citizenship, ‘New Permission to Work Arrangements,’ <http://www.immi.gov.au/refugee/permission/>. (2009).

378. While most asylum seekers living in the community are now eligible to be granted the right to work, they face severe challenges in obtaining work. This is due to inadequate access to employment services and job training programs, lack of English language skills, outdated training and experience resulting from time away from work while seeking asylum, and the disinclination of employers to hire people without permanent or even long term status in Australia. Hotham Mission Asylum Seeker Project, a Melbourne charity which assists vulnerable asylum seekers who have no source of income and are at risk of homelessness, notes that less than 15% of their clients have been able to find work.⁴⁸²

(c) Social Security

379. Asylum seekers living in the community are still ineligible to access social security benefits. Those people are reliant on two schemes funded by the Department of Immigration and Citizenship for financial and/or health support. The Asylum Seeker Assistance Scheme (**ASAS**) provides financial assistance equivalent to 89% of a Centrelink Special Benefit. The Community Assistance Support program (**CAS**) provides health and welfare support.

380. However, each of these programs is only available to the most marginalised and vulnerable asylum seekers living in the community, such as unaccompanied minors, elderly people and persons suffering the effects of trauma.⁴⁸³ This means that many asylum seekers who need assistance do not receive it. Hotham Mission has found that ‘single men – the largest group among asylum seekers – often don’t meet the eligibility criteria’ and, if unable to find work, ‘are quickly vulnerable to destitution.’⁴⁸⁴

381. For asylum seekers who are ineligible for the ASAS, CAS or any other charity or support service, Hotham Mission provides housing services and a ‘basic living allowance’. Hotham Mission is only able to provide \$33 per week per person and relies on public donations, philanthropic grants and community support to provide basic living allowances and housing.⁴⁸⁵

⁴⁸² HMASP, ‘Asylum seeker project: fact sheet 1’, (Dec 2009).

⁴⁸³ To obtain the ASAS applicants must undergo a six month waiting period and then prove financial hardship. Unaccompanied minors, elderly people, families with dependents and those unable to work as a result of a disability, illness, care responsibilities or the effects of torture or trauma may be eligible for a waiver of the six month waiting period: Department of Immigration and Citizenship, ‘Fact Sheet 62 – Assistance for Asylum Seekers in Australia,’ <http://www.immi.gov.au/media/fact-sheets/62assistance.htm> (Mar 2010). The CAS is only available to particularly vulnerable asylum seekers living in the community, such as those suffering the effects of torture and trauma, serious mental illness or medical conditions, incapable of supporting themselves or facing serious family difficulties, such as family violence: Department of Immigration and Citizenship, ‘Fact Sheet 64 – Community Assistance Support program,’ <http://www.immi.gov.au/media/fact-sheets/64community-assistance.htm> (Sept 2009).

⁴⁸⁴ Hotham Mission, ‘Asylum seeker project: fact sheet 1’, (Dec 2009).

⁴⁸⁵ Hotham Mission, ‘Asylum seeker project: fact sheet 1’, (Dec 2009).

382. Given the difficulty finding work that is often experienced by asylum seekers in the community, the restriction on social security and financial support can have detrimental impacts on their standard of living and health.

Proposed Recommendations for Concluding Observations (Article 5(e))

THAT the Australian Government immediately end its policy and practice of mandatory detention of asylum seekers, including children.

THAT the Australian Government, as a matter of immediate priority, take all necessary steps and measures, including legislative measures, to ensure that all asylum seekers who are detained are provided access to adequate physical and mental health care and crucial support services such as legal advice and social and religious support. The Government should empower and resource the AHRC to conduct independent monitoring of health services provided in detention.

THAT the Australian Government provide equitable access to financial assistance to all asylum seekers living in the community who have been unable to obtain employment.

THAT the Australian Government provide work rights to all asylum seekers on bridging visas for the full duration of their claims for asylum, including all avenues available under the migration system. Asylum seekers should also be provided with adequate access to employment services and training programs, as well as English language education.

G.5 Migrant and Culturally and Linguistically Diverse Communities

(a) Aged Care Services

383. Research indicates a growing population of older Australians from culturally and linguistically diverse backgrounds with diverse needs. To ensure better health and active ageing for all Australians in accordance with the Department of Health and Ageing's vision, all levels of Government must achieve an accelerated and deeper understanding of the needs of older Australians from culturally and linguistically diverse backgrounds and strategies on how to address these in an appropriate and flexible manner. The current dearth in culturally appropriate health and ageing services for the CALD community is inconsistent with Australia's obligations under Article 5(e) of CERD.
384. Ethno-specific and multicultural service providers do not currently have the opportunity to provide aged care services on an equal footing to mainstream services providers, including in the area of Home and Community Care services which are often managed by state governments with significant federal funding.⁴⁸⁶ Building the capacity of the mainstream aged care service industry is necessary to cater to the changing needs and demands of the growing population of older Australians from culturally and linguistically diverse backgrounds

⁴⁸⁶ Federation of Ethnic Communities' Councils of Australia, *FECCA Aged Care Policy Statement*, available at http://www.fecca.org.au/Policies/1/policies_2007011.pdf.

through appropriate standards and cultural competence training. This will assist in delivery services which take a non-discriminatory approach to aged care and provide older people from culturally and linguistically diverse backgrounds with equal access to the range of positive ageing programs.

