



Australian
Human Rights
Commission

International Covenant on Civil and Political Rights – List of issues prior to reporting

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE**

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1 Introduction

This submission is made by the Australian Human Rights Commission, Australia's national human rights institution. It outlines a number of issues that the Commission suggests should be considered by the Human Rights Committee as it develops a List of Issues Prior to Reporting ahead of Australia's preparation of its sixth periodic report regarding the implementation of the *International Covenant on Civil and Political Rights* (ICCPR).

In these comments, the Commission aims to provide the Committee with information on a number of key issues that the Commission believes may be relevant to the Committee in considering Australia's implementation of the ICCPR. This submission does not provide a complete assessment of Australia's compliance with the ICCPR, but rather draws on the relevant recent and current areas of Commission work.

The Commission looks forward to further engagement in the Human Rights Committee's review of Australia's sixth periodic report, and will provide further submissions to the Committee once this report has been lodged and published.

2 Legal framework for human rights protection (article 2)

2.1 Federal human rights legislation

As discussed in the Commission's submission to the Human Rights Committee in 2008, Australia's current system of governance does not adequately protect the rights set out in the ICCPR.¹ Many of the international human rights standards agreed to by the Australian Government, including those set out in the ICCPR, have not been fully incorporated into Australian law. Individuals who experience human rights violations are often left without legal remedies.

During 2009, the Australian Government undertook a National Human Rights Consultation, seeking a broad range of views regarding the protection and promotion of human rights. The Commission, and thousands of other individuals and organisations, contributed to the Consultation.² The Consultation Committee report, released in October 2009, recommended, among other things, that the federal Parliament adopt a Human Rights Act.

In April 2010, the Australian Government responded to the national Human Rights Consultation report by announcing that it would not introduce a Human Rights Act. Instead, it announced Australia's Human Rights Framework, which commits to a variety of measures to strengthen the protection and promotion of human rights in Australia. While the Commission strongly welcomed the measures included in the Framework, these measures alone are not sufficient to address all of the weaknesses in Australia's system of human rights protection.

2.2 National Human Rights Framework

As noted above, in April 2010, the Australian Government responded to the national Human Rights Consultation report by announcing Australia's Human Rights

Framework, which commits to a variety of measures to strengthen human rights protection in Australia, including

- human rights education for the community
- a National Action Plan on Human Rights
- establishing a federal Parliamentary Joint Committee on Human Rights to scrutinise existing and new legislation for compliance with Australia's human rights obligations
- requiring that all new federal legislation be accompanied by a statement of compatibility with Australia's human rights obligations
- developing a consolidated federal anti-discrimination law.³

Australia's Human Rights Framework is informed by seven core human rights treaties, including the ICCPR.⁴

2.3 National Human Rights Action Plan

Although Australia was the first nation to develop a Human Rights Action Plan (in 1994, following the 1993 World Conference on Human Rights), this Action Plan and its 2004 update have been widely acknowledged as having had very limited impact. In the development of a new Action Plan,⁵ the Australian Government has followed a much improved process, with substantially increased conformity with the Handbook on National Human Rights Action Plans available from the Office of the High Commissioner for Human Rights.⁶

The process has included publication of a Baseline Study assessing key human rights issues and existing measures. This was informed by the previous National Human Rights Consultation and by further public consultation on a draft Baseline Study.

An Exposure Draft of a new National Human Rights Action Plan was released in December 2011 for consultation. As at 7 August 2012, the new Action Plan was yet to be finalised and released. In its submission on the Exposure Draft of the Action Plan,⁷ the Commission made a series of recommendations for enhanced commitments and actions by Australia, a number of which are addressed in further detail below.

2.4 Human rights education

The Commission welcomes the Australian Government's commitment to human rights education outlined in Australia's Human Rights Framework.

Under the Framework, the Australian Government has invested over \$12 million in a range of education initiatives to promote a greater understanding of human rights across the community.

It has also commenced an education and training program for the Commonwealth public sector, which comprises a range of resources and materials that:

- aim to assist public sector officials to understand human rights obligations
- strengthen the capacity of legal and policy officers to develop policies, programs and legislation that are consistent with human rights
- provide guidance to administrative decision-makers on relevant human rights considerations that they should take into account.⁸

While the Commission welcomes these initiatives, it notes that such training needs to be comprehensive across agencies and embedded into public service practice.

The Framework also identifies that ‘developing an understanding of rights and responsibilities, including human rights’, should be an integral part of a national school curriculum.⁹ The draft national school curriculum is currently being drafted and parts of it are under consultation. However, the current draft national school curriculum contains very limited reference to human rights, including ICCPR rights.¹⁰ The Commission considers that human rights education should be embedded as a core and cross-cutting element across all relevant learning areas of the curriculum and at all stages of schooling.

This approach will foster an understanding and appreciation for human rights and encourage students to adopt human rights values in their everyday lives.

3 Protection against discrimination (articles 2, 3 and 26)

3.1 Consolidation of Australia’s discrimination laws

The Australian Government released a public Discussion Paper on review and consolidation of Federal discrimination laws in September 2011.

The Government has committed to introducing new protections against sexual orientation and gender identity discrimination as part of this process and has stated the following principles for the review:

- a reduction in complexity and inconsistency in regulation to make it easier for individuals and businesses to understand their rights and obligations under the legislation
- no reduction in existing protections in federal anti-discrimination legislation
- ensuring simple, cost-effective mechanisms for resolving complaints of discrimination
- clarifying and enhancing protections where appropriate.¹¹

Release of draft legislation is anticipated later in 2012.

3.2 Gender equality and non-discrimination on the basis of sex

(a) Participation in public life (article 25)

In 2010 the Australian Government introduced gender equality targets for appointments to Australian Government boards set at a minimum of 40 per cent

women by 2015 (as at June 2011, women held 35.3 per cent of these board appointments).¹² The Commission has also recommended that gender equality targets are set and reported against annually within the Australian Public Service including executive level and senior executive service positions.¹³ The Australian Stock Exchange Corporate Governance Council introduced reforms in 2011 that provide for equivalent targets being set within the private sector.¹⁴ To achieve increased participation of women in public life, the Commission notes the need to address the current gender pay gap (17.4%)¹⁵ and to accommodate family and caring responsibilities, which are currently predominantly undertaken by women.¹⁶

(b) *Violence against women (articles 2, 3, 7 and 26)*

The Commission welcomed the adoption in 2011 of the Australian Government's *National Plan to Reduce Violence against Women and their Children, 2010–2022*. A National Plan Implementation Panel consisting of government and NGO representatives was recently established, but neither the first three-year national implementation plan has been released nor all jurisdictional implementation plans developed. Similarly, the National Centre for Excellence and the data collection frameworks and mechanisms have not been developed.

The Commission has concerns about the lack of consultation regarding the plan, specifically with non-governmental organisations, service providers and communities, and that there has not been coordinated implementation of the National Plan across federal and state/territory governments. The Commission is also concerned about the unavailability of sufficient, dedicated, sustainable resources for both preventative and response based services. The Commission has called for independent monitoring and evaluation mechanisms to be established for the National Plan; currently no such mechanisms have been established.

The Commission notes that during the study tour to Australia in 2012 of the UN Special Rapporteur on violence against women, its causes and consequences to Australia, a key issue raised by participants was the lack of specific programs and services under the National Plan to address the specific needs of Aboriginal and Torres Strait Islander women, women with disability, migrant and refugee women, sex and gender diverse women and older women.

