

Joint NGO Submission to the Universal Periodic Review of Australia — July 2010

This joint submission has been prepared in consultation with a number of key Australian NGOs.¹ It has been endorsed, in whole or part, by the [#] organisations listed in Attachment A.

A. Constitutional and legislative framework

1. Despite being a party to seven of the core human rights treaties,² Australia has not incorporated these treaties into its domestic law and has failed to adopt a comprehensive legal framework for the protection of human rights. There are significant gaps in the protection of human rights by and in Australia and many individuals are unable to access effective remedies.³

2. In 2008, the Federal Government appointed an independent committee to conduct a National Human Rights Consultation on the protection and promotion of human rights in Australia. The Committee found that: (a) Australia's democratic and legal institutions do not provide adequate protection of human rights; (b) human rights are not enjoyed fully or equally by all Australians, both in fact and in law; and (c) there is strong public support for enhanced legal and institutional protection of rights.⁴

3. In May 2010, the Federal Government announced a "Human Rights Framework" in response to the Committee's report.⁵ The Framework does not include a federal Human Rights Act – the Committee's key recommendation. Instead, the Framework focuses on enhanced human rights education and parliamentary engagement with human rights.⁶ **Australia should fully incorporate its international human rights obligations into domestic law (with the aim of eventual Constitutional entrenchment) by introducing a comprehensive, judicially enforceable federal Human Rights Act. Further, Australia should include and resource education about human rights in primary and secondary school curricula.**

4. Despite being an independent national human rights institution in accord with the "Paris Principles", the mandate and powers of the Australian Human Rights Commission are limited. The Commission cannot make enforceable determinations and there is no requirement for the Australian Government to implement, or even respond to, the Commission's recommendations. **Australia should ensure that the determinations and recommendations of its NHRI are enforceable and that the Commission is sufficiently funded to independently and effectively fulfil its mandate.**

5. **Australia should ratify the Convention on Migrant Workers, OP-ICESCR, OP-CAT and ILO Convention No. 169.**

B. Cooperation with human rights mechanisms

6. In 2008, Australia issued a standing invitation to the Special Procedures of the Human Rights Council. Despite this welcome development, Australia regularly fails to implement recommendations of UN human rights bodies and has not established institutional mechanisms to follow up on recommendations.⁷ **Australia should extend the mandate of the proposed Joint Parliamentary Committee on Human Rights to include the consideration, follow up and oversight of implementation of recommendations and views of UN human rights mechanisms.**

C. Promotion and protection of human rights on the ground

1. Equality and non-discrimination

7. Australia has enacted federal laws to prevent discrimination on the basis of race, sex, age and disability. However, there remain significant gaps in Australia's discrimination laws and there are a number of groups within Australian society who remain particularly disadvantaged in the equal enjoyment of their human rights. The Australian Constitution does not enshrine the right to equality and permits discrimination on the ground of race.⁸

8. Among the initiatives included in the new "Human Rights Framework" is the development of a comprehensive Equality Act.⁹ However, there are concerns that the focus of the reform on streamlining existing legislation and reducing the regulatory burden on business will lead to the weakening of an already deficient legislative framework. **Australia should enact comprehensive**

legislation that addresses all prohibited grounds of discrimination, promotes substantive equality, and provides effective remedies against systemic and intersectional discrimination.

9. **Women:** Recent positive developments in Australia include the ratification of the Optional Protocol to CEDAW, proposed amendments to the *Sex Discrimination Act 1984*¹⁰ and the introduction of a paid maternity leave scheme.¹¹ Despite these welcome changes, there remains inadequate protection from discrimination against women in the workforce, with women continuing to experience employment discrimination on the basis of pregnancy and family responsibilities. Women are also under-represented in Board and managerial levels and experience pay levels of approximately 84% of men's income.¹² **Australia should immediately further reform the *Sex Discrimination Act 1984* to implement all recommendations of the Senate Committee Inquiry.¹³ Australia should consider targets of 30% representation of women on public and private sector boards, with a view to adopting quotas if targets are not met after three years. Australian should devote greater resources to the education of employers about discrimination on the basis of pregnancy and family responsibilities.**

10. **People with Disability:** Despite Australia's ratification of the *Convention on the Rights of Persons with Disabilities*, Australia fails to ensure that people with disability enjoy their rights on an equal basis with others. **Australia should conduct a thorough, critical review of domestic laws and policies to ensure their compatibility with the CRPD. Australia systematically improve voting procedures to ensure that all people with disability are able to exercise their right to vote freely and independently. Australia should close all residential care institutions that congregate, segregate and isolate people with disability.**

11. Non-therapeutic sterilisation of people with disability remains an ongoing practice in Australia and impacts most significantly on the rights of women and girls with disability. **Australia should enact national legislation prohibiting the use of non-therapeutic sterilisation of children, regardless of whether they have a disability,¹⁴ and of adults with disability in the absence of their fully informed and free consent.**