385. The consequence of older Australians from culturally and linguistically diverse backgrounds not receiving timely and appropriate care and support must be considered by the Government in the context of ensuring their right to health and access to Government services.⁴⁸⁷

(b) Young People

386. Racial discrimination in education exists against young people from culturally and linguistically diverse backgrounds, particularly young African migrants, raising significant concerns in relation to Australia's obligations under Article 5(e) of CERD. Education-based difficulties have been identified as including a general lack of educational support for students who have difficulties with English, literacy and numeracy and lack of understanding by school institutions of the difficulties young culturally and linguistically diverse people face in order to succeed in school.⁴⁸⁸
387. A study undertaken by the Foundation for Young Australians, in conjunction with Deakin University, made a number of recommendations to address the impact of racism in schools, at both the individual and community level. These include:⁴⁸⁹
- (a) professional development for school staff, including training for senior staff about cohesion and engagement with culturally and linguistically diverse communities;
 - (b) development of mentoring programs;
 - (c) ongoing targeted professional development for teachers to enable them to identify and deal with incidents of racism in the school and classroom;
 - (d) curriculum materials that help teachers to engage students with issues of culture, race and social inclusion.

⁴⁸⁷ Federation of Ethnic Communities' Councils of Australia, *FECCA Aged Care Policy Statement*, available at http://www.fecca.org.au/Policies/1/policies_2007011.pdf.

⁴⁸⁸ Multicultural Youth South Australia Inc, *Under the Radar: Exploring Problem Behaviour Among Newly Arrived Youth in SA (2007-2010)*, 2010, 16.

⁴⁸⁹ Foundation for Young Australians, *The Impact of Racism upon the Health and Wellbeing of Young Australians (At A Glance)*, October 2009

Proposed Recommendations for Concluding Observations (Article 5(e))

THAT the Australian Government consult with CALD organisations to develop a funded strategy for increasing the number of specialised aged care and health facilities for CALD communities and to increase the capacity (through appropriate standards and cultural competence training) of the mainstream aged care service industry to cater to the changing needs and demands of the growing population of older CALD Australians through appropriate standards and cultural competence training.

THAT the Australian Government, in consultation with CALD organisations, implement the recommendations of the Foundation for Young Australians/Deakin University study into the impact of racism in schools.

A. ACCESS TO PUBLIC SPACES (ARTICLE 5(F))

A.1 Aboriginal and Torres Strait Islander Peoples

388. 'Public space' or 'public order' offences exist in varying forms in all Australian states and territories. Although these laws are non-discriminatory on their face, in practice the laws have a disproportionate impact on particular communities, including Aboriginal communities.⁴⁹⁰ In 2005, a report revealed that Aboriginal peoples were more likely to be in custody for public order offences than other Australians and that just under one quarter of the total number of Aboriginal peoples taken into custody were in custody for public order offences.⁴⁹¹ The effect of public space and public order laws has been to diminish Aboriginal peoples' rights to access to areas intended for use by the general public.
389. Under public space and public order laws it is unlawful to do certain activities in public places such as possess an open container of liquor, be intoxicated or urinate or defecate in public.⁴⁹² These laws apply to public areas including parks, gardens, reserves,⁴⁹³ licensed premises, streets and alleyways.⁴⁹⁴ Violation of these laws can result in persons being 'moved-on' from an area by police or other authorised personnel, the imposition of a fine or sometimes even criminal sanctions.
390. The penalties for violating move-on laws are particularly stringent in Western Australia where there are limited safeguards against the arbitrary enforcement of these laws. Further, the legislation allows for penalties of up to \$12,000 or 12 months imprisonment for a failure to comply with them.⁴⁹⁵ The laws have been justified as a preventative measure to lower the crime rate but it has not been proven that such a correlation exists.⁴⁹⁶
391. 'Move-on' laws are in place in all Australian states and territories.⁴⁹⁷ Broadly, move-on laws permit law enforcement officers to issue directions to persons or groups occupying public

⁴⁹⁰ See the Final Report of the Special Rapporteur on Adequate Housing dated 11 May 2007.