Research suggests high rates of violence, abuse and neglect of women and girls with disability in institutional settings.¹⁷ Women with disabilities may experience violence for longer periods of time due to inadequate pathways to safety, reluctance to report incidents for fear of reprisal, or a lack of confidence in authorities and the justice system. Even where reports are made, victims are commonly not believed, or institutions respond by treating them as 'incidents' to be managed internally, rather than addressing them as alleged crimes.¹⁸ The Commission agrees with the Committee on the Elimination of Discrimination against Women's recommendation that the Australian Government 'address, as a matter of priority, the abuse and violence experienced by women with disabilities living in institutions or supported accommodation'.¹⁹

(c) *Domestic violence as a ground of discrimination (article 2, 3 and 26)*

The Commission is aware that individual women and men may be discriminated against in areas such as employment and accommodation because they either have been, or are currently, in a violent domestic or family situation. Such discrimination takes many forms, for example, in the employment context where discrimination against victims and survivors may include being denied leave or flexible work arrangements to attend to violence-related matters (such as moving into a shelter) or termination of employment for violence-related reasons. The Commission has called on the Australian Government to include a new ground of discrimination covering domestic and family violence within its new consolidated equality law.²⁰ The Commission has also called for employment laws to be amended to allow for employees to access leave and flexible working arrangements, for the purposes of addressing domestic and family violence and related issues.

3.3 Discrimination on the basis of disability

(a) *Access to justice for people with communication impairment in the criminal justice system (articles 2, 9 and 10)*

The Commission is concerned about access to justice for people (suspects, offenders, victims and witnesses) with a communication impairment. These people include people with an intellectual disability, people who use augmentative or alternative forms of communication, people with Acquired Brain Injury, people with cerebral palsy who have communication problems, people who are deaf and use sign language, people who have a hearing impairment and people who have little or no speech.

The issues include the capacity of people with a communication impairment to give evidence and to initiate or defend proceedings, and the treatment of people with a communication impairment by police, judges, lawyers and other court personnel. The Commission is also concerned about the accessibility of court processes such as access to interpreters to facilitate communication.

(b) *Sterilisation of women and girls with a disability (articles 7 and 17)*

The Commission is concerned that non-therapeutic sterilisation of women and girls with disability continues to occur in Australia and that rates of such sterilisations may be increasing. This is despite the requirement that the Family Court of Australia or a state or territory guardianship tribunal authorise the performance of such sterilisations.

Concerns about non-therapeutic sterilisation of women and girls with disability were highlighted during Australia's first Universal Periodic Review by the UN Human Rights Council.²¹ The Committee on the Rights of the Child and the CEDAW Committee have also expressed concern regarding non-therapeutic sterilisation, noting that forced sterilisation is a form of gender-based violence and consequently a form of discrimination against women,²² and have urged the Government to enact national legislation prohibiting the practice, except where there is a serious threat to life or health.²³ The Commission considers that the gravity and irreversible consequences of sterilisation makes this a significant human rights issue. The

Commission has called on the Australian Government to enact legislation prohibiting the sterilisation of women and girls with disability, except in cases of serious threat to life or health of a child, or with the informed consent of an adult.²⁴

3.4 Discrimination on the basis of race

(a) Racial hatred (article 20)

Australia currently has a reservation to article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) which requires States to implement criminal sanctions for racial violence and the dissemination of ideas based on racial superiority or hatred. While certain Australian states and territories have provisions which criminalise acts of violence motivated by racial hatred or prejudice, federal law does not contain provisions that allow racist motivations to be taken into account when charging or sentencing offenders.

In response to the Universal Periodic Review process, the Australian Government has committed to review all reservations against international human rights conventions. The Commission has recommended that its reservation to article 4(a) of ICERD be reviewed.

(b) Religious discrimination and hatred (articles 18 and 20)

While a number of states and territories have laws which prohibit religious discrimination and in some cases vilification, there is currently no protection against discrimination or hatred on the basis of religion in federal discrimination law. Under the *Australian Human Rights Commission Act 1986* (Cth) the Commission may accept and inquire into complaints alleging religious discrimination in employment and occupation but this does not give rise to enforceable remedies.

In its submission to the consolidation of Commonwealth anti-discrimination laws, the Commission recommended that the Australian Government consider extending protections against religious discrimination to all areas of public life currently covered by federal discrimination law.

3.5 Discrimination on the basis of age (articles 2 and 26)

(a) Workers compensation

A number of Australia's worker's compensation schemes discriminate against older workers. Australia has 11 different schemes, including one in each state and territory and three federal schemes. Most of Australia's workers compensation schemes contain an age limit at which point workers are no longer covered for income replacement. In most jurisdictions, the age at which income replacement is cut off or limited is 65.²⁵ The Commission welcomes recent moves by the Australian Government to review the three federal schemes, but notes that state and territories must follow suit in order to provide coverage for all Australian workers, regardless of age.

(b) *Superannuation schemes*

The Australian Government has also recently made changes to extend the superannuation guarantee to cover all Australian workers regardless of age (which will come into effect July 2013). The Commission welcomes this initiative but notes that some aspects of the superannuation scheme continue to limit the contributions that people can make after the age of 75. People over 75 are not able to make concessional and non-concessional contributions.²⁶ The Commission is concerned that these limitations discriminate against people over 75 who continue to work and meet the superannuation contribution rules. Contributing to superannuation is one of the most effective ways to ensure social insurance in retirement.

3.6 *Discrimination on the basis of sexual orientation, sex, or gender identity (articles 2 and 26)*

There is currently inadequate protection from discrimination on the basis of sexual orientation, sex and/or gender identity in federal laws.²⁷ However, the Australian Government has committed to including 'sexual orientation and gender identity' as protected attributes in yet to be released consolidated federal anti-discrimination legislation.²⁸ The Commission welcomes this commitment but recommends that coverage of sexual orientation, sex characteristics, gender identity and gender expression in a consolidated federal equality law be framed to achieve the broadest coverage of people of all sex and/or gender identities and to provide comprehensive protection against discrimination.²⁹

3.7 *Marriage equality (articles 2 and 26)*

The Australian Government discriminates against same-sex couples by denying them the right to marry.³⁰ The Commission argues that the fundamental human rights principle of equality means that civil marriage should be available, without discrimination, to all couples, regardless of sex, sexual orientation or gender identity. Further, civil marriages between same-sex couples lawfully entered into in other jurisdictions should be recognised in Australia.³¹

An issue resulting from this situation is the inability for trans people, who are married, to amend their birth certificates to reflect their true gender identity and have it recognised by law.³² Each state and territory law facilitates the recognition of the affirmed sex of persons who have undergone some kind of gender affirmation treatment or surgery,³³ however, to ensure there are no same-sex marriages the person applying to change their sex must be unmarried. This means that those who are already married will be forced to make a choice between remaining married to their spouse or having their true gender identity recognised by law. Further, to ensure no successful discrimination complaints can be brought on the basis of marital status the Australian Government has amended the federal *Sex Discrimination Act 1984* (Cth) to provide that it is not unlawful for a state or territory law to require the applicant to be unmarried.³⁴

4 Aboriginal and Torres Strait Islander peoples (articles 1, 2, 6, 24, 26 and 27)

4.1 The United Nations Declaration on the Rights of Indigenous Peoples

Despite Australia declaring its support for the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) in September 2009, the level of engagement nationally on the implementation of the Declaration has been low.