12. **Children:** Australia does not have a comprehensive, national policy framework for the protection of children's rights. Many children with disability continue to experience high levels of abuse, neglect and exploitation.¹⁵ **Australia should appoint an independent national Child Commissioner, whose mandate includes monitoring implementation of the CRC and CRPD. Australia should develop a national policy framework for children and enact stronger legislative protections for children with disability.**

13. **GLBTI Communities:** Recent amendments to federal laws gave equal financial and workplace benefits to unmarried same-sex couples.¹⁶ However, GLBTI Australians continue to experience higher levels of discrimination and assault.¹⁷ **Australia should extend equality in marriage and parenting laws¹⁸ to same-sex couples, and recognise sex and gender identity in all official documents.¹⁹ Federal law should prohibit discrimination on the grounds of sexual orientation, gender identity and relationship status.²⁰**

2. Indigenous peoples²¹

14. Positive developments for Australia's Aboriginal and Torres Strait Islander peoples ('Aboriginal peoples'),²² include the Apology to the "Stolen Generations", the endorsement of the UN Declaration on the Rights of Indigenous Peoples and the establishment of the National Congress of Australia's First Peoples. The commitment to "Close the Gap" in health standards and life expectancy between Aboriginal peoples and other Australians by 2030 is also welcome. However, Aboriginal peoples continue to suffer significant disadvantage in the enjoyment of human rights, as evidenced by the recommendations contained in the report of the Special Rapporteur on Indigenous Rights following his country visit in September 2009.²³ **Australia should review and implement each of the Special Rapporteur's recommendations in real partnership with Aboriginal peoples. Consultation must meet the standards contained in the DRIP requiring genuine respect for cultural integrity and self determination.**

15. **Northern Territory Intervention:** The “Northern Territory Emergency Response” intervention²⁴ into Aboriginal communities (NTER) suspends the operation of Australia’s race discrimination legislation and involves a range of draconian measures targeted directly at Aboriginal communities.²⁵ Recent legislative amendments²⁶ do not repeal the racially discriminatory aspects of the NTER and continue to raise significant human rights concerns. **Australia should amend the NTER to remove its discriminatory elements and ensure compliance with international human rights. The recommendations in the *Little Children are Sacred* report²⁷ should also be fully implemented.**
16. **Criminal Justice System:** The interaction of Aboriginal peoples with the criminal justice system continues to be a major concern, in particular the disproportionate impact of certain criminal laws,²⁸ the over-representation of Aboriginal peoples in prison²⁹ and limited access to legal and interpretive services.³⁰ **Australia should update and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody, the National Indigenous Law and Justice Framework and the Australian Senate’s Access to Justice inquiry report.³¹**
17. **Native title:** **Australia should reform the onerous standards and burdens of recognition for native title which deny Aboriginal peoples the right to access and control their traditional lands and take part in cultural life.³²**
18. **Stolen Generations and Stolen Wages:** Australia has failed to implement a national reparation scheme, including compensation, for members of the “Stolen Generations”³³ or for the “Stolen Wages” of many Aboriginal peoples.³⁴ **Australia should establish a national reparation scheme, including compensation, for members of the “Stolen Generations” and implement all the recommendations contained in the *Bringing Them Home* report. Australia should also establish a national compensation scheme for people affected by Stolen Wages.**
19. **ESC rights:** Aboriginal children, particularly those living in remote communities, suffer from severe disadvantage, especially in relation to living standards, health and education.³⁵ Efforts at improvement are impeded by a lack of culturally appropriate services.³⁶ Access to appropriate education is hampered by threats to bilingual education programs.³⁷ **Australia should ensure that economic, social and cultural rights for Aboriginal peoples are protected and promoted in culturally appropriate ways.**
- 3. Migrants, refugees and asylum seekers**
20. Positive reforms of the immigration system include ending the “Pacific Solution”, removing the system of temporary protection visas for asylum seekers and seeking to ensure that immigration detention is only for the shortest possible period of time. Despite these developments, mandatory detention and off-shore processing of asylum seekers continues to operate.³⁸ Asylum seekers are detained in remote “prison-like” detention facilities, including on the remote Christmas Island and the recently re-opened Curtin detention facility.³⁹ Inadequate judicial oversight means that detention is often arbitrary,⁴⁰ and has deleterious impacts on mental health and on families and children. **Australia should end its policy of mandatory immigration detention, close the Christmas Island and Curtin detention centres and ensure that all asylum seekers can access health care and work rights. All asylum seekers should be processed on-shore and be entitled to adequate judicial oversight. Australia should legislate to provide complementary protection in accordance with human rights and refugee law.**
21. In April 2010, Australia suspended the processing of visa applications from Sri Lankan and Afghan refugees,⁴¹ which contravenes its obligations under the 1959 Refugee Convention and CERD. **Australia should immediately reinstate the processing of asylum applications in accordance with its international legal obligations.** Australia’s migration laws also permit discrimination on the basis of disability by providing for strict health criteria to be met to be granted a visa.⁴² **Australia should amend the Migration Act to ensure the application of the Disability Discrimination Act and withdraw its interpretative declaration in relation to articles 12 and 18 of the CRPD.**

