

**Australian Non-governmental Organisations'
Submission to the Committee on the
Elimination of Racial Discrimination**

January 2005

**Co-ordinated by the National Human Rights Network of the
National Association of Community Legal Centres**



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Glossary

	ACT	Australian Capital Territory
	ADI	Australian Defence Industry
	ATSIC	Aboriginal and Torres Strait Islander Commission
	ATSILS	Aboriginal and Torres Strait Islander Legal Services
	ATSIS	Aboriginal and Torres Strait Islander Services
	ASIO	Australian Security and Intelligence Organisation
	CAR	Council for Aboriginal Reconciliation
10	CERD	International Convention on the Elimination of Racial Discrimination
	CLC	Community Legal Centre
	CLR	Commonwealth Law Report
	Cth	Commonwealth
	DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
	EOC	Equal Opportunity Commission
	HREOC	Human Rights and Equal Opportunity Commission
	ICCPR	International Covenant on Civil and Political Rights
20	NCP	National Crime Prevention program
	NSW	New South Wales
	NT	Northern Territory
	NTA	Native Title Act
	PJC	Parliamentary Joint Committee
	RDA	<i>Race Discrimination Act 1975 (Cth)</i>
	QLD	Queensland
	SA	South Australia
	TAS	Tasmania
	TIS	Translating and Interpreting Service
30	TPV	Temporary Protection Visa
	UN	United Nations
	UNHRC	UN Human Rights Committee
	VIC	Victoria
	WA	Western Australia
	WCAR	World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

Contributors

Co-ordinators: Annie Pettitt (Public Interest Advocacy Centre) and Fiona McGaughey
Editor: Fiona McGaughey (Centre for Human Rights Education, Curtin University)

Aboriginal Legal Service of WA Inc.

A Just Australia

Australian Council for International Development

Australian Lawyers for Human Rights Inc

10 Australians for Native Title and Reconciliation (ANTaR) Inc.

Centre for Human Rights Education, Curtin University

Centre on Housing Rights and Evictions

Community Legal Centre (CLC) Association, WA

Combined Community Legal Centres' Group (NSW)

Ethnic Community Council, WA

Federation of Ethnic Community Councils Australia

Foundation of Aboriginal and Islander Research Action

Human Rights WA

Human Rights Working Group, Federation of Community Legal Centres, Victoria

20 Illawarra Community Legal Centre, NSW

Inner City Legal Centre, Sydney

Marrickville Legal Centre, Sydney

Macarthur Legal Centre, Sydney

Multicultural Disability Advocacy Association of NSW

National Association of Community Legal Centres

National Ethnic Disability Alliance

National Human Rights Network of the National Association of Community Legal Centres

30 National Network of Indigenous Women Legal Services Inc.

People with Disability Australia

Public Interest Advocacy Centre

Redfern Legal Centre

Southern Communities Advocacy Legal & Education Service, (SCALES) WA

Tenancy Advice Service, WA

UTS Community Law and Legal Research Centre NSW

Western Australians for Racial Equality WA

Youthlaw

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Alison Aggarwal (Combined Community Legal Centres NSW)

Anna Copeland (Southern Communities Advocacy Legal & Education Service, (SCALES) WA)

Conrad Gershevitch (Federation of Ethnic Community Councils Australia)

Denese Griffin (National Network of Indigenous Women Legal Services Inc.)

Howard Glenn (A Just Australia)

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Executive summary

This report is in response to Australia's thirteenth and fourteenth periodic reports to CERD, and has been developed with input from over thirty non-governmental organisations from across Australia. These organisations work regularly with people who face racial discrimination and associated disadvantage. The contributions cite extensive research and other evidence to demonstrate significant areas where the Australian government has failed to sufficiently meet its obligations under CERD. The report is structured according to CERD article number, and where appropriate, recommendations have been offered. A summary of the recommendations offered throughout the report is listed below.

The National Network of Indigenous Women Legal Services Inc. has prepared a separate report, which is supported by these organisations and attached as an appendix.

Australia has been a signatory to CERD for over thirty years, and indeed 2005 marks the 30th anniversary of the bringing of most of the Convention into domestic law through the passage of the *Racial Discrimination Act 1975 (Cth)* (RDA). The Australian non-government organisations present this critique of Australia's progress since that time, not to suggest that Australia has failed comprehensively in its implementation of CERD, but to demonstrate the areas where Australia, as a democratic and pluralist society, could make further advances in meeting its obligations under CERD.