The Declaration reflects international standards including those contained within the ICCPR pertaining to self-determination, non-discrimination and equality, the right to freely determine one's political status and to participate in the political, economic, social and cultural life of the State, and the right to nationality.

The Australian Government has listed the Declaration within Australia's Human Rights Framework as a demonstration of its ongoing commitment to international human rights protection.³⁵ However, the Commission is concerned that the Australian Government continues to promote the Declaration as aspirational only.

The Commission is also concerned that the Australian Government asserts that its policies and legislation are compliant with the Declaration. To date, a national assessment on compliance with the Declaration has not been conducted and a number of the United Nations Treaty Bodies including the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, and the Universal Periodic Review have recently raised concerns about the protection and realisation of the rights of Aboriginal and Torres Strait Islander peoples in Australia.³⁶

4.2 Constitutional recognition

Australia's Constitution does not mention Australia's first peoples, permits the Commonwealth Parliament to validly enact laws that are racially discriminatory, and contemplates disqualifying people from voting on the basis of their race. The Commission believes that Australia's Constitution should be reformed so as to recognise the unique position of Aboriginal and Torres Strait Islander peoples and remove discrimination. The Australian Constitution can only be changed by referendum.

In December 2010, the Prime Minister appointed the Expert Panel on Constitutional Recognition of Indigenous Australians, to examine the options for the recognition of Aboriginal and Torres Strait Islander peoples within Australia's Constitution. The Panel reported in January 2012, making recommendations for several amendments to the Constitution and regarding the process of a referendum. The Australian Government has provided \$10 million in funding to Reconciliation Australia to conduct an education campaign as a first stage in leading up to a national referendum on the issue.³⁷

4.3 Indigenous representation

The National Congress of Australia's First Peoples, Australia's new national Aboriginal and Torres Strait Islander peoples' representative body, was established as a company in April 2010. The Australian Government committed \$30 million to the establishment and operation to 2013 but no further funding announcement has made.³⁸ The Commission urges the Australian Government to commit to funding arrangements to ensure the Congress' sustainability.

4.4 Stronger Futures in the Northern Territory

On 21 June 2007, the Australian Government announced a 'national emergency response to protect Aboriginal children in the Northern Territory' from sexual abuse and family violence.³⁹ The *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act) was passed by the federal Parliament and received Royal Assent on 17 August 2007. This has become known as the 'NT intervention' or the 'Emergency Response'. This legislation has been in place for the past five years and many of the measures were due to sunset in August 2012.⁴⁰

In preparation for the sunset of the Northern Territory Emergency Response, the Australian Government introduced the Stronger Futures in the Northern Territory legislation. The Stronger Futures Bills were introduced to the House of Representatives on 23 November 2011 and passed with some amendments on 29 June 2012.⁴¹ This legislation allows some of the existing Northern Territory Emergency Response measures to continue and modifies others; and will be in place for ten years.

In summary, the Stronger Futures legislation:

- repealed the NTNER Act⁴²
- retained existing alcohol bans in prescribed Northern Territory communities but introduced the mechanism of community 'alcohol management plans' to transition communities from blanket bans to community developed and owned plans⁴³
- amended laws relating to alcohol abuse, including increased penalties for possession of less than 1350ml of alcohol in an alcohol protected area to include the option of 6 months imprisonment⁴⁴
- amended sections of the social security legislation which enable a new process for dealing with unsatisfactory school attendance⁴⁵ (this change accompanied the policy announcement that the School Enrolment and Attendance Measures which allow for the suspension of welfare payments would be expanded)⁴⁶
- introduced measures to allow the Commonwealth to amend Northern Territory legislation relating to leasing in Community Living Areas and Town Camps in the Northern Territory⁴⁷
- amended the licensing regime for community stores, extending licencing requirements beyond stores which accept income managed funds and

allowing greater assessment and more robust enforcement of regulatory measures⁴⁸

- amended the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) to continue existing pornography bans and require communities to be consulted if they are to be subject to a ban or bans are to be removed⁴⁹
- amended the *Crimes Act 1914* (Cth) to introduce an exception to the rule preventing consideration of customary law or cultural practice in bail and sentencing for certain offences involving cultural heritage⁵⁰
- amended the operation of the income management scheme by allowing recognised state/territory authorities to refer people to income management. Recognised state/territory authorities or their employees must have ‘functions, powers or duties in relation to the care, protection, welfare or safety of adults, children or families’.⁵¹

While the Commission welcomed the intent of the Australian Government to address and improve the critical situation facing Aboriginal peoples in the Northern Territory, it is concerned that the measures contained within the Stronger Futures legislation are intrusive and limiting of individual freedoms and human rights. It is the Commission’s view that where it is deemed appropriate to design interventions which infringe on individuals’ human rights, then that intervention must be the least restrictive on the rights of individuals.

The Commission has raised a number of over-arching issues including:

- consultation and engagement with Aboriginal and Torres Strait Islander peoples in the formulation of the Bills and implementation of NTNER measures and the Stronger Futures legislation
- governance arrangements in Aboriginal communities in the Northern Territory to appropriately respond to the legislation
- government capacity and cultural competency to implement the Stronger Futures measures
- compliance with the *Racial Discrimination Act 1975* (Cth).⁵²

As the Stronger Futures legislation is due to commence in August 2012, ongoing monitoring will be necessary to assess compliance against human rights standards.

4.5 Access to justice

Nationally, Aboriginal and Torres Strait Islander people are 14.3 times more likely to be imprisoned than non-Indigenous people.⁵³ Indigenous juveniles are 28 times more likely to be placed in juvenile detention than their non-Indigenous counterparts.⁵⁴

These imprisonment rates for Indigenous people are unacceptably high. The impact of incarceration is compounded because the communities with high imprisonment rates are already disadvantaged.⁵⁵ This makes them more vulnerable to the disruption and drain caused by imprisonment, sustaining the cycle of crime.

The Commission remains concerned that since the final report of the Royal Commission’s Inquiry into Aboriginal Deaths in Custody more than 20 years ago

there is little improvement in Aboriginal and Torres Strait Islander peoples' access to justice.

For example, the Commission recently witnessed two devastating examples of the ramifications of Aboriginal and Torres Strait Islander incarceration and over-policing with the death of Mulrunji Doomagee on Palm Island in Queensland, and on the other side of the country, Mr Ward, who died of heat stroke as a result of being transported from Laverton to Kalgoorlie in the back of a prison van.⁵⁶

The Commission also remains concerned about the impact of mandatory sentencing regimes on Aboriginal and Torres Strait Islander young people. Mandatory sentencing applies to young people between 10–18 years in Western Australia.⁵⁷ The court must seriously consider a custodial sentence for repeat offenders on their third proven serious conviction. Victoria has also indicated its intention to introduce statutory minimum sentences for gross violence offences.⁵⁸

Mandatory sentencing has an additional impact on Aboriginal and Torres Strait Islander people as they are more likely to have criminal histories and inadequate access to diversion programs.

The Commission has been calling for a new approach to address Aboriginal and Torres Strait Islander overrepresentation in the justice system by way of 'justice reinvestment'. Justice reinvestment diverts a portion of the money that would have been spent on prison to communities where there is a high concentration of offenders. The funds are then spent on crime prevention, diversion and support programs.

The Commission has also been advocating for national justice targets to be included in the Close the Gap strategy. This could include specific targets to reduce the overrepresentation of Aboriginal and Torres Strait Islander young people in the juvenile justice system. Setting justice targets at the Council of Australian Government level will provide accountability as well as greater cooperation between Commonwealth and state and territory governments.