4. Right to life, liberty and security of person

22. **Violence against women:** Violence against women remains a major issue, particularly for Aboriginal women and women with disabilities.⁴³ Aboriginal legal services provide services primarily to men and there is no national network of Aboriginal women's legal services. There is a lack of adequate access to sexual assault services for rural and remote women and a lack of access to crisis accommodation services, particularly for Aboriginal women and women with disabilities.⁴⁴ Three major government-commissioned reports have found that the family law system does not respond effectively to issues of family violence.⁴⁵ **Australia should immediately implement the National Plan to Reduce Violence Against Women with proper funding and independent monitoring by civil society. Australia should fund Aboriginal women's legal services across Australia and a peak body to ensure coordinated law reform and policy development, and improve health services in rural and remote areas to assist victims of violence. Australia should amend the *Family Law Act* to better protect the safety of women and children.**

23. **Prisons:** Inadequate access to health care, particularly mental health care, remains a significant issue for prisoners in Australia.⁴⁶ Conditions in prison, including transport between prisons and in "supermaximum" prisons, also raises serious concerns.⁴⁷ **Australia must provide adequate resources for mental health diagnosis and treatment within prisons, in particular for the provision of services to specific groups of prison populations. Australia should also place greater emphasis on access to education and rehabilitative services in prison and on post-release programs and support, including in the areas of health care, housing and education.**

24. **Police:** In many Australian jurisdictions, there is a lack of regulation regarding police use of force, including lethal force, inadequate mechanisms for independent investigation and oversight of police, and a lack of access to effective remedies for police misconduct. There is evidence of police targeting and harassment of Aboriginal peoples⁴⁸ and newly arrived migrants, particularly Africans.⁴⁹ **Australia should establish independent, effective police oversight mechanisms, legislate to regulate the use of force in a human rights-compliant manner, and mandate human rights and anti-racism training for police.**

5. Administration of Justice

25. There is inadequate funding for legal aid commissions, community legal centres and Aboriginal legal services. Civil law funding is limited, even where human rights are at stake. From 1997 to 2007, there was an 18% reduction in real funding to community legal centres.⁵⁰ **Australia should implement the recommendations of the 2009 *Senate Inquiry into Access to Justice*⁵¹ and the Concluding Observations of the Human Rights Committee.**

26. In Western Australia and Northern Territory, mandatory sentencing for certain criminal offences has a disproportionate affect on particular groups, including young people and Aboriginal peoples. **Australia should implement CERD's recommendation that mandatory sentencing provisions be repealed.**⁵²

27. Several Australian states have passed laws enabling the continued detention of sex offenders beyond their term of imprisonment.⁵³ **Australia should ensure that any laws providing for extended detention or supervision of offenders be compatible with human rights standards and be subject to periodic merits and judicial review.**

28. People with disability are significantly over-represented in the criminal and juvenile justice systems, particularly people with intellectual disability, psycho-social disability and acquired brain injury.⁵⁴ **Australia should develop a comprehensive national framework to address the over-representation of children and adults with disability in the criminal justice system.**

6. Right to social security and to an adequate standard of living

29. **Poverty:** Despite Australia's economic prosperity, 12% of the Australian population lives in poverty.⁵⁵ Poverty rates are particularly high among Aboriginal peoples, asylum seekers, migrants

and persons with disabilities. **Australia should develop and implement a comprehensive national poverty reduction strategy, with concrete targets and impact indicators.**⁵⁶

30. **Homelessness:** Despite increased efforts, homelessness remains a significant issue in Australia, with over 100,000 people experiencing homelessness on any given night.⁵⁷ This issue is exacerbated by a severe lack of available and affordable housing.⁵⁸ **Australia should implement the recommendations of the Special Rapporteur on the Right to Adequate Housing,⁵⁹ the Human Rights Committee and CESCR. Australia should ensure that social, economic and other conditions do not deprive homeless persons of the full enjoyment of their rights.⁶⁰ Australia should also amend discrimination laws to include “homelessness” or “social status” as prohibited attributes.**

31. **Social Security:** Compulsory quarantining of welfare payments applies to particular “disadvantaged” or “vulnerable” groups across the country. **Australia should repeal compulsory income quarantining and introduce a non-discriminatory, voluntary scheme that is compatible with human rights standards.**

32. **Mental Health Care:** Mental health services are significantly under-resourced in Australia and there are widespread problems with access to care, quality of care and adequate accommodation for people requiring mental health services.⁶¹ **Australia should allocate adequate resources for mental health services and other support measures for persons with mental health problems in line with human rights principles and standards.⁶² Australia should also implement the recommendations of the Special Rapporteur on the Right to Health.**

7. Human rights and counter-terrorism

33. Since 2001, Australia has passed over 40 pieces of counter-terrorism legislation, including giving increased powers to police and intelligence agencies and creating new terrorism offences. Many of these laws infringe upon fundamental human rights by reversing the onus of proof and presumption of bail, authorising the potentially indefinite detention of terrorist suspects, criminalising association with certain groups, and expanding powers to detain people without access to lawyers.⁶³ The lack of fundamental protection of human rights in Australia means that these laws are not assessed against a human rights framework.⁶⁴ The impact of these laws has been felt disproportionately by the Muslim, Kurdish, Tamil and Somali communities in Australia.⁶⁵ **Australia should review and amend its counter-terrorism laws and practices to ensure that they are consistent with Australia’s international human rights obligations.**