⁴⁹¹ Taylor N and Bareja M (2005) *2002 National Police Custody Survey* Canberra: Australian Institute of Criminology [online] www.aic.gov.au/publications/tbp/tbp013/tbp013.pdf

⁴⁹² For example in Victoria public space laws apply to persons found drunk or engaging in drunk and disorderly conduct; In Queensland the laws apply to urinating, begging, wilful exposure and public intoxication.

⁴⁹³ Section 3.3 *Police Offences Act 1935*(Tas).

⁴⁹⁴ Section 4 *Summary of Offences Act 1953* (SA).

⁴⁹⁵ Section 153(1) *Criminal Investigation Act 2006* (WA).

⁴⁹⁶ Monica Taylor, *Nowhere to Go: The Impact of Police Move-on Power on Homelessness People in Queensland* (2006), at 18.

⁴⁹⁷ Section 197(c) *Law Enforcement (Powers & Responsibilities) Act 2002* (NSW); Section 46,47 and 48 *Police Powers and Responsibilities Act 2000* (Qld); Section 27 *Criminal Investigation Act 2006* (WA); Section 18(1) *Summary Offences Act 1953* (SA); Section 47 *Summary Offences Act 2002* (NT); Section

areas that require them to move from the space. One problem with public space or public order laws is that they give police a very broad discretion in relation to their application. It has been shown that this discretion is used disproportionately adversely against Aboriginal peoples.⁴⁹⁸

392. Laws vary between jurisdictions, but the threshold for police to move people on is often very low. For example:
- (a) police in Queensland can act on a reasonable suspicion that a person is or has been engaged in causing anxiety to a person in a place,⁴⁹⁹
 - (b) police in Western Australia can act on a reasonable suspicion that a person is, or is just about to, do an act that is likely to involve the use of violence against a person that will cause a person to use violence against another person, or that will cause a person to fear violence will be used by a person against another; and⁵⁰⁰
 - (c) police in Victoria can act when they have reasonable suspicion that the person is, or is likely, to engage in actions that breach the peace, endangers the safety of any other person or is otherwise a risk to public safety.⁵⁰¹
393. Public space or public order offences have a particular impact on Aboriginal peoples for a number of reasons, including that:
- (a) Aboriginal peoples tend to use public space in a different and distinct way from other Australians for cultural reasons;⁵⁰²
 - (b) the enforcement of public space laws can be selective, targeting areas in which Aboriginal peoples are known to reside or occupy, or in which there are a large number of Aboriginal peoples who are homeless,⁵⁰³ and

4(1) *Crime Prevention Powers Act 1998* (ACT); *The Summary Offences and Control of Weapons Acts Amendment Act 2009* (Vic); Section 15B(c) *Police Offences Act 1935* (Tas).

⁴⁹⁸ A study in New South Wales identified 22% of those given directions to be from Aboriginal and Torres Strait Islander backgrounds whereas Aborigines and Torres Strait Islanders constitute less than 2% of the total population of New South Wales: Chris Cunneen, 'Zero tolerance policing : implications for indigenous people : paper prepared for the Law and Justice Section of the Aboriginal and Torres Strait Islander Commission', 1999.

⁴⁹⁹ Section 46, 47 and 48 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA).

⁵⁰⁰ Section 27 (1)(a) & (b) *Criminal Investigation Act 2006* (WA).

⁵⁰¹ Section 6 *Summary Offences and Control of Weapons Acts Amendment Act 2009* (Vic).

⁵⁰² Aboriginal and Torres Strait Islander communities have a recognised cultural and social connection to the land. The use of public space as a 'cultural space' for Aboriginal and Torres Strait Islander cultures is attributed to the "communal nature" of their cultures. Trans-generational trauma following the dispossession of cultural space in the past is also a common reason for gatherings in public spaces. Low socio-economic status, poor health and over-crowding in houses have also been cited as motivating factors for the use of public spaces: Victorian Aboriginal Legal Service Co-operative Ltd., 'Submission in Response to Yarra City Council's Draft Local Law No.8 [2009] Consumption of Liquor in Public Places', 2009, at 8.