4.6 Native title

Article 27 of the *United Nations Declaration on the Rights of Indigenous Peoples* requires that States shall:

establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

The *Native Title Act 1993* (Cth) provides the federal legislative framework for the recognition at common law of the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and natural resources.

However, as previously reported to this Committee, the Commission holds a number of concerns regarding the recognition of native title in Australia, including:

- the inconsistency between the Native Title Act and Australia's international obligations under the *Convention on the Elimination of All Forms of Racial Discrimination*
- the adversarial nature of the native title system
- the lack of equality afforded to traditional owners engaging in negotiations concerning their lands, territories and natural resources.⁵⁹

Since Australia last appeared before the Committee, the Australian Government has enacted a number of legislative changes, including amendments to the Native Title Act, aimed at improving the operation of the native title system. They include:

- *Native Title Amendment Act 2009* (Cth)
- *Native Title Amendment Act (No 1) 2010* (Cth)
- *The Indigenous Economic Development Strategy*
- *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth).

The Commission acknowledges efforts to increase the effectiveness and flexibility of the native title system, particularly in terms of resolving claims and encouraging agreement making. However, the Commission remains concerned that native title legislative and policy reforms continue to prioritise the interests of non-Indigenous stakeholders. Amendments to date do not make any real change that meaningfully achieve the rights and protect the interests of traditional owners to their lands, territories and natural resources.

The Commission has recommended an independent review of the Native Title Act to develop reforms to ensure that the Native Title Act complies with international standards including the Declaration.

The terms of reference for any such review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. The review should at least involve an inquiry into:

- the current burden of proving native title
- the operation of the law regarding extinguishment
- the future act regime.⁶⁰

5 Asylum seekers and immigration detention (articles 7, 9, 10, 14 and 24)

5.1 Mandatory and indefinite detention

The Commission continues to hold concerns about Australia's system of mandatory immigration detention which has led to prolonged and indefinite detention for many people. The Commission has consistently called for an end to the system of mandatory and indefinite immigration detention because it places Australia in breach of its obligations under the ICCPR to ensure that no one is arbitrarily detained.⁶¹

The Commission welcomes the fact that many people who arrived to Australia by boat as asylum seekers have been released from closed immigration detention over the last two years into community based arrangements; either placed into community detention or granted a bridging visa while their immigration status is being resolved.⁶² However, Australia's system of mandatory detention continues to lead to the prolonged detention of many asylum seekers, refugees and stateless people.⁶³ The Commission acknowledges that the use of immigration detention may be legitimate in certain circumstances for a strictly limited period of time. To avoid detention being arbitrary, there should be an individual assessment of the necessity of detention for each person, as soon as possible after a person is taken into detention. A person should only be held in an immigration detention facility if they are individually assessed as posing an unacceptable risk to the Australian community and that risk cannot be managed in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved – if necessary, with appropriate conditions imposed to mitigate any identified risks. Australia's system of mandatory detention of all unlawful non-citizens is fundamentally inconsistent with this approach.

The Commission is concerned that the absence of the right to judicial review of immigration detention breaches article 9(4) of the ICCPR. There is only a limited right to judicial review of decisions to detain unlawful non-citizens under the *Migration Act 1958* (Cth). The courts are precluded from authorising release from detention, unless the detention contravenes domestic law. The courts have no authority to order that a person be released from immigration detention on the grounds that the person's continued detention is arbitrary, in breach of article 9(1) of the ICCPR. This is because under Australian law it is not unlawful to detain a person (or to refuse to release a person), contrary to article 9(1) of the ICCPR. The Commission believes that any decision to detain a person should be subject to judicial review and there should be clear legal limits on the period of time for which immigration detention is permitted.

5.2 Children in immigration detention

For many years the Commission has repeatedly raised particular concerns about the mandatory immigration detention of children, the high number of children in closed immigration detention facilities, and the long periods of time many children are spending in immigration detention.⁶⁴

In October 2010 the Australian Government announced that it would begin moving the majority of children and families into community detention.⁶⁵ In November 2011 it also announced that following initial health, security and identity checks, selected asylum seekers who arrive in Australia by boat would be released into the community on bridging visas.⁶⁶ While the Commission has welcomed the transfer of a significant number of families and unaccompanied minors out of closed immigration detention facilities into community detention, it remains concerned that there are still significant numbers of children who remain detained in closed facilities.⁶⁷

5.3 Conditions of detention

Over the past two years, the Commission has visited immigration detention facilities in seven locations and produced six reports on the conditions within those facilities.⁶⁸ The Commission's main concerns with conditions include the impacts of detention in remote locations, overcrowding, inadequate health and mental health services in some facilities, and inadequate provision of education, activities and excursions in some facilities. People detained in remote locations often have few opportunities for visitors or excursions and limited access to services including health care, legal advice and appropriate cultural and religious support. Holding people in remote locations can make detention operations less visible, transparent and open to public scrutiny. Finally, the physical environment is often harsh. Immigration detainees continue to be held in extremely remote locations, including detention facilities at Christmas Island, Leonora in the Western Australian desert, Curtin Immigration Detention Centre in far north Western Australia and the Scherger Royal Australian Air Force base on Cape York Peninsula in far north Queensland.

5.4 Indefinite detention of people who have received adverse security assessments and people who are stateless

The Commission is concerned that the indefinite detention of refugees who have received adverse security assessments from the Australian Intelligence and Security Organisation (ASIO) amounts to arbitrary detention, in breach of article 9(3) of the ICCPR. Refugees with adverse security assessments are currently not considered for community placement but remain indefinitely detained in closed facilities. Many of these people have already spent prolonged periods in detention. Furthermore, security assessment processes are subject to inadequate procedural safeguards, as refugees who have received adverse assessments are not told the reasons for ASIO's decision nor are they provided with any substantive opportunity for appeal.⁶⁹

Australian law permits the indefinite detention of people who are stateless.⁷⁰ The Commission holds serious concerns about the prolonged and indefinite detention of people who have been assessed by the Australian Government as not being refugees, but who are stateless or otherwise cannot be returned to their country of origin or habitual residence. As at 15 May 2012, there were 555 people in closed detention in Australia who identified as being stateless, 114 of whom had been detained for over 540 days.⁷¹

5.5 Third country processing

The Commission holds serious concerns regarding the stated intention of both the Australian Government and the political party in opposition to send asylum seekers who arrive in Australia by boat to third countries for processing of their claims. There is a high risk that such arrangements will result in breaches of Australia's human rights obligations. Transferring asylum seekers to third countries may lead to serious breaches of Australia's international human rights obligations, most significantly, to breaches of Australia's *non-refoulement* obligations (both direct and indirect),⁷² as well as those relating to non-discrimination⁷³ and family unity.⁷⁴

6 Issues related to detention (articles 7, 10 and 14)

6.1 ***Prolonged detention of Indonesian nationals suspected of people smuggling offences including those who say that they are children (articles 9, 10 and 14)***

(a) *Prolonged pre-charge detention*

The Commission has serious concerns about the length of pre-charge detention of Indonesian nationals suspected of people smuggling offences, including those who say that they are children. Individuals suspected of people smuggling offences are held in immigration detention until they are either removed from Australia or charged with an offence. The Commission considered the issue of pre-charge detention in its recent *Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*.⁷⁵ The Commission found that young Indonesians who were ultimately charged with people smuggling and who ultimately had their prosecutions discontinued, spent an average of 186 days in immigration detention prior to charge. The Australian Federal Police informed the Commission that the average time taken by the AFP to complete an investigation is currently 104.5 days.⁷⁶ The Commission believes that these are unacceptably long periods of pre-charge detention.