8. Business and human rights

34. Some Australian companies, particularly mining companies, have a severe impact on the human rights of people in many parts of the world.⁶⁶ However, there is no comprehensive legal framework that imposes human rights obligations on Australian corporations when they are operating overseas, especially in areas of relaxed or no regulation. **Australia should enact domestic legislation with extra-territorial application to ensure that Australian corporations respect human rights within the Special Representative’s framework.⁶⁷**

9. International Assistance

35. Australia’s international development assistance in 2009/10 was only 0.29% of Gross National Income (GNI).⁶⁸ While Australia has recently committed to increase its assistance to 0.5% of GNI by 2015-16,⁶⁹ this remains far below the international target of 0.7%.⁷⁰ **Australia should increase its official development assistance to 0.7 per cent of GNI, as well as announce a timetable for doing this. Australia should also adopt a human rights-based approach to aid and development to ensure the effectiveness of this assistance.⁷¹ Australia should also take a human rights-based approach to foreign policy, including in the areas of trade, investment, business, labour, migration, defence, military cooperation, security and the environment.⁷²**

¹ This submission to the Universal Periodic Review of Australia has been prepared by a coalition of non-government organisations (NGOs) from across Australia. The principal authors of this submission are the Human Rights Law Resource Centre, Kingsford Legal Centre and the National Association of Community Legal Centres Inc. The submission was prepared with substantial input and guidance from a high-level NGO Working Group, comprising: [List organisations here]. The submission is endorsed, in whole or in part, by the NGOs set out in [Attachment A] of this submission.

² Australia is a party to the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRoC), Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Convention on the Rights of Persons with Disability (CRPD).

³ Australia does not have any federal law that comprehensively protects human rights, such as a Human Rights Act, and there is extremely limited protection of human rights in the Australian Constitution.

⁴ The National Human Rights 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. A copy of the Committee's comprehensive report on the protection and promotion of human rights in Australia is available at <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>.

⁵ A copy of the Human Rights Framework is available at www.ag.gov.au/humanrightsframework.

⁶ Attorney-General's Department, *Australia's Human Rights Framework*, 23 June 2010, <<http://www.ag.gov.au/humanrightsframework>> at 29 June 2010.

⁷ For example, the Human Rights Committee expressed concern about Australia's failure to give effect to views adopted by the Committee and to provide effective remedies where there has been a treaty violation. See Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia* (March 2009), UN Doc CCPR/C/AUS/CO/5, [10].

⁸ The 'race power' in the Australian Constitution has been held by the High Court of Australia to permit the Australian Government to pass both beneficial *and* detrimental legislation in relation to persons of a particular race. See: *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

⁹ Attorney-General's Department, *Australia's Human Rights Framework*, 23 June 2010, <http://www.ag.gov.au/humanrightsframework>> at 29 June 2010. For analysis and discussion, see Human Rights Law Resource Centre, *Advance Australia Fair: An Agenda to Promote Equality and Address Discrimination in Australia*, <<http://www.hrlrc.org.au/files/Policy-Paper-Equality-and-Human-Rights1.pdf>> at 29 June 2010.

¹⁰ The recommendations of the Inquiry into the effectiveness of the *Sex Discrimination Act 1984* by the Senate Committee on Legal and Constitutional Affairs should be implemented in entirety. See also, Australian Human Rights Commission, Press Release 'First phase of Sex Discrimination Act reform now assured', 5 May 2010, <http://www.hreoc.gov.au/about/media/media_releases/2010/42_10.html> at 29 June 2010.

¹¹ Australian Government, Family Assistance Office, 'Paid Parental Leave Scheme', 2009, <http://www.familyassist.gov.au/news-and-updates/paid-parental-leave-scheme.html>> at 29 June 2010.

¹² See Australian Bureau of Statistics, *Yearbook Australia 2008*, 1310.0 Earnings (2008), <<http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/0796FAC7CDEEA671CA2573D20010F2DD?opendocument>> at 29 June 2010. See also, Department of Families, Housing, Community Service and Indigenous Affairs, *The impact of a sustained gender wage gap on the Australia Economy*, 2. The gender wage gap in Australia 1990-2009, 16 March 2010, <http://www.fahcsia.gov.au/sa/women/pubs/general/gender_wage_gap/Pages/p2.aspx> at 29 June 2010. The 2009 ICCPR & ESCR Concluding Observations recommend greater legislative protection against discrimination. See Committee on Economic, Cultural and Social Rights, *Concluding Observations on the Committee on Economic, Social and Cultural Rights: Australia* (May 2009), UN Doc E/C.12/AUS/CO/4 and Human Rights Committee, *Concluding Observations: Australia* (April 2009), UN Doc CCPR/C/AUS/CO/5.