This report demonstrates that important laws, policies, and programmes of the Australian government have failed to sufficiently eliminate racial discrimination against Indigenous Australians and other people from culturally and linguistically diverse backgrounds, including asylum seekers and refugees. Significantly, in some areas there has been a retrogression marked by increased discrimination against members of these groups. The inequality between Indigenous Australians and the rest of the population remains striking. The important issue of land rights has not been addressed in this report, but is being comprehensively presented by the Foundation of Aboriginal and Islander Research Action in its report to the Committee.

This report demonstrates that the Committee's concerns and recommendations from their previous concluding observations have gone largely unheeded by the Australian government.¹ Australian law still lacks an entrenched guarantee against racial discrimination. The CERD Committee has requested that the Commonwealth utilise its constitutional powers to ensure that State and Territory legislation conform with CERD standards.² Whilst Federal governments have intervened to override legislation in the past,³ they have not acted similarly regarding the legislation of concern to the CERD Committee, and of concern in this report. Provisions for legal remedies and compensation in Australia remain inadequate. For example, the key legislation in this area, the *Race Discrimination Act 1975 (Cth)* (RDA), has never reflected the CERD obligations in their entirety. It is also vulnerable to repeal, and judicial interpretation of the RDA can be at variance with CERD.

¹ Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc: CERD/C/304/Add.101, 19/04/2000.

² CERD/C/304/Add.101, paragraph 7.

³ For example, by overriding the Northern Territory's legislation on euthanasia, and enacting the *Human Rights (Sexual Conduct) Act 1994* to override Tasmania's criminal laws regarding gay male sexual activity.

Lacunae exist at both Federal and State level in relation to the criminalisation of racial discrimination and vilification. This includes the lack of religious vilification criminal offences. Establishing such criminal offences would offer protection to all religious communities, but in the current climate of counter-terrorism would provide particular protection for Muslim communities in Australia.

10 The Australian government's apparent lack of commitment to promoting human rights and the elimination of racial discrimination is also evident in the second Australian Human Rights Action Plan, completed in December 2004.⁴ The plan does not adequately identify positive, forward-looking measures to address several human rights issues that impact on groups vulnerable to racial discrimination.⁵ The government's apparent lack of commitment is also displayed in their inadequate response to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), and resultant Platform for Action. As outlined in subsequent areas of this report, since WCAR, the government has introduced laws, policies, and programmes that do not meet with or adequately fulfil many of the WCAR commitments.

20 There is also significant concern about attempts by the government to place limitations on NGO advocacy on human rights issues. This is evidenced by the concerning lack of a consultative approach by the government with NGOs on human rights issues. Critically, the Charities Bill 2003⁶ has concerned many NGOs due to the definition of, and restrictions upon, charities and advocacy. For example, clause 8(2) of the Bill states that organisations can be disqualified from being a charity if they undertake activities that 'seek to change the law or government policy' or 'advocate a cause'. This will impact many organisations working to eliminate racial discrimination as they rely on being "charities" to operate most effectively under Australian taxation law.

30 The role of the Human Rights and Equal Opportunities Commission (HREOC) continues to be diminished by the government. Due to substantial funding cuts since 1996, HREOC's work force has been reduced by about one third, which has severely affected its ability to effectively handle individual complaints, education, public inquiry and policy work. Also, since 1997, the responsibilities and functions of the Disability Discrimination Commissioner have been added to those of the Human Rights Commissioner. In addition, since 1998 one Commissioner has carried responsibilities for Aboriginal and Torres Strait Islander Social Justice and Race Discrimination.

40 It has been found that the media has contributed to a heightened level of racial vilification and discrimination in Australia.⁷ As a result, people perceived to be Muslim have experienced abuse, harassment and vilification; and Indigenous people have been negatively portrayed, affecting their ability to access housing. Government representatives have also contributed to racial discrimination, particularly through their use of misleading language in relation to asylum seekers. The recent HREOC national consultations and subsequent report, *Isma*, on eliminating prejudice against

⁴www.ag.gov.au/agd/WWW/civiljusticeHome.nsf/AllDocs/0F9F219C19427392CA256F6C00150967?OpenDocument

⁵ These include issues such as: freedom of speech; the limitations on civil liberties stemming from anti-terrorism legislation; the removal of ATSIC; the detention of asylum seekers; children's issues including mandatory sentencing and children in immigration detention; and religious vilification.