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- (c) the conduct that is proscribed might be conduct that is, for a variety of reasons, more likely to be engaged in by Aboriginal peoples than other groups.⁵⁰⁴ For example, it is sometimes more common for Aboriginal peoples to choose to drink in public⁵⁰⁵ and as a result, the bans on public drink disproportionately impact on Indigenous populations.
394. In 2009, the Alice Springs Town Council introduced draft by-laws that made it illegal to do a range of things in 'a public place', including: drinking liquor, possessing an open container of liquor, urinating or defecating, indecent behaviour, spitting and swearing. Given that these activities are only offences when they are committed in public spaces, these offences will have a disproportionate impact on homeless and Aboriginal peoples. In Alice Springs, the Aboriginal community accounts for roughly one-quarter of the population. Alice Springs also has one of the highest rates of homelessness in the country, nearly six times the national rate.⁵⁰⁶ These laws consequently impact on the rights of Aboriginal peoples to property, freedom of speech, freedom of assembly and association, housing and access to public space.
395. In Victoria, legislation was recently enacted to regulate public drunkenness. These new laws allow police to intervene without having to prove that a person is drunk. Police may even intervene if the person is in possession of an unsealed container of alcohol.⁵⁰⁷ According to a report of the local council, there was an immediate and observable discriminatory impact on an Aboriginal community group known as 'the Parkies'.⁵⁰⁸ Anecdotal evidence revealed that the Parkies had fewer and smaller gatherings in public spaces⁵⁰⁹ which resulted in a perceived loss of social connectedness amongst the group.⁵¹⁰
396. Across Australia, greater numbers of Aboriginal peoples are being placed in police custody for public space and public order offences. These offences represented the largest single category of offences Aboriginal peoples were convicted for in Western Australia.⁵¹¹ The

⁵⁰³ Rose Best, 'Out and about in Kurilpa: the right to public space' (2006) 19(1) *Parity* 68.

⁵⁰⁴ Victorian Aboriginal Legal Service Co-operative Ltd., '*Submission to Crime Prevention Victoria in response to: 'A Good Night for All'- Options for Improving Safety and Amenity in Inner City Entertainment Precincts*', 2005, at 1.

⁵⁰⁵ Victorian Aboriginal Legal Service Co-operative Ltd., '*Submission in Response to Yarra City Council's Draft Local Law No.8 [2009] Consumption of Liquor in Public Places*, 2009, at 8.

⁵⁰⁶ Australian Census Analytic Program: Counting the Homeless (2009).

⁵⁰⁷ Victorian Aboriginal Legal Service Co-operative Ltd., '*Submission in Response to Yarra City Council's Draft Local Law No.8 [2009] Consumption of Liquor in Public Places*, 2009, at 9.

⁵⁰⁸ Report on the Impact of Local Law No. 8-Three Months After Implementation (2010), at 51.

⁵⁰⁹ Report on the Impact of Local Law No. 8 – Three Months After Implementation (2010), at 51.

⁵¹⁰ Report on the Impact of Local Law No. 8 – Three Months After Implementation, (2010) at 52.

⁵¹¹ Hon Dennis Mahoney, AO QC, *Inquiry into the Management of Offenders in Custody and in the Community*, Perth, November 2005, p 284.

Aboriginal people targeted under these laws often do not have the capacity to pay the fines or for legal representation.

397. Aboriginal peoples also experience discrimination in everyday life. A 2009 survey of Aboriginal people in South Australia found that discrimination is 'commonplace' in a range of everyday settings. For example, 63% of Aboriginal people reported race-based discrimination in service settings and 54% experienced racism from the general public.⁵¹²

Case Study: 'No Coons Policy'

In May 2004, six Aboriginal people were denied entry to a nightclub in New South Wales, because the security staff had been directed by the nightclub manager to exclude all Aboriginal people from the premises. The manager told the security staff that this was the nightclub's 'NCP' or 'No Coons Policy'.

The policy was justified by the nightclub on the basis that some Aboriginal people had become drunk and disorderly the week before, causing damage to property. None of the claimants had ever caused trouble or behaved inappropriately at the venue. They were excluded solely on the basis of their Aboriginality. The security staff apologised to the claimants at the time, stating that the policy was insisted upon by management and that they knew it was wrong. When the applicants challenged the policy and sought to speak to the manager, the manager refused to speak to them.

The applicants were each awarded \$15,000 in damages, to be paid by the nightclub proprietor or the security company, for the hurt and humiliation caused by the unlawful discrimination. The Administrative Decisions Tribunal did not allow a complaint of unlawful racial vilification on the basis that the acts were not sufficiently public or serious enough to incite hatred, serious contempt or severe ridicule.⁵¹³

A.2 African Communities

398. Negative stereotyping and vilification of African Australians and people of African descent is discussed in part [D.2: Vilification of African Communities](#) above. One effect of this stereotyping of African Australians has been an eroded sense of safety in public space. Most of the young African Australians consulted for the 'Rights of Passage' report indicated that they had experienced racial discrimination, including verbal abuse and physical threats, in public places such as on the street or on public transportation. Fear amongst African Australians about entering public places or travelling alone intensified following the highly publicised death of Liep Gony in 2007. According to the *Rights of Passage report*, experiences of racism have left African Australians feeling excluded, unsafe and dehumanised. The report also points to unrealistic fears among non-African Australians about new Sudanese Australians which appear to be at last partly motivated by their physical features.

⁵¹² See discussion of Gallaher Survey in Vic Health, above n 153, page 30.

⁵¹³ *Grogan and Ors v First Rate Leisure Pty Limited and Ors* [2007] NSWADT 294.