¹³ ESCR Concluding Observations recommends initiatives aimed implementing the principle of equal pay for work of equal value and the recommendations of the Senate Inquiry into the *Sex Discrimination Act 1984*. See Committee on Economic, Cultural and Social Rights, *Concluding Observations on the Committee on Economic, Social and Cultural Rights: Australia* (May 2009), UN Doc E/C.12/AUS/CO/4.

¹⁴ In considering Australia's report under Article 44 of the CRC (Fortieth Session), the Committee on the Rights of the Child encouraged Australia to: '*prohibit the sterilisation of children, with or without disabilities*'. See, United Nations

Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, Fortieth Session (20 October 2005), CRC/C/15/Add.268, paras 45-46(e).

¹⁵ See, Dr Lesley Chenoweth, *Children with Disabilities: What evidence do we have for better practice?*, September 2002, <http://www.acwa.asn.au/Conf2002/Conf_proceedings/04%20Lesley%20CHENOWETH.doc> at 29 June 2010.

¹⁶ See, Attorney-General's Department, *Same Sex Reforms*, 2 September 2009, <<http://www.ag.gov.au/samesexreform>> at 24 June 2010. See also, Department of Immigration and Citizenship, *Key Changes to Same-Sex Relationships*, <<http://www.immi.gov.au/legislation/key-changes/2009/same-sex-relationships.htm>> at 29 June 2010.

¹⁷ For example, see Berman A and S Robinson, 'Speaking Out, Stopping Homophobic and Transphobic Abuse in Queensland', *Australian Academic Press*, Brisbane, 2010.

¹⁸ Legislative Council Standing Committee on Law and Justice, *Inquiry into Adoption by Same-Sex Couples*, Parliament of New South Wales, 2009 and Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report*, 2007, <<http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/law+reform/home/completed+projects/art+and+adoption/lawreform+-+art+and+adoption+-+final+report>> at 24 June 2010 and Tasmanian Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No. 2 (2003) <<http://www.law.utas.edu.au/reform/docs/AdoptionFinRepA4.pdf>> at 24 June 2010).

¹⁹ Recommended by Australian Human Rights Commission, *Sex Files: the Legal Recognition of Sex in Documents and Government Records*, March 2009, <http://www.hreoc.gov.au/genderdiversity/sex_files2009.html> at 24 June 2010.

²⁰ Recommended in Australian Senate Legal and Constitutional Affairs Committee, *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, 2008, <http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/report/index.htm> at 24 June 2010.

²¹ The indigenous peoples of Australia are the Aboriginal and Torres Strait Islander peoples and are referred to as Aboriginal peoples throughout this report.

²² 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 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, 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 livelihood' (Australian Human Rights Commission, *Social Justice Report 2009* (2009), p. 6).

²³ 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). The Report by the Special Rapporteur to the UN Human Rights Council follows an official visit to Australia in August 2009 and will be tabled at the UN Human Rights Council in September 2010. The Brennan Committee Report on Australia's Human Rights Consultation also made a similar recommendation: National Human Rights Consultation Committee, *National Human Rights Consultation Report*, 2009, Recommendation 16 <<http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>> at 16 June 2010.

²⁴ The authors acknowledge that there are mixed views about the Northern Territory Intervention measures among Aboriginal and Torres Strait Islander women: some women report feeling safer as a result of the increased police presence, alcohol and pornography bans and income management, however others have expressed concern about lack of relationship between the *Little Children are Sacred Report* and the Intervention, and the way the measures have been imposed on their communities. For discussion, see *Australian Aboriginal and Torres Strait Islander Women's Parallel NGO Report: The Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), 2010, p. 25

²⁵ The Special Rapporteur on Indigenous Rights, CERD, Human Rights Committee and CESCR have all expressed serious concerns in relation to the operation of the NTER. The right to **self determination** is impacted by the powers given to the Australian Government to take over representative community councils in order to, for example, direct them to deliver services in a particular way, to transfer council-owned assets to the Commonwealth, to appoint observers or to suspend community councils or to appoint managers to run them (Part 5, *Northern Territory National Emergency Response Act 2007* (Cth)). **Property** rights are impacted by the compulsory acquisition and control of specified Aboriginal land and community living areas through renewable five-year leases, without compensation (Section 31, *Northern Territory Emergency Response Act 2007* (Cth)) and Government control of designated Aboriginal

town camps. The right to **social security, adequate standard of living, health and education** is impacted by the introduction of an income management regime, which includes measures such as quarantining 50 per cent of welfare payments for food and other essentials, and linking welfare payments to children's school attendance. The right to **work** is impacted by 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. **Child rights** were impacted by the failure to use a child rights framework to address the complex issue of protection of children from sexual abuse in Aboriginal communities. Notwithstanding the descriptor as a 'national emergency intervention', the former Australian Government made no effort to use child rights or human rights principles to frame its response. **Remedies** are impacted by limiting the consideration of Aboriginal customary law and cultural practice of the offender in criminal proceedings for all offences in bail and sentencing hearings (Part 6, *Northern Territory Emergency Response Act 2007* (Cth)).