(b) *Mandatory sentencing of Indonesian nationals convicted of people smuggling offences*

The Migration Act provides a mandatory minimum penalty of five years, with a non-parole period of three years for the aggravated offence of people smuggling.⁷⁷ The Commission considers that these mandatory minimum sentences imposed on offenders convicted of the aggravated offence of people smuggling can be disproportionate to their level of culpability. Generally, people who work as crew on boats that bring asylum seekers to Australia are recruited from poor fishing communities on the Indonesian coast. The Commission believes that the majority of those who face people smuggling charges are low-level crew, who often have little prior knowledge of the nature or purpose of their role before departing Indonesia. As a consequence, the Commission considers that the mandatory minimum sentences currently applicable under s 236B of the Migration Act are not proportionate and may violate the protection against arbitrary detention in article 9(1) of the ICCPR. In addition, where a court imposes the mandatory minimum penalty provided by law for the aggravated offence of people smuggling, there is no right of appeal against the sentence. The Commission submits that this is in breach of Australia's obligations under article 14(5) of the ICCPR.⁷⁸

(c) *Age assessment of Indonesian nationals suspected of people smuggling offences*

The Commission has recently released *An age of uncertainty*, the report of the *Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*. The Inquiry found that between late 2008 and late 2011 many young Indonesians suspected of people smuggling who said that they were children were not given the benefit of the doubt and treated as children. Instead, their

age was assessed by relying on wrist x-ray analysis, with those assessed to be skeletally mature often spending long periods of time in detention, including in adult correctional facilities. It is now clear that many young Indonesians assessed to be adults on the basis of wrist x-ray analysis were in fact children at the time of their apprehension, or are very likely to have been children at that time. The approach to the age assessment of young Indonesians suspected of people smuggling has now changed, and wrist x-ray analysis is no longer relied upon in practice. However, the Commission is concerned that there remains a risk that errors in age assessment may again be made until the *Crimes Act 1914* (Cth) is amended to prevent the use of wrist x-ray analysis as a means of age assessment in the context of criminal justice proceedings.⁷⁹

6.2 Juveniles detained with adults (article 10(2)(b))

Australia continues to have a reservation to article 10 of the ICCPR, which requires that accused juvenile persons be separated from adults.

While in most cases across Australia child offenders are held in specific juvenile detention facilities, there are instances when young people under 18 years of age may be detained in adult facilities. For example, in the state of Queensland 17 year olds are treated as adults in the criminal justice and corrections systems, and consequently they can be placed on remand or sentenced to a term of imprisonment in adult correctional facilities. A number of organisations, including the Commission, have raised concerns about the Queensland law since its introduction, and have recommended that it be amended.⁸⁰ As required under the Queensland law, the majority of 17 year olds are generally held separately from the wider prison population. However, they are still held within adult correctional centres.⁸¹

Further, as discussed above with regard to Indonesian minors suspected of people smuggling who say that they are children, the Commission found that the Australian Government failed to ensure that children in detention were separated from adults, as required under the CRC (article 37(c)).

6.3 Ratification of OPCAT (articles 7 and 10)

The Commission welcomes the Australian Government's indication of its intention to accede to the *Optional Protocol of the Convention against Torture* (OPCAT). An inspections regime envisaged under OPCAT would provide independent monitoring of the conditions in all places of detention including immigration detention facilities and juvenile and adult correctional facilities. An independent monitoring mechanism would assist to prevent the mistreatment of individuals deprived of their liberty in Australia. In June 2012 the federal Parliament's Joint Standing Committee on Treaties recommended that Australia ratify OPCAT.⁸² The Commission urges the Australian Government to ratify OPCAT as soon as possible.

7 Protection from torture and cruel, inhuman and degrading treatment (article 7)

Although the Commission does not have jurisdiction to monitor the implementation of the CAT, the Commission has investigated complaints regarding allegations of

violations of the freedom from cruel, inhuman and degrading treatment under the ICCPR and CRC.⁸³

In the comments to the Committee against Torture, the Commission identified shortcomings in the existing Commission protections against torture and cruel, inhuman or degrading treatment or punishment for people in detention, including that:

- the Commission is unable to investigate complaints of a breach of a person's human rights under the CAT
- the Commission's function to receive human rights complaints does not generally apply to acts or practices that occur in state or territory prisons
- the Commission's complaints handling function is reactive rather than preventative because it deals with individual complaints which occur after the breach
- the Commission has no specific power to compel entry into places of detention.⁸⁴

8 Trafficking (articles 2, 3, 7, 8, 9, 12 and 23(3))

The UN Special Rapporteur on Trafficking undertook a formal mission to Australia in November 2011.

The Special Rapporteur's report on the mission (to which the Commission made a submission) was submitted to the UN Human Rights Council in June 2012 with recommendations that Australia:

- adopt a cohesive national plan of action to prevent and protect trafficked persons with clear indicators for measuring outcomes and success
- develop a new collaborative framework for collecting data on trafficked persons
- increase capacity-building activities for government departments and agencies
- redress weaknesses in the support program and services for trafficking victims, in particular in relation to: delinking government support and temporary and permanent residency from assistance with the criminal justice process; providing specialised services for trafficked children; and improved access to legal services, housing and assistance services
- develop a federal victim's compensation scheme
- ensure ongoing regional engagement to strengthen national responses that target the causes of trafficking in sending countries, including the creation of more opportunities for safe labour migration.⁸⁵

The Special Rapporteur also expressed concern that trafficked persons including children were arrested, detained for protracted periods of time and deported for breach of migration regulations without proper identification. The Australian Government is currently considering these recommendations.

In May 2012, the Australian Government tabled the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 in the federal Parliament. The Bill seeks to insert offences of forced labour, forced marriage, organ trafficking and harbouring a victim, as well as extend the application of existing offences of slavery, deceptive recruiting and servitude, and increase the penalties for debt bondage.

The Commission welcomed the Exposure Draft Bill for bringing Australian laws on trafficking and slavery into line with Australia's human rights obligations. The Commission has also called for the criminal code to be amended to ensure that trafficking victims are not liable to prosecution or punishment for offences committed as a direct consequence of their status as a trafficking victim.

In relation to the proposed offence for forced marriage, the Commission noted the importance of undertaking culturally appropriate forms of engagement with communities within which forced marriage may be occurring. Accessible and appropriate awareness raising programs need to be undertaken with affected communities, including provision of culturally aware and linguistically appropriate information. Cultural competency training should also be provided to service providers, Australian Federal Police and legal services in ensuring that any victims of forced marriage are able to access culturally appropriate support services and accommodation.

9 Legal recognition of sex in official records (articles 2, 12, 16, 17 and 26)

There are significant limitations in the way that government records and official documents⁸⁶ record sex and gender.⁸⁷ For example, while Australia has some systems that enable the sex marker on official documents to be changed, not all people of diverse sex and/or gender can access those systems. In particular, current systems for changing the sex marker on some official documents can only be accessed by people who have undergone sex affirmation surgery.⁸⁸ Having documents that contain accurate information about sex and gender is crucial to the full participation in society of people who are sex and gender diverse.