399. This treatment of African Australians not only limits their ability to enjoy and access public spaces equally, but is a threat to their right to liberty and security of the person. This further highlights the need for independent police complaints mechanisms, as discussed in part [E.2: Aboriginal and Torres Strait Islander Peoples – Policing](#) above.

Proposed Recommendations for Concluding Observations (Article 5(f))

THAT the Australian Government take immediate steps to ensure that the nature and application of public space or public order offences do not have a racially discriminatory effect, in particular on Aboriginal and Torres Strait Islander peoples and African Australians.

B. EFFECTIVE REMEDIES (ARTICLE 6)

B.1 Aboriginal and Torres Strait Islander Peoples

(a) Northern Territory Intervention

400. The exclusion of the operation of the RDA and state and territory anti-discrimination legislation prevents people who are affected by the Northern Territory Intervention from challenging the intervention measures or seeking remedies for the harm they have suffered as a result of these measures (see [B.1: Northern Territory Intervention](#)). The proposed reinstatement of the RDA, while welcome, should be done in a manner that limits the ability of affected persons to challenge or seek remedies for harm suffered as a result of the intervention measures.

(b) Stolen Generations

401. The AHRC's 'Bringing Them Home' report⁵¹⁴ established that between 1910 and 1970, at least 100,000 Aboriginal children (approximately 10-30 per cent of all Aboriginal children during that period) were forcibly removed from their families by various government agencies and church missions (**Bringing Them Home report**). The Bringing Them Home report made a number of key findings pertaining to the failure by welfare officials to protect Aboriginal children from abuse. It also found that the practice of forced removal had a destructive effect on Aboriginal culture, denied Aboriginal peoples their fundamental rights, had a profoundly detrimental effect on Aboriginal children,⁵¹⁵ and amounted to genocide.⁵¹⁶
402. The report made 54 recommendations aimed at restoring justice and dignity to the Stolen Generations and rectifying the ongoing inter-generational effect of family separation. However, many of the recommendations have not been implemented by the Australian Government, including the recommendation that those affected be compensated. The UN Human Rights Committee, the Special Rapporteur on Indigenous People and the AHRC have all called on the government to provide compensation to the Stolen Generations.⁵¹⁷

⁵¹⁴ Human Rights and Equal Opportunity Commission, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

⁵¹⁵ Western Australian Aboriginal Child Health Survey, *Forced Separation from Natural Family and Social and Emotional Wellbeing of Aboriginal Children and Young People* (2005), 52. In relation to Western Australian members of the Stolen Generations, the survey found that they were twice as likely to be at risk of emotional and behavioural difficulties and to abuse alcohol and drugs as other children.

⁵¹⁶ Key findings included that welfare officials failed in their duty to protect Aboriginal wards from abuse and that many children were denied their right to Aboriginal culture, language, land or kinship, were placed in institutions, church missions, adopted or fostered, received little education, were expected to perform low grade domestic and farming work, often without wages, and suffered physical, emotional and sexual abuse.

⁵¹⁷ Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [19]; Australian Human Rights Commission, *Social Justice Report 2008*, Chapter 4. Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (3 April 2009) [15].

403. In 2008, the Australian Government formally apologised to the Stolen Generations. While, the formal apology is a long-awaited gesture towards reconciliation, it must be recognised only as only 'first step' in what should be a long term commitment to meaningful reconciliation with Aboriginal peoples and towards efforts to improve the ongoing disadvantage experienced by Aboriginal peoples in relation to many civil, political, economic, social and cultural rights. The government is otherwise to be congratulated for issuing its formal apology.
404. In 2008, Senator Andrew Bartlett introduced the *Stolen Generation Compensation Bill 2008* (Cth) into the Australian Parliament. However, the Senate Standing Committee on Legal and Constitutional Affairs rejected the bill. Instead, the committee recommended that a 'National Indigenous Healing Fund' be established to 'provide health, housing, ageing, funding for funerals, and other family support services for members of the stolen generation as a matter of priority'.⁵¹⁸ The fund has since received a commitment from the Australian Government of \$29.5 million for initiatives to assist Stolen Generations survivors.⁵¹⁹ However, this fund does not address one other reason for compensating individual members of the Stolen Generations: the recognition that wrongs were committed against those individuals by the state.
405. To date, only one person in Australia has received compensation for their removal from their parents. In August 2007, an Indigenous man from South Australia, Bruce Trevorrow, was the first person from the Stolen Generations to secure compensation through the courts. While Mr Trevorrow's success is significant, it is of great concern that he had to resort to the court system in order to be provided with compensation.

(c) Stolen Wages

406. The failure of the Australian Government to provide any compensation or reparation for wages stolen from Aboriginal peoples is discussed in more detail in part [G.1\(g\): Aboriginal and Torres Strait Islander Peoples – Stolen Wages](#) above. It also constitutes a failure by the Australian Government to provide effective remedies for violation of rights under CERD.