²⁶ Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Bill 2009 and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009.

²⁷ Patricia Anderson and Rex Wild QC (Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse), *Little Children are Sacred: Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

²⁸ Mandatory sentencing laws operate in the Northern Territory and Western Australia and have a disproportionate impact on Aboriginal and Torres Strait Islander peoples. Largely as a result of imprisonment under mandatory sentencing provisions, 83% of the prison population in Northern Territory is Aboriginal (Northern Territory Department of Justice – Correctional Services Annual Statistics – 2008) and in Western Australia, Aboriginal and Torres Strait Islander people are 21 times more likely to be in prison than non-Indigenous Australians (Australian Bureau of Statistics, *Prisoners in Australia*, 2007). Separately, there has been an increase in State and Territory, as well as local laws that provide increased discretionary powers to police in the context of stop and search powers. Evidence shows that increased discretionary powers will impact disproportionately on Aboriginal people and impede their equal access to public spaces: see 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* (11 May 2007), UN Doc A/HRC/4/18/Add.2.

²⁹ Aboriginal peoples in Australia are among the most highly incarcerated peoples in the world: Aboriginal peoples are 13 times more likely as other Australians to be imprisoned in 2008, the imprisonment rate increased by 46% for Aboriginal women and by 27% for Aboriginal men between 2000 and 2008, and in the Northern Territory, Aboriginal peoples constitute 83% of the prison population despite only making up 30% of the Northern Territory's total population: see, Northern Territory Department of Justice, *Correctional Services Annual Statistics – 2008-09* (2009), pg. 4, <<http://www.nt.gov.au/justice/policycoord/researchstats/index.shtml>> at 4 June 2010.

³⁰ Specialist Aboriginal and Torres Strait Islander legal services are the preferred and most culturally appropriate means of delivering legal assistance and services to Aboriginal and Torres Strait Islander peoples. Australian Government funding to the Legal Aid Indigenous Australians program decreased 6% in the decade to 2008 and by 40% (in real terms) to Aboriginal and Torres Strait Islander legal services (see, Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Access to Justice Inquiry Report*, 2009, [8.5]). A May 2010 increase in funding to specialist services by the Attorney-General's Department has been welcomed by Aboriginal and Torres Strait Islander legal services, however there are concerns that the increase does not go far enough to address the systemic crisis in resourcing of, and access to, specialist services for Aboriginal peoples (see Aboriginal Legal Rights Movement, 'ALRM welcomes Rudd Government's Legal Aid Funding' (Press Release, 14 May 2010) <<http://www.alrm.org.au/mediareleases.php>> at 6 June 2010).

³¹ Parliament of Australia, *Senate Legal and Constitutional Affairs Committee's Access to Justice Report* (2009) Chapter 6 of the Report recommended that the Australian Government address ways in which individuals can access justice using means other than legal representation and/or the judicial system, including Indigenous specific approaches, early intervention and prevention, alternative dispute resolution, restorative justice, justice reinvestment and clinical legal education.

³² The *Native Title Act 1993* (Cth) requires claimants to demonstrate a continuing connection, under traditional laws and customs, with the land and to demonstrate that native title has not been extinguished by an inconsistent government act. The high evidentiary barrier required by the *Native Title Act 1993* (Cth) has been confirmed by the High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. 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 and other traditional occupation and use’. The Special Rapporteur on the rights of Indigenous peoples recently observed that progressive loss of control over and access to traditional lands and natural resources by Aboriginal and Torres Strait Islander peoples is another ‘crippling aspect’ of racial discrimination against these communities.

³³ Stolen Generations refers to Aboriginal children who were forcibly removed from their families under official government policies between 1909 and 1969 to promote assimilation. The UN Human Rights Committee, the Special Rapporteur on Indigenous People and the Australian Human Rights Commission has all called on the government to provide compensation to the Stolen Generations. See, James 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* (3 April 2009), UN Doc CCPR/C/AUS/CO/5, [15].

³⁴ Stolen wages is a term used to refer to the wages of ‘Indigenous workers whose paid labour was controlled by the Government’ – in many cases, Aboriginal and Torres Strait Islander people did not receive any wages at all, or received insufficient wages. A Senate Legal and Constitutional Affairs Committee in 2006 found that Aboriginal and Torres Strait Islander people suffered stolen wages in every Australian jurisdiction. However, no scheme or process is currently in operation anywhere in Australia that requires the state and territory governments to account for the monies held by them on behalf of Aboriginal and Torres Strait Islander peoples. 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. This places the onus on the person whose trust money was withheld, rather than the trustee who should be accounting for, and paying it (See, Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006)).

³⁵ See Select Committee on Regional and Remote Indigenous Committees, First Report 2008, <http://www.aph.gov.au/senate/committee/indig_ctte/index.htm> at 24 June 2010. See also, 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) (4 March 2010), UN Doc A/HRC/15.