⁶ *A Bill for an Act to define charities and charitable purpose, and for related purposes 2002/2003*, (The Charities Bill 2003).

⁷ Anti-Discrimination Board, NSW, *Race for the Headlines: Racism and media discourse*. www.lawlink.nsw.gov.au/adb.nsf/85b15a3388df13624a2565c6001633d9/bbed51f388c7ed7dca256ce60022240a?OpenDocument.

Arab and Muslim Australians, highlight a rise in discrimination, abuse and violence experienced by Arab and Muslim Australians since September 11 2001.⁸

A serious development in recent years has been the introduction of a spate of anti-terrorist legislation. The legislation has a skewed impact on Muslims and erodes many civil and political rights. For example, all seventeen of the terrorist groups prohibited have some connection to Islamic organisations, and only Muslims have been arrested under the new laws to date.⁹ The disproportionate effect of the application of the laws is clear, and has a singular, adverse impact on Muslims.

10

Many migrant communities endure unacceptably high levels of unemployment and under-employment, particularly women and people living in rural, regional or isolated areas of Australia. Many skilled migrants come to Australia expecting to find work, often to discover that their qualifications are not recognised, no bridging training is provided, and no recourse to government programs is available to them.

The Australian Defence Industry (ADI) is proposing exemptions to allow them to discriminate against prospective and existing employees and others on the basis of their “place of birth (national origin)” and / or their “nationality”. The RDA does not allow for exemptions; therefore the ADI has attempted to bypass the Federal legislation by making applications for exemption under State specific anti-discrimination legislation.

20

Racial discrimination against Indigenous people

Indigenous Australians still experience much higher than average incarceration rates, on average sixteen times the rate of non-Indigenous people.¹⁰ Despite Indigenous Australians representing only approximately 2% of the Australian population, HREOC found that in 2001 20% of the prison population were Indigenous and that in 2003, Indigenous women were incarcerated at a rate 19.3 times that of non-Indigenous women.¹¹ In addition, adequate interpreting services for Indigenous people and other culturally and linguistically diverse groups are sorely lacking.

30

Indigenous people continue to be disproportionately affected by legislation such as the mandatory sentencing laws in WA. Indigenous youth, who are a small fraction of the youth population of WA, comprise three quarters of mandatory sentencing cases.¹² WA has also introduced a curfew policy for teenagers. This indirectly discriminates against Indigenous children and children from other highly visible ethnic groups.¹³ 2004 has seen two race riots, the first when a young Indigenous man was killed while being followed by police, and the second relating to the continuing problem of Indigenous deaths in custody, when an Indigenous man died in custody in Palm Island.

40

Further negative developments include the fact that Indigenous Australians have been further disenfranchised by the abolition of their representative body, the Aboriginal and Torres Strait Islander Commission (ATSIC). Indigenous Australians now lack proper

⁸ HREOC 2003, *Isma Consultations*.

http://www.hreoc.gov.au/racial_discrimination/isma/consultations/index.html.

⁹ Information provided by the Public Interest Advocacy Centre in their submission to this report.

¹⁰ Cited on University of Newcastle website. www.newcastle.edu.au/centre/airn/nodes-justice.html

¹¹ Human Rights and Equal Opportunity Commission 2004, *A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia*. www.humanrights.gov.au/social_justice/statistics/index.html.

¹² Morgan, N. 2001, *Mandatory sentences in Australia: where have we been and where are we going?* Judicial Conference of Australia.

¹³ Human Rights WA Inc 2004, *Human Rights in WA: A Report on Developments in 2003*.

representation; can no longer elect their own representatives in this way; and will not have the same mechanisms for participation in governance and decision-making. ATSIC has been replaced by a national Indigenous Advisory Council *appointed by the government*, and lacking a legislative mandate. ATSIC's abolition is exacerbated by the fact lack of Indigenous candidates and elected parliamentarians in the 2004 Federal elections. The only Indigenous senator was not re-elected.