(d) Native Title

407. The Native Title Act provides that native title can be extinguished by unilateral uncompensated acts (the doctrine of 'extinguishment') (see [F.1\(f\): Aboriginal and Torres Strait Islander Peoples – Native Title](#)). This is inconsistent with the UN Declaration on the Rights of Indigenous Peoples which provides, at Article 28, that:

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

⁵¹⁸ Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Inquiry into the Stolen Generation Compensation Bill 2008* (2008) ix.

⁵¹⁹ Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [18].

The AHRC and the Special Rapporteur on Indigenous People have both observed that Aboriginal peoples whose rights have been extinguished face 'extreme difficulty' in obtaining compensation under the current native title scheme.⁵²⁰

B.2 Australian Human Rights Commission

408. The role and functions of the AHRC, and the limits in its effectiveness to provide effective protections and remedies for race discrimination are discussed in detail in part [A.3: Australian Human Rights Commission](#) above). The AHRC faces challenges that include funding limitations, a lack of power to initiate complaints independently of a complaint lodged by aggrieved individuals, the inability of its recommendations to bind the Australian Government in relation to complaints of human rights breaches and the potential exposure of complainants to cost jurisdictions in relation to complaints of unlawful discrimination.

Proposed Recommendations for Concluding Observations (Article 6)

THAT the Australian Government provide comprehensive reparations, including compensation, to those affected by the Stolen Generations.

THAT the Australian Government, in consultation with Aboriginal communities, audit and implement the recommendations contained in the AHRC's 'Bringing Them Home' report.

THAT Australia take steps to ensure evidentiary laws governing the admissibility of Aboriginal and Torres Strait Islander testimony so as to allow for the recognition and respect of Aboriginal and Torres Strait Islander oral testimony in native title claims.

THAT the Australian Government ensure that the AHRC is provided with adequate funding to properly discharge its functions.

⁵²⁰ Anaya, *Addendum – The Situation of Indigenous Peoples in Australia* (Advanced unedited version), above n 220, para [29], Australian Human Rights Commission, *Native Title Report 2007*, 7.

C. EDUCATION TO COMBAT PREJUDICES AND PROMOTE TOLERANCE AND UNDERSTANDING (ARTICLE 7)

409. Aboriginal peoples and people from non-English speaking backgrounds, especially migrants and refugees are the most vulnerable groups to racial discrimination in Australia. There is plenty of evidence to show that attitudes towards diversity and tolerance in Australia remain tinged with racism, and that more education is required. For example, recent research in Victoria showed:⁵²¹
- Nearly 1 in 10 respondents agreed with the statement that ‘not all races are equal’;
 - Nearly 1 in 10 respondents said it is not a good idea for people of different races to marry each other;
 - 37% of respondents felt that ‘Australia is weakened by people of different ethnic origins sticking to their old ways’; and
 - 36% of respondents believed that some groups do not fit within Australian society. The most common groups mentioned were Muslim, Middle Eastern and Asian Victorians.
410. The Australian Government has recently announced that it will invest \$12 million in Human Rights education. Under its recently announced Human Rights Framework, the government will invest \$3.8 million in education and training for the Commonwealth public sector. It will also provide an additional \$6.6 million over four years to the AHRC to enable it to expand its community education capabilities and support for human rights education programs. It has also pledged \$2 million over the next four years to NGOs for the development and delivery of community human rights awareness and education programs.⁵²²
411. Although this funding of human rights education is welcome, it is essential that the Australian Government also invest in broader education with a view to combating existing prejudices and to promoting understanding and tolerance between racial and ethnic groups.

C.1 Primary and Secondary Human Rights Education

412. As part of the Australian Government’s Human Rights Framework, it has stated it will ‘enhance its support for human rights education across the community, including primary and secondary schools’.⁵²³ While these sentiments are welcome, two issues should be noted.
413. First, on 1 March 2010, the Australian Government released the draft K-10 Australian Curriculum (**Curriculum**) for national consultation. The purpose of the Curriculum is to

⁵²¹ Vic Health, above n 153, pages 29-31.

⁵²² Attorney-General’s Department, above n 5, pages 5-8.