³⁶ See also: the Australian Medical Association’s annual report card presenting a snapshot of the health of Indigenous Children (2008) ‘presents a disturbing picture of health conditions and outcomes more commonly associated with the Third World than with a wealth nation such as ours’. Aboriginal children are, for example, more likely to be stillborn or die within the first month of life, eleven times more likely to die from respiratory causes and nearly 30 times more likely to suffer from nutritional anaemia and malnutrition up to four years of age (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).

³⁷ See, Northern Territory Government, ‘Education Restructure Includes Greater Emphasis on English’ (Media Release, 14 October 2008), <<http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=4599&d=5>> at 28 June 2010. Note that the UN Committee on Economic, Social and Cultural Rights has recommended that the Australian Government preserve and promote bilingual education at schools: 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].

³⁸ 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 full rights to apply for refugee status or to have any decisions reviewed as applicants for protection on the mainland.

³⁹ AHRC, Immigration Detention and offshore processing on Christmas Island, <http://hreoc.gov.au/human_rights/immigration/idc2009_xmas_island.html#s2> (2009) and 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.

⁴⁰ The mandatory detention regime results in detention which is manifestly arbitrary in that: there is no consideration of the particular circumstances of each detainee’s case, detention is not demonstrated or evidenced to be the least invasive means of achieving the government’s policy objectives, and substantive judicial review of the lawfulness of detention is non-existent or inadequate.

⁴¹ On 9 April 2010, the Australian Government announced a policy to suspend processing of protection visa applications from Sri Lankans for three months, and from Afghans for six months (Chris Evans MP, Stephen Smith MP and Brendan O’Connor MP, *Changes to Australia’s Immigration Processing System*, 2010), <<http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm>> as at 29 June 2010.

⁴² Health criteria are found in the *Migration Regulations* 1994 (Cth) sch 4, cl 40.

⁴³ Violence against women has been the subject of numerous treaty body recommendations, including: *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, the UN released Concluding Observations (2009 ICCPR – *Concluding Observations*) and (2009 ESCR – *Concluding Observations*) which state that Australia should take further steps to address ongoing issues of violence against women, including the prompt implementation of the National Plan, of Action to Reduce Violence against Women and their Children. *International Covenant on the Elimination of All Forms of Discrimination against Women*, 2006 Concluding Observations, 19. Indigenous women are 35.1 times more likely than non-Indigenous women to be hospitalised for family violence (<<http://www.aph.gov.au/library/intguide/sp/ViolenceAgainstWomen.htm>> as at 29 June 2010). See: Women With Disabilities Australia (WWDA) (2009) Submission to the National Human Rights Consultation. WWDA, Tasmania, <<http://www.wwda.org.au/subs2006.htm>> at 28 June 2010. See also: Commonwealth of Australia (2009) *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021 [p9].

⁴⁴ See: Women With Disabilities Australia (WWDA) (2009) Submission to the National Human Rights Consultation. WWDA, Tasmania <<http://www.wwda.org.au/subs2006.htm>> at 28 June 2010. See also: Commonwealth of Australia (2009) *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021, [p9].

⁴⁵ There have been three major government-commissioned reports into family law in the last 12 months: Family Law Council, 'Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues' (2010) http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FirstQuarter_28January2010-ReleaseofFamilyLawReviews at 28 June 2010; Australian Institute of Family Studies, 'Evaluation of the 2006 Family Law Reforms' (2009) <<http://www.aifs.gov.au/familylawevaluation/>> at 28 June 2010; Attorney-General's Department, 'Family Courts Violence Review: A Report by Professor Richard Chisholm' (2009) http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyCourtsViolenceReview at 28 June 2010.

⁴⁶ 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].16-18.

⁴⁷ Prison conditions vary between states; however overcrowding and substandard health care is a real problem in many Australian prisons. (See, Aboriginal Legal Service of WA, *Submission to the Community Development and Justice Standing Committee Legislative Assembly Parliament of Western Australia – Making Our Prisons Work – Inquiry into the Efficiency and Effectiveness of Prisoner Education, Training and Employment Strategies* (April 2010); 'Claims of Overcrowding in SA Prisons', *ABC News*, 10 March 2008, <http://www.abc.net.au/news/stories/2008/03/10/2185116.htm> at 28 June 2010; Greg Skelton, 'Overcrowding Pressures Prisons', *The Advertiser* (Adelaide), 17 February 2008, <http://www.news.com.au/adelaidenow/story/0,22606,23228823-2682.00.html> at 28 June 2010; *ABC News*, 'Juvenile Prisoners Sharing One-Person Cells', 7 April 2008, <http://www.abc.net.au/news/stories/2008/04/07/2209444.htm?section=justin> at 28 June 2010; Australian Human Rights Commission, *Submission to the Special Rapporteur*, para [47]. The Committee against Torture has recommended that the Australian Government take urgent action to reduce overcrowding. Additionally, reports have emerged from the Northern Territory about the increase in intellectually disabled and mentally ill people who remain incarcerated due to lack of appropriate care facilities (Natasha Robinson, *Jailing of Mentally ill 'appalling' says NT Chief Justice*, *The Australian* (Sydney), 21 September 2009, <<http://www.theaustralian.com.au/news/nation/jailing-of-mentally-ill-appalling-says-nt-chief-justice/story-e6fgr6nf-1225777245772>> at 28 June 2010.