10 It is also proposed to tender out Indigenous legal services, until now provided by Aboriginal and Torres Strait Islander Legal Services (ATSILS). This involves reducing the range of services currently offered by the Indigenous service providers working in this area. The proposal was made without consultation with the Indigenous community.

20 The state of Indigenous peoples' health and well being has been described as "the biggest crisis facing Australia."¹⁴ This is evidenced by the fact that death rates for Australian Indigenous people are *three times higher* than for non-Indigenous people. For example, Indigenous males born in 1999-2001 could be expected to live to 56.3 years, almost 21 years less than the 77.0 years expected for all Australian males.¹⁵ Likewise, life expectancy for Indigenous women is 63 years compared with the average of 82 years for all Australian women.¹⁶ Indigenous health services are severely under funded. Also, many Indigenous communities lack basic needs such as adequate water, electricity and sewerage.¹⁷ Recent consultations in NSW with Indigenous people with disability have identified people who have never received social security entitlements, because they have not been aware of them.

30 The National Network of Indigenous Women Legal Services Inc. (NNIWLS) report attached at Appendix 1, describes the new policy by the Minister for Indigenous Affairs relating to a punitive welfare and benefit approach for remote Indigenous communities. The NNIWLS report finds that this policy has dangerous social ramifications, ignores ill-informed previous approaches, is blatantly discriminatory, oppressive, and punitive. It serves to deny Indigenous Australians their basic dignity, human rights and fundamental freedoms.

Indigenous children and young people are over represented within the care and protection system. In Victoria it was found that Indigenous children are six times more likely to be removed from their family by Child Protection Services.¹⁸

40 Multiple factors contribute to the extensive and disproportionate violation of the right to housing for Indigenous peoples in Australia who continue to be discriminated against on the basis of race in relation to home ownership, private rental, public and community housing, and the regulation of public space.

The issue of stolen wages remains unresolved. For much of the Twentieth century, Federal and State governments in some cases took money from Indigenous people and placed it in trust accounts for which the government was legally responsible.

¹⁴ Australians for Native Title and Reconciliation Media Release, *Use Budget Surplus to Fix Indigenous Health Crisis – Says ANTaR*, 10 September 2004.

¹⁵ Australian Bureau of Statistics 2002, *Deaths Australia 2001*.

¹⁶ Human Rights and Equal Opportunity Commission 2004, *A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia*. www.humanrights.gov.au/social_justice/statistics/index.html.

¹⁷ Australian Bureau of Statistics, 2002, *Housing and infrastructure in Aboriginal and Torres Strait Islander communities*.

¹⁸ Victorian Council of Social Services 2003, *Plan and Deliver: access and opportunities for all Victorians: VCOSS State Budget submission 2004-5*.

Governments then resisted people who sought to have their own money returned to them.

10 The 'stolen generation' of Indigenous people forcibly removed from their families still remains an unresolved issue. It has been more than six years since HREOC published its report on the 'stolen generation',¹⁹ yet the government has not adequately implemented its recommendations. Similarly the government has refused to apologise for past wrongs to Indigenous peoples. It is now widely regarded that reconciliation is no longer on the national agenda in Australia and that Indigenous rights are dead issues.²⁰

Indirect racial discrimination against asylum seekers and refugees

20 Australia continues to ignore its international obligations in relation to asylum seekers and refugees. The Australian government maintains a harsh regime of detention of asylum seekers and the allocation of temporary protection visas (TPVs), for asylum seekers arriving without a valid visa. This focus on 'boat people' indirectly discriminates against refugees of certain nationalities; 89% of all TPVs have been granted to Afghan and Iraqi refugees.²¹ Of grave concern is the detrimental affect of detention on children. Despite the HREOC report and recommendations on this matter,²² there remain approximately eighty-one children in detention centres in Australia.²³ Refugees with TPVs are denied a number of their human rights and live in fear of being returned to face persecution in the country from which they are fleeing.

Summary of recommendations

To strengthen protection against racial discrimination, it is recommended that the government:²⁴

- 30
- develop a national Bill of Rights, in consultation with the community
 - withdraw its Article 4(a) reservation
 - broaden its consultation processes
 - recognise the legitimate and vital role that NGOs play in civil discourse
 - support and resource HREOC's role
 - give HREOC Commissioners the necessary resources to develop an appreciation of the various needs of individuals and communities
 - enact legislation to prohibit discrimination and vilification on the ground of religion and to criminalize such activities
 - 40 • ensure that media organisations fulfil their obligation to be socially responsible, fair, accurate, thorough, comprehensive, and balanced, and refrain from promoting negative racial stereotypes and images.