The Commission is encouraged by the Australian Government's commitment to a number of actions in Australia's draft National Human Rights Action Plan which will address some of these limitations,⁸⁹ however a number of recommendations made by the Commission with regard to this issue remain outstanding.⁹⁰ The Australian Government should implement the outstanding recommendations from the *Sex Files* report to enable broader access to systems legally recognising sex identity and by streamlining the process for amending documents to make it more user-friendly.⁹¹

10 Homelessness and public space laws (articles 2, 7, 9, 12, 17, 19, 21 and 22)

As raised in the Commission's previous submission to the Human Rights Committee in 2008, people experiencing homelessness are unable to enjoy many of the human rights set out in the ICCPR to the same extent as other Australians, including the right to liberty and security of the person, the right to privacy and the right to non-

discrimination. They may also be adversely affected by laws and policies that regulate public spaces, which are currently in existence across states and territories. These laws may disproportionately impact on homeless people, who rely heavily on using public space, and enforcement of the laws by way of fines or other criminal sanctions exacerbates disadvantage faced by homeless people. Human rights affected by public space laws include:

- the right to freedom of movement and freedom of association
- the right to freedom of expression
- the right to freedom from cruel, inhuman or degrading treatment or punishment.

In 2009, the House of Representatives Standing Committee on Family, Community, Housing and Youth conducted an Inquiry into homelessness legislation. It recommended that the Australian Government, in cooperation with state and territory governments, conduct an audit of laws and policies that impact disproportionately on people experiencing homelessness, including public space laws. The Australian Government subsequently committed to introduce homelessness legislation, and in June 2012, released an exposure draft of the legislation for comment. However, the Inquiry's recommendation to conduct an audit of public space laws has yet to be implemented.

11 Australia's reservations to the ICCPR

During Australia's Universal Periodic Review in 2011, the Australian Government committed to establishing a systematic process for the regular review of Australia's reservations to international human rights treaties, which includes reservations to the ICCPR.⁹² The Commission welcomes the Australian Government's commitment to review the reservations and urges progress on this initiative.

¹ See Australian Human Rights Commission, *Comments to the United Nations Human Rights Committee on issues relevant to Australia's fifth periodic report under the ICCPR* (30 September 2008). At http://humanrights.gov.au/legal/submissions/united_nations/20080930_ICCPR.html (viewed 8 August 2012).

² Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009). At http://www.humanrights.gov.au/legal/submissions/2009/200906_NHRC_complete.pdf (viewed 8 August 2012).

³ For information on Australia's Human Rights Framework, see Australian Government, *Australia's Human Rights Framework*, <http://www.ag.gov.au/humanrightsframework> (viewed 8 August 2012).

⁴ Australia's human rights obligations are considered to be those rights set out in the following core international instruments: the *International Convention on the Elimination of all Forms of Racial Discrimination*, 1965; the *International Covenant on Economic, Social and Cultural Rights*, 1966; the *International Covenant on Civil and Political Rights*, 1966; the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979; the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984; the *Convention on the Rights of the Child*, 1989; and the *Convention on the Rights of Persons with Disabilities*, 2006.

⁵ Documents and updates are available at Attorney-General's Department, *National Human Rights Action Plan*, <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/NationalHumanRightsActionPlan.aspx> (viewed 8 August 2012).

⁶ Office of the United Nations High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action*, Professional Training Series No. 10 (2002). At www.ohchr.org/Documents/Publications/training10en.pdf (viewed 8 August 2012).

⁷ Australian Human Rights Commission, *Submission to the Attorney-General's Department Consultation on Exposure Draft of National Human Rights Action Plan* (6 March 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20120309_NHRAP.html (viewed 8 August 2012).

⁸ For information on Australia's Human Rights Framework, see Australian Government, *Australia's Human Rights Framework*, <http://www.ag.gov.au/humanrightsframework> (viewed 8 August 2012).

⁹ Australian Government, *Australia's Human Rights Framework* (2010), p 4. At <http://www.ag.gov.au/humanrightsframework> (viewed 8 August 2012).

¹⁰ As of June 2011, the draft version of the learning area 'ethical understanding' mentions 'human rights' as one possible ethical framework: see Australian Curriculum, Assessment and Reporting Authority, *Ethical Behaviour* (2011). At <http://www.australiancurriculum.edu.au/GeneralCapabilities/Ethical-behaviour> (viewed 8 August 2012). Significant historical human rights events are also included in the History Curriculum: see Australian Curriculum, Assessment and Reporting Authority, *History* (2011). At <http://www.australiancurriculum.edu.au/History/Curriculum/F-10> (viewed 8 August 2012). It is also anticipated that human rights will be included in the 'civics and citizenship' learning area currently under development.

¹¹ For documents including the Australian Government's Discussion Paper and submissions in response from the Commission and other organisations, see Australian Government, *Australia's Human Rights Framework*, 'Consolidation of Commonwealth anti-discrimination laws', <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx> (viewed 8 August 2012).

¹² Australian Government, *Gender Balance on Australian Government Boards Report 2010–2011* (2012). At <http://www.fahcsia.gov.au/our-responsibilities/women/publications-articles/government-international/gender-balance-on-australian-government-boards-report-2010-2011> (viewed 8 August 2012).

¹³ Australian Human Rights Commission, *Submission to the Attorney-General's Department Consultation on Exposure Draft of National Human Rights Action Plan* (6 March 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20120309_NHRAP.html (viewed 8 August 2012).

¹⁴ Australian Institute of Company Directors, *Gender Diversity on Boards – Statistics: Appointment to ASX 200 Boards* (2012). At <http://www.companydirectors.com.au/Director-Resource-Centre/Governance-and-Director-Issues/Board-Diversity/Statistics> (viewed 8 August 2012).

¹⁵ In June 2012, Fair Work Australia made an equal remuneration order to increase pay by up to 45 per cent over eight years for workers in the highly feminised social and community services sector: Fair Work Australia, *Equal Remuneration Case*, <http://www.fwa.gov.au/index.cfm?pagename=remuneration&page=introduction> (viewed 8 August 2012). The Australian Government is also currently considering reforms to the *Equal Opportunity for Women in the Workplace Act 1999* (Cth), which include focusing on gender equality, equal pay, and establishing gender equality indicators. The Commission has welcomed the proposed reforms to the Act.

¹⁶ The Australian Government introduced a paid parental leave scheme in 2011 which provides government-funded parental leave pay at the national minimum wage for 18 weeks and an additional two weeks paid parental leave for partners of the primary care giver: Department of Families, Housing, Community Services and Indigenous Affairs, *Parental Leave Scheme*, <http://fahcsia.gov.au/our-responsibilities/families-and-children/programs-services/paid-parental-leave-scheme> (viewed 8 August 2012).

The Commission has called for:

- amending the National Employment Standard to extend ‘right to request’ provisions to accommodate family and caring responsibilities, including caring for older people and people with disabilities
- reviewing the provision of superannuation on paid parental leave and extending the superannuation co-contribution scheme
- ensuring effective and equitable access to affordable and appropriate child care, early childhood education and out-of-school care.

See further, Australian Human Rights Commission, *Consultation on exposure draft National Human Rights Action Plan: Australian Human Rights Commission Submission to the Attorney-General’s Department*, at http://humanrights.gov.au/legal/submissions/2012/20120309_NHRAP.html#Heading233 (viewed 8 August 2012).