⁵²³ Attorney-General’s Department, above n 5, page 5.

introduce a consistent curriculum across all Australian States and Territories, in the four learning areas of English, mathematics, science and history.⁵²⁴

414. The Curriculum does not include any requirement for teaching of rights to equality and non-discrimination or the principles of human rights as required under Article 7. Instead the curriculum makes reference to human rights, notions of diversity and seeks to educate students about various cultures.⁵²⁵ For example, the Curriculum includes content regarding Aboriginal and Torres Strait Islander culture, perspectives and literature.⁵²⁶
415. Secondly, in the absence of a National Human Rights Act, education on human rights is more difficult and less effective. Domestic human rights instruments are a basic tool for teaching human rights. A comprehensive study of human rights education has found that the existence of a bill of rights or other domestic human rights laws influence a teacher's understanding of human rights and 'is also critical to the nature and extent of human rights education provided in schools.'⁵²⁷ The author of this study, Dr Paula Gerber, said in response to the announcement about the government's Human Rights Framework that steps to incorporate human rights education into the national school curriculum would be inadequate without a Human Rights Act:

It is great to say that Australia will promote human rights education, but education about what? Empirical research clearly demonstrates that human rights education is most effective when there is a domestic human rights act on which to base that education.⁵²⁸

⁵²⁴ ACARA Releases Draft Australian Curriculum for National Consultation (1 March 2010) Australian Curriculum, Assessment and Reporting Authority
<http://www.acara.edu.au/verve/_resources/Media_release_Draft_Aust_Curriculum_for_National_Consultation_20100301.pdf> at 5 May 2010.

⁵²⁵ The history curriculum for senior students considers the struggle for freedom and rights, and the contributions of the United Nations and other international bodies in establishing human rights internationally: ACARA Australian Curriculum Consultation Portal - Draft Consultation version 1.0.1, History (5 May 2010) Australian Curriculum Assessment and Reporting Authority
<<http://www.australiancurriculum.edu.au/Documents/History%20curriculum.pdf>> at 5 May 2010;⁵²⁵ ACARA Australian Curriculum Consultation Portal - Draft Consultation version 1.0.1, English (30 April 2010) Australian Curriculum Assessment and Reporting Authority
<<http://www.australiancurriculum.edu.au/Documents/English%20curriculum.pdf>> at 5 May 2010.

⁵²⁶ ACARA Australian Curriculum Consultation Portal - Draft Consultation version 1.0.1, History (5 May 2010) Australian Curriculum Assessment and Reporting Authority
<<http://www.australiancurriculum.edu.au/Documents/History%20curriculum.pdf>> at 5 May 2010;⁵²⁶ ACARA Australian Curriculum Consultation Portal - Draft Consultation version 1.0.1, English (30 April 2010) Australian Curriculum Assessment and Reporting Authority
<<http://www.australiancurriculum.edu.au/Documents/English%20curriculum.pdf>> at 5 May 2010.

⁵²⁷ Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (2008, VDM) 324.

⁵²⁸ Castan Centre for Human Rights, Media Release, 'Human Rights Act thwarted by government', 21 April 2010.

Proposed Recommendations for Concluding Observations (Article 7)

THAT the Australian Government also invest in broad education campaigns with a view to combating existing prejudices and to promoting understanding and tolerance between racial and ethnic groups.

THAT the Australian Government develop and release a draft exposure Human Rights Bill in advance of the review of the Human Rights Framework in 2014.

That the Australian Government ensure that the National Curriculum incorporates the requirements in Article 7 of CERD to educate with a view to combating prejudices and to teach the principles of human rights as contained in the international human rights treaties.

D. DOMESTIC IMPLEMENTATION OF CERD VIEWS AND RECOMMENDATIONS (ARTICLE 14)

416. There are currently no institutional mechanisms in Australia for the consideration, implementation or follow-up of the views and recommendations of the CERD Committee and other treaty bodies.
417. As discussed above (See Overview of Human Rights Framework in Australia at page 5), the Australian Government has introduced a bill to parliament establishing a Parliamentary Joint Committee on Human Rights to scrutinise new legislation for compliance with Australia's international human rights obligations.⁵²⁹ However, the bill fails to provide the committee with a mandate to consider the recommendations and views of UN human rights treaty bodies or the Human Rights Council (including the Special Procedures) in order to guide the implementation of those outcomes into Australian law, policy and practice.
418. Since January 1993, the Australian Government has recognised the competence of the CERD Committee to receive and consider complaints from individuals and groups under Article 14 of CERD. However, the Australian Government's recent treatment of the decisions of other UN treaty bodies raises concerns about its willingness to implement its treaty obligations in individual cases.
419. First, the Australian Government's position is that it is not bound to implement the views of treaty bodies and that such views are not legally authoritative or binding. For example, Australia has consistently demonstrated a reluctance to accept and implement the views of the Human Rights Committee. In 2009 the Human Rights Committee was critical of Australia's record in this regard.⁵³⁰ In each of the last six responses of the Australian Government to the Human Rights Committee's findings that there has been violation in the context of an individual communication, the Government has rejected the adverse finding and any recommendations as to remediation, whether through compensation, legislative or policy amendment or otherwise.⁵³¹
420. Secondly, the Australian Government has recently shown its willingness to act in defiance of an interim measures request of the Human Rights Committee.⁵³² In April 2010 the Human

⁵²⁹ Attorney-General's Department, above n 5, page 3; see also at page 8.