¹⁹ HREOC 1997, *Bringing Them Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*.

²⁰ For example, The Age 24 November 2004, *Howard's Quiet Revolution*.
www.theage.com.au/articles/2004/11/23/1100972391552.html

²¹ Figures produced at the Senate Legal and Constitutional Legislation Committee Estimates on 17 February, 2004, cited by the Refugee Council of Australia.
www.refugeecouncil.org.au/html/current_issues/tpv.html.

²² HREOC 2004, *A Last Resort? The Report of the National Inquiry into Children in Immigration Detention*.

²³ Figures received from the Human Rights Working Group of the Federation of Community Legal Centres in their submission to this report.

²⁴ Recommendations are directed at Federal and / or State governments as appropriate, bearing in mind that the Australian Federal government has responsibility for ensuring compliance with CERD.

In relation to Indigenous issues, it is recommended that the government:

- urgently allocate additional funding to Indigenous health
- implement policies and action plans, to ensure available and accessible health care for all Indigenous people in the shortest possible period of time
- address the violations of Indigenous people's right to housing and address discrimination in public housing
- establish a Reparations Tribunal
- launch a national inquiry into the stolen wages issue
- abolish the tendering out of Indigenous legal services
- 10 • develop national principles and action plans for (culturally appropriate) child protection
- where out-of-home placement is necessary, ensure Indigenous children and young people are placed in Indigenous care
- focus on preventive programs to reduce the over representation of Indigenous people in the criminal justice system; and of Indigenous children / young people in the juvenile justice system
- offer greater access to diversionary programs within the juvenile justice system
- provide training for all those working within the juvenile justice system to ensure their work with Indigenous children / young people is culturally sensitive
- 20 • ensure that all those within the juvenile justice system use interpreters when required
- consult with NNIWLS and other Indigenous organisations to find an alternative solution to penalty-based welfare / benefit provision
- ensure adequate participation of Indigenous peoples in decision-making at all levels of government

In relation to culturally and linguistically diverse groups generally, it is recommended that the government:

- provide adequate, free interpreting and translating services
- 30 • provide information concerning access to the justice system to culturally and linguistically diverse communities, where appropriate in community languages
- continue to collate information on "Language Spoken at Home" and "Language Proficiency" as part of the census
- ensure that the Australian Electoral Commission broaden its engagement with culturally and linguistically diverse communities
- ensure that industrial relations policies reinforce employers' obligations to develop employees' skills
- focus on the needs of older workers from culturally and linguistically diverse backgrounds in terms of funding for job placement programs
- 40 • give fair and prompt recognition to qualifications of skilled migrants

In relation to asylum seekers and refugees, it is recommended that the government:

- implement alternatives to mandatory detention of asylum seekers
- legislate to ensure that stateless persons are not held in immigration detention
- if detention continues, put in place safeguards to ensure the human rights of detainees are respected, and locate detention centres in surroundings that permit reasonable access of local service providers and community groups providing support for detained asylum seekers
- grant people found to be refugees permanent protection visas in Australia
- 50 • if the TPV regime continues, provide TPV holders with equal treatment and full access to settlement assistance including health services, education, legal aid, social services, accommodation assistance, trauma counselling, English language training, and family reunion opportunities

- re-affirm its commitment to Article 4 of CERD and acknowledge that its handling of the *Children Overboard* affair was a clear breach of that article.

It is recommended that a number of policies, legislation and regulations be subject to review, or be amended or repealed. These include:

- overhaul *The Migration Act* to ensure it complies with Australia's international obligations to refugees, asylum seekers and stateless persons
- review the effectiveness of the *Racial Discrimination Act 1975 (Cth)*
- review the ATSIC Bill
- 10 • repeal WA mandatory sentencing laws
- review of the curfew policy in WA
- strengthen racial vilification laws and amend to include protections against religious vilification
- review all anti-terrorism laws to ensure they are consistent with Australia's human rights obligations
- review and amend all legislation, policies, and programmes that are inconsistent with the commitments made in the WCAR outcomes document