¹⁷ See Disability Representative, Advocacy, Legal and Human Rights Organisations, *Australian Civil Society Shadow and Baseline Report to the UN Committee on the Rights of Persons with Disabilities* (June 2012). At <http://www.daru.org.au/resource/australian-civil-society-shadow-and-baseline-report-to-the-un-committee-on-the-rights-of-persons-with-disabilities> (viewed 8 August 2012); J Dillon, *Violence Against People with Cognitive Impairments: Report from the Advocacy/Guardianship Program*, Office of the Public Advocate, Victoria (2010). At

<http://www.publicadvocate.vic.gov.au/file/file/Research/Reports/Violence%20and%20disability%20report%202010.rtf> (viewed 8 August 2012); S Price-Kelly and M Attard, *Accommodating Violence: The Experience of Domestic Violence and People with Disability Living in Licensed Boarding Houses*, People with Disability Australia (2010). At

<http://www.pwd.org.au/documents/pubs/Accommodating%20Violence%20Report.doc> (viewed 8 August 2012). More than two Department of Human Services clients were attacked every day on average in Victoria, with almost 1800 assaults, sex attacks or rape allegations reported in the period January 2009 – July 2011. In more than 500 cases (approximately 28%) state-appointed staff and carers were accused: see P Mickelborough, ‘Carers prey on vulnerable children and the disabled’, *Herald Sun*, 13 February 2012. At <http://www.heraldsun.com.au/news/more-news/carers-prey-on-vulnerable-children-and-the-disabled/story-fn7x8me2-1226269125327> (viewed 3 August 2012).

¹⁸ See the issues raised in the Australian Human Rights Commission, *Report of the UN Special Rapporteur on Violence against Women Australian Study Tour*, April 2012 (forthcoming 2012); J Dillon, *Violence Against People with Cognitive Impairments: Report from the Advocacy/Guardianship Program*, Office of the Public Advocate, Victoria (2010). At <http://www.publicadvocate.vic.gov.au/file/file/Research/Reports/Violence%20and%20disability%20report%202010.rtf> (viewed 8 August 2012).

¹⁹ Committee on the Elimination of Discrimination against Women, *Concluding Observations: Australia*, UN Doc CEDAW/C/AUL/CO/7 (2010), para 43. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/485/48/PDF/N1048548.pdf?OpenElement> (viewed 8 August 2012).

²⁰ See Australian Human Rights Commission, *Supplementary submission to the Attorney-General's Department Consolidation of Commonwealth Discrimination Law – Domestic and Family Violence* (23 January 2012). At http://humanrights.gov.au/legal/submissions/2012/20120123_consolidation.html (viewed 8 August 2012).

²¹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/17/10 (24 March 2011). At <http://www.ohchr.org/EN/HRBodies/UPR/5CPAGES/5CAUSession10.aspx> (viewed 8 August 2012), as cited in Australian Human Rights Commission, *Report of the UN Special Rapporteur on Violence against Women Australian Study Tour*, April 2012 (forthcoming 2012).

²² Committee on the Elimination of All forms of Discrimination against Women, *General Recommendation No. 19 adopted at the 11th session* (1992). At <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> (viewed 8 August 2012); R Coomaraswamy, *Violence against Women (Addendum): Policies and Practices that Impact Women's Reproductive Rights and Contribute To, Cause or Constitute Violence against Women*, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, UN Doc E/CN.4/1999/68/Add.4 (1999), para 51. At <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/4cad275a8b5509ed8025673800503f9d?Opendocument> (viewed 8 August 2012).

²³ See Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (20 October 2005), paras 45–46. At <http://www.unhcr.org/refworld/publisher,CRC,,AUS,45377eac0,0.html> (viewed 8 August 2012); Committee on the Elimination of Discrimination against Women, *Concluding Observations: Australia*, UN Doc CEDAW/C/AUL/CO/7 (2010), para 43. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/485/48/PDF/N1048548.pdf?OpenElement> (viewed 8 August 2012), as cited in Australian Human Rights Commission, *Report of the UN Special Rapporteur on Violence against Women Australian Study Tour*, April 2012 (forthcoming 2012).

²⁴ G Innes, Disability Discrimination Commissioner, Correspondence to Hon R McClelland, Australian Government Attorney-General, 13 July 2011.

²⁵ Safe Work Australia, *Key Workers Compensation Information Australia* (2011), p 4. At http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/579/WC_Information_per_cent20booklet_per_cent202011_web.pdf (viewed 8 August 2012).

²⁶ Australian Taxation Office, *Super contributions – too much super can mean extra tax*, 3 July 2012, <http://www.ato.gov.au/individuals/PrintFriendly.aspx?ms=individuals&doc=/content/00106372.htm> (viewed 8 August 2012); Super Guide, *Super contributions beyond the age of 75*, <http://www.superguide.com.au/superannuation-basics/super-contributions-beyond-the-age-of-75> (viewed 8 August 2012).

²⁷ The Commission can receive complaints alleging discrimination on the basis of 'sexual preference' in employment or occupation: *Australian Human Rights Commission Act 1986* (Cth), s 3 and *Australian Human Rights Commission Regulations 1989* (Cth), s 4. The Commission can also receive complaints alleging that an act or practice done by or on behalf of the Commonwealth is inconsistent with, or contrary to any human right: *Australian Human Rights Commission Act 1986* (Cth), ss 11(1)(f), 20(1). However, in both cases, remedies are not enforceable. 'Human right' is defined in *Australian Human Rights Commission Act 1986* (Cth), s 3.

²⁸ Australian Government, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (2011), p 6. At <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx> (viewed 8 August 2012).

²⁹ This is discussed further in Australian Human Rights Commission, *Submission to the Attorney-General's Department Consolidation of Commonwealth Discrimination Law* (6 December 2011), paras 76–88. At http://www.humanrights.gov.au/legal/submissions/2011/20111206_consolidation.html (viewed 8 August 2012).

³⁰ 'Marriage' is currently defined in federal legislation as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life: *Marriage Act 1961* (Cth), s 5.

³¹ For further discussion see Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Marriage Equality Amendment Bill 2010* (29 March 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20120329_marriageEquality.html (viewed 8 August 2012).

³² See Australian Human Rights Commission, *Sex Files: The legal recognition of sex in documents and government records* (2009), section 8. At

<http://www.humanrights.gov.au/genderdiversity/index.html> (viewed 8 August 2012).

³³ *Births, Deaths and Marriages Registration Act 1995* (NSW); *Birth Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 1996* (Vic); *Sexual Reassignment Act 1988* (SA); *Births, Deaths and Marriages Registration Act* (NT); *Births Deaths and Marriages Registration Act 1999* (Tas); *Gender Reassignment Act 2000* (WA); *Births Deaths and Marriages Registration Act 2003* (Qld).

³⁴ *Sex Discrimination Act 1984* (Cth), s 40(5). This amendment was made in contravention of recommendation 1 from the Commission's *Sex Files Report: Australian Human Rights Commission, Sex Files: The legal recognition of sex in documents and government records* (2009). At

<http://www.humanrights.gov.au/genderdiversity/index.html> (viewed 8 August 2012). For further

discussion see: Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Sex and Age Discrimination Legislation Amendment Bill 2010* (3 November 2010), section 5.2. At

http://www.humanrights.gov.au/legal/submissions/2010/20101103_inquiry_SDA.html (viewed 2 August 2012).

³⁵ Australian Government, *Australia's Human Rights Framework* (April 2010), p 7. At

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/> (viewed 8 August 2012).

³⁶ See for example, Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (2012). At <http://www2.ohchr.org/english/bodies/crc/crcs60.htm> (viewed 8 August 2012); Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/17/10 (2011). At

<http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx> (viewed 8 August 2012); Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination*, UN Doc CERD/C/AUS/CO/15-17, (2010). At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 8 August 2012).