⁵³⁰ In 2009, the Human Rights Committee expressed its concern at Australia's restrictive interpretation of, and failure to fulfil its obligations under the First Optional Protocol to the ICCPR and the Covenant itself, and at the fact that victims have not received reparation. It recommended that the Australian Government should do more to implement views in individual cases: Human Rights Committee, *Concluding Observations on Australia*, CCPR/C/AUS/CO/5, 2 April 2009, para.10.

⁵³¹ The views of the Human Rights Committee and the Australian Government's responses can be found at http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationCommunications (accessed 3 June 2010).

⁵³² This obligations arises under the Vienna Convention on the Law of Treaties, 1969, article 26 and has been stated by the Human Rights Committee *General Comment No 33: The Obligations of States Parties under*

Rights Committee asked the Australian Government not to deport Sheikh Mansour Leghaei, who had been the subject of an adverse security assessment in 1997, because he had not been granted a right to a fair hearing. Sheikh Leghaei has not been given any particulars of the allegations on which the adverse security assessment was based. It is of grave concern that the Australian government has defied the Human Rights Committee's request by setting a date for the Sheikh's deportation.⁵³³

421. The Australian Government should act in good faith with its treaty obligations and in doing so comply with the views and give effect to the recommendations of the UN treaty bodies.

Proposed Recommendations for Concluding Observations (Article 14)

THAT Australia develop appropriate institutional mechanisms to implement the recommendations and views of UN human rights treaty bodies, the Human Rights Council and the Special Rapporteurs in order to guide the implementation of those outcomes into Australian law, policy and practice. In this regard, the proposed new Joint Parliamentary Committee on Human Rights (or other appropriate committee such as the Joint Standing Committee on Treaties or the Joint Committee on Foreign Affairs, Defence and Trade) should be empowered to consider, monitor and make recommendations in relation to the domestic implementation of Concluding Observations and views of UN treaty bodies and the UN Human Rights Council.

THAT the Australian Government make a firm commitment to act in good faith and in accordance with the decisions of UN treaty bodies as the authoritative interpreters of UN human rights treaties. In particular, the government must ensure that it unconditionally accedes to any requests from the UN treaty bodies for urgent or interim measures granted in order to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of CERD. Further, it should ensure that persons are provided with effective remedies where a violation is found.

the Optional Protocol to the International Covenant on Civil and Political Rights UN Doc CCPR/C/GC/33 (5 November 2008).

⁵³³ See Sarah Gerathy, 'Deporting sheikh would breach human rights', 17 May 2010, <http://www.abc.net.au/news/stories/2010/05/17/2902016.htm>; Rick Fenely, 'Deportation of Sheikh puts Australia at odds with UN', 18 May 2010, <http://www.smh.com.au/nsw/deportation-of-sheikh-puts-australia-at-odds-with-the-un-20100517-v9gm.html>.

Glossary

Term	Definition
AIHW	Australian Institute of Health and Welfare
AHRC	Australian Human Rights Commission
ATSIC	Aboriginal and Torres Strait Islander Commission (the former Aboriginal representative body)
Basics Card	Welfare quarantining measure used for the purchase of priority needs under the Northern Territory Intervention
Bringing Them Home report	AHRC report <i>Bringing Them Home</i> report about the Stolen Generations
CALD Communities	Culturally and Linguistically Diverse Communities
CDEP	Community Development Employment Projects
Close the Gap	The federal policy for closing the gap in Indigenous disadvantage
COAG	Council of Australian Governments
DRIP	United Nations Declaration on the Rights of Indigenous Peoples
FPIC	Free prior and informed consent
Government's CERD report	Australia's Combined Fifteenth, Sixteenth and Seventeenth Periodic Reports under Article 9 of CERD
Human Rights Framework	Australian Government's April 2010 announcement in response to the National Human Rights Consultation
National Human Rights Consultation	2009 national consultation on the protection and promotion of human rights in Australia
Northern Territory Intervention	Australian Government legislative package targeted at Aboriginal peoples in certain Northern Territory communities, also known as Northern Territory Emergency Response
RDA	<i>Racial Discrimination Act 1975</i> (Cth) – the primary law implementing CERD in Australia
Redesign Consultations	Department of Families, Housing, Community Services and Indigenous Affairs consultation with Aboriginal people in the Northern Territory about the future directions for the Northern Territory Intervention

Stolen Generations	Aboriginal children who were forcibly removed from their families under official government policy between 1909-1969
Stolen Wages	Wages of Aboriginal peoples whose paid labour was controlled by the Australian Government under the 'Protection Acts' of the 19 th and 20 th centuries
VEOHRC	Victorian Equal Opportunity and Human Rights Commission