⁴⁸ See, e.g. Vic Health, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (December 2009) page 31, <<http://www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources.aspx>> at 28 June 2010; 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.

⁴⁹ Victorian Equal Opportunity & Human Rights Commission, *Rights of Passage: The Experiences of Australia-Sudanese Young People* (2008) <http://www.humanrightscommission.vic.gov.au/pdf/rights_of_passage.pdf> at 28 June 2010, at pages 30-38. 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).

- ⁵⁰ The Legal Aid and Access to Justice 2009-10 Federal Budget is available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=212CC6C1-1E4F-17FA-D2A6-BB3D7124DA2F&siteName=lca.
- ⁵¹ The Senate Access to Justice Report is available at http://www.aph.gov.au/senate/committee/legcon_ctte/access_to_justice/report/report.pdf.
- ⁵² *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia* (14 April 2005), CERD/C/AUS/CO/14.
- ⁵³ New South Wales, Victoria, Queensland and Western Australia, *The Serious Sex Offenders Act 2006* permits the court to impose a fresh sentence on a person convicted of a serious sex offence regardless of the years already served, if there is a high probability that the offender is likely to commit a future serious sex offence.
- ⁵⁴ Susan Hayes, 'People with intellectual disabilities in the criminal justice system – when is disability a crime?', *Lock 'Them' Up?: Disability and Mental Illness Aren't Crimes Conference*, Sisters Inside, Brisbane, Australia, 17-19 May 2006, www.sistersinside.com.au/media/PaperSusanHayes.doc at 28 June 2010.
- ⁵⁵ Australian Association of Social Workers, *Human Rights Protection in Australia: AASW Submission to the National Human Rights Consultation* (2009) < <http://www.aasw.asn.au/document/item/151> > at 28 June 2010.
- ⁵⁶ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, 2009*.
- ⁵⁷ Over 100,000 people experience homelessness on any given night. *Freedom, Respect, Equality, Dignity: Action – NGO Submission to the Human Rights Committee* (September 2008), < <http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/> > at 28 June 2010. See also, *Freedom, Respect, Equality, Dignity, Action: NGO Submission to the Committee on Economic, Social and Cultural Rights* (2008) < <http://www.hrlrc.org.au/content/topics/esc-rights/icescr-ngo-report-australia-un-committee-on-economic-social-and-cultural-rights/> > at 28 June 2010.
- ⁵⁸ Women With Disabilities Australia, *Shut Out, Hung Out, Left Out, Missing Out: WWDA Submission in Response to the Australian Government's Green Paper on Homelessness*, 2008) <<http://www.wwda.org.au/homesubjune08.htm>>, at 28 June 2010 at 4.1
- ⁵⁹ 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).
- ⁶⁰ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (March 2009), [18].
- ⁶¹ Senate Select Committee on Mental Health, *A National Approach to Mental Health: From Crisis to Community (First Report)*, (2006), [3.18].
- ⁶² *Concluding Observations on the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (May 2009), [30].
- ⁶³ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (March 2009).
- ⁶⁴ While legislation establishing an Independent Monitor of National Security law was passed and assented to in April 2010, a monitor is yet to be appointed. Furthermore while the Federal Government has introduced reforms to national security legislation, key provisions giving rise to human rights concerns remain unchanged, National Security Legislation Amendment Bill 2010.
- ⁶⁵ 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. See: Australian Government, Australian National Security, *What Governments are Doing – Listing of Terrorist Organisations*, 15 September 2009, <<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>> as at 29 June 2010.
- ⁶⁶ Australian Human Rights Commission, *The Australian Mining and Resource Sector and Human Rights*, <http://www.hreoc.gov.au/human_rights/corporate_social_responsibility/factsheet3.htm> as at 29 June 2010.
- ⁶⁷ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5, 7 April 2008.

⁶⁸ According to the OECD, the Australian Government's 2009 commitment was ranked 16th on the OECD list of countries.

⁶⁹ Australian Government Budget 2010-11, Australia's Development Assistance Program, <http://www.budget.gov.au/2010-11/content/ministerial_statements/ausaid/html/ms_ausaid-01.htm> as at 29 June 2010.

⁷⁰ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, 2009, para 12.

⁷¹ Australian Parliament, *Human Rights in the Asia-Pacific: Challenges and opportunities, 2010* <http://aph.gov.au/house/committee/jfadt/asia_pacific_hr/report.htm> at 28 June 2010.

⁷² In March 2010, the Joint Standing Committee on Treaties called for the inclusion of human rights safeguards in Australia's extradition arrangements with other countries. Similarly, in its 2009 report on *Australia's Relationship with ASEAN*, the Joint Committee on Foreign Affairs, Defence and Trade recommended that "human rights, core labour standards, and the environment be pursued in future free trade agreements" and the review of existing free trade agreements: 159 [Recommendation 8].