³⁷ For information on the Expert Panel, see Department of Families, Housing, Community Services and Indigenous Affairs, *Constitutional recognition of Indigenous Australians*, <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/recognition-respect/constitutional-recognition-of-indigenous-australians> (viewed 8 August 2012).

³⁸ National Congress of Australia's First Peoples, *Congress Facts*, <http://nationalcongress.com.au/about-us/> (viewed 8 August 2012).

³⁹ Minister for Families, Community Services and Indigenous Affairs, 'National emergency response to protect Aboriginal children in the NT' (Media Release, 21 June 2007). At

http://www.formerministers.fahcsia.gov.au/3581/emergency_21june07/ (viewed 8 August 2012).

⁴⁰ *Northern Territory National Emergency Response Act 2007* (Cth), s 6.

⁴¹ The Stronger Futures Bills consist of the Stronger Futures in the Northern Territory Bill 2011 (Cth), the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth), and the Social Security Legislation Amendment Bill 2011 (Cth).

⁴² *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), Schedule 1.

⁴³ The Minister has discretion to approve community alcohol management plans: *Stronger Futures in the Northern Territory Act 2012* (Cth), Part 2.

⁴⁴ *Stronger Futures in the Northern Territory Act 2012* (Cth), s 8, inserting s 75B(1) into the *Liquor Act 2012* (NT).

⁴⁵ *Social Security Legislation Amendment Act 2012* (Cth), Schedule 2.

⁴⁶ Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (6 February 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20120206_stronger.pdf (viewed 8 August 2012).

⁴⁷ *Stronger Futures in the Northern Territory Act 2012* (Cth), ss 34, 35.

⁴⁸ *Stronger Futures in the Northern Territory Act 2012* (Cth), Part 4.

⁴⁹ *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), Schedule 3.

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- ⁵⁰ *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), Schedule 4.
- ⁵¹ *Social Security Legislation Amendment Act 2012* (Cth), Schedule 1, s 6.
- ⁵² Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (6 February 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20120206_stronger.pdf (viewed 8 August 2012).
- ⁵³ Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2011* (December 2011). At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Explanatory%20Notes12011?OpenDocument> (viewed 8 August 2012).
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⁷⁰ *Al-Kateb v Godwin* (2004) 219 CLR 562.

⁷¹ Commonwealth, *Official Committee Hansard: Senate Legal and Constitutional Affairs Legislation Committee – Estimates* (21 May 2012), pp 97–98 (John Moorhouse, Deputy Secretary, Immigration Detention Services Group, Department of Immigration and Citizenship). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees/estimate/b429b5c1-1858-47f9-ab41-542ef70c9e51/0000%22> (viewed 8 August 2012), as cited in Australian Human Rights Commission, *Community arrangements for asylum seekers, refugees and stateless persons: Observations from visits conducted from December 2011 to May 2012* (July 2012), p 32. At http://www.humanrights.gov.au/human_rights/immigration/2012community-arrangements/index.html (viewed 8 August 2012).

⁷² Australia is prohibited under article 33(1) of the *Convention Relating to the Status of Refugees*, 1951, from expelling or returning refugees to territories where their lives or freedom would be threatened on the basis of their race, religion, nationality, membership of a particular social group or political opinion. Australia has further and broader *non-refoulement* obligations under articles 6 and 7 of the *International Covenant on Civil and Political Rights*, articles 6 and 37 of the *Convention on the Rights of the Child* and article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which prevent the removal of anyone from Australia to a country where they are in danger of death, torture or other mistreatment including arbitrary detention.

⁷³ Article 31 of the *Convention Relating to the Status of Refugees* prohibits state parties from penalising asylum seekers on account of their unlawful entry. Further, Australia is bound to respect the right of everyone to equality and non-discrimination under article 26 of the *International Covenant on Civil and Political Rights*, and article 22 of the *Convention on the Rights of the Child* affirms the right of child asylum seekers and refugees to receive appropriate protection and assistance. The principle of non-discrimination in article 2 of the *Convention on the Rights of the Child* means that all children seeking asylum are entitled to the same level of assistance and protection of their rights, regardless of how or where they arrive.

⁷⁴ Articles 17(1) and 23(1) of the *International Covenant on Civil and Political Rights* and article 8(1) of the *Convention on the Rights of the Child* provide that everyone has the right to freedom from interference with their family. Article 10(1) of the *Convention on the Rights of the Child* specifically states that 'applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with ... in a positive, humane and expeditious manner'.

⁷⁵ Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children* (2012). At <http://www.humanrights.gov.au/ageassessment/report/index.html> (viewed 8 August 2012).

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⁷⁷ *Migration Act 1958* (Cth), s 236B.

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http://www.humanrights.gov.au/legal/submissions/2012/20120227_migration_amendment.html (viewed 8 August 2012).

⁷⁹ Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children* (2012). At <http://www.humanrights.gov.au/ageassessment/report/summary.html#Heading135> (viewed 8 August 2012).

⁸⁰ Australian Law Reform Commission and the Australian Human Rights Commission, *Seen and heard: Priority for children in the legal process*, ALRC Report No 84 (1997), paras 18.21–18.22. At <http://www.alrc.gov.au/publications/report-84> (viewed 8 August 2012); JJ Kennedy, *Commission of Review into Corrective Services in Queensland – Final Report* (1998), p 126. At http://www.correctiveservices.qld.gov.au/Publications/Corporate_Publications/Reviews_and_Reports/index.shtml (viewed 8 August 2012); Anti-Discrimination Commission Queensland, *Women in Prison: A report by the Anti-Discrimination Commission Queensland* (2006), p 117. At http://www.adcq.qld.gov.au/pubs/WIP_report.pdf (viewed 8 August 2012).

⁸¹ Section 18(2) of the *Queensland Corrective Services Act 2006* (Qld) provides that a prisoner who is under 18 years of age must be kept apart from other prisoners who are 18 years or older unless it is in the prisoners best interests not to be kept apart.

⁸² Joint Standing Committee on Treaties, Parliament of Australia, *Report 125* (21 June 2012). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jscct/28february2012/report.htm (viewed 8 August 2012).

⁸³ The reports of these findings can be found at Australian Human Rights Commission, *Reports to the Minister under the AHRC Act*, <http://www.humanrights.gov.au/legal/humanrightsreports/index.html> (viewed 8 August 2012). See for example, Australian Human Rights Commission, *Report of an inquiry into a complaint by Mr AV of a breach of his human rights while in immigration detention*, HREOC Report No. 35 (April 2006). At

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⁸⁴ Australian Human Rights Commission, *Comments on Australia's compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (February 2007). At http://humanrights.gov.au/legal/submissions/2007/aust_compliance_with_the_convention_against_torture.html (viewed 8 August 2012). See also Australian Human Rights Commission, *Submission to the Joint Standing Committee on Treaties' Inquiry into the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. At <http://www.humanrights.gov.au/legal/submissions/jscot.html> (viewed 8 August 2012).

⁸⁵ J Ngozi Ezeilo, *Mission to Australia*, Report of the Special Rapporteur on trafficking in persons, especially women and children to the Human Rights Council 20th session, UN Doc A/HRC/20/18/Add.1 (2012), para 1. At <http://www.ohchr.org/EN/Issues/Trafficking/Pages/Visits.aspx> (viewed 8 August 2012).

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