20 It is also requested that the government implement the recommendations made from previous reports and inquiries, including:

- the HREOC reports into children in detention and the stolen generation
- the Royal Commission into Aboriginal Deaths in Custody
- the Council for Aboriginal Reconciliation's report
- the Australian Senate Legal and Constitutional References Committee in the 2003 Inquiry into Legal Aid and Access to Justice
- the Multicultural Disability Advocacy Association of NSW report in relation to equitable access to public housing for people from culturally and linguistically diverse backgrounds with disabilities

30

Introduction

10 This report is in response to Australia's thirteenth and fourteenth periodic reports to CERD. It was co-ordinated by the Human Rights Network of the National Association of Community Legal Centres, with input from over thirty non-governmental organisations from across Australia. They work with and advocate on behalf of, Indigenous people and others from culturally and linguistically diverse backgrounds, including asylum seekers and refugees. The groups came together to work collaboratively with the common goal of presenting their concerns to the CERD Committee in a coherent report. Each organisation contributed to the report based on its own expertise. Through discussions and review, the organisations reached a consensus on the concerns and recommendations presented herein. The important issue of land rights has not been addressed in this report, but is being comprehensively presented by the Foundation of Aboriginal and Islander Research Action in their report to the Committee.

20 The contributions cite extensive research and other evidence to demonstrate that the Australian government has failed to meet its many of its obligations under CERD. The report is structured according to CERD article number and offers numerous recommendations. The National Network of Indigenous Women Legal Services Inc. has prepared a separate report, which is supported by the other contributors, and is attached at Appendix 1.

30 Australia has been a signatory to CERD for over thirty years, and indeed this year marks the 30th anniversary of the bringing of most of the Convention into domestic law through the passage of the *Racial Discrimination Act 1975 (Cth)* (RDA). The Australian non-government organisations present this critique of Australia's progress since that time, not to suggest that Australia has failed comprehensively in its implementation of CERD, but to demonstrate the areas where Australia, as a democratic and pluralist society, could make further advances in meeting its obligations under CERD.

This report proceeds on the basis that important laws, policies, and programmes of the Australian government have failed to sufficiently eliminate racial discrimination against Indigenous Australians and others from culturally and linguistically diverse backgrounds, including asylum seekers, and refugees. Significantly, in some areas there has been a retrogression marked by increased discrimination against members of these groups.

40 Lack of entrenched guarantees against racial discrimination

In its previous concluding observations, the CERD Committee expressed concern over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, States and Territories.²⁵ There are still no such entrenched guarantees. The ACT is the only State or Territory in Australia which has enacted its own specific human rights legislation, making the *ACT Human Rights Act 2004* the first Bill of Rights in Australia.²⁶ This Bill of Rights has been publicly criticised by the Coalition Federal government. Prime Minister Howard has publicly stated:

²⁵ CERD/C/304/Add.101, paragraph 6.

²⁶ However, the ACT Human Rights Act does not provide for invalidation of legislation which is inconsistent with its provisions. Under s 32, the Supreme Court is only empowered to issue a declaration of incompatibility with the ACT Human Rights Act following which the ACT Attorney General's obligations are to report to the Legislative Assembly (s 33), which has the final decision about whether to amend any offending legislation.

“I think a Bill of Rights is a totally undesirable... I think it can end up restricting rights rather than enhancing them.”²⁷

The present Federal government has hitherto shown no intention of taking a leadership role in community debate about the need for constitutional reform to secure a Bill of Rights including entrenched protection against racial discrimination.

10 Under Section 109 of the Australian Constitution, the RDA can operate to override any State or Territory legislation which contravenes its provisions. However, the RDA is an ordinary piece of legislation and is not entrenched, thus it can be overridden by the express legislative intent of the Commonwealth Parliament, as happened with the *1998 Native Title Act Amendments*. The Federal government does have the legislative power to fully incorporate its obligations under CERD into domestic law. Under the Australian Constitution, it is empowered to enact legislation to give effect to its international obligations, including those created by ratification of an international treaty such as CERD. This constitutional power is known as the 'external affairs' power.²⁸ Accordingly, the Commonwealth would be empowered to pass national legislation to override State and Territory laws where they are inconsistent with
20 Australia's obligations under CERD.

The CERD Committee has requested that the Commonwealth utilise its constitutional powers to ensure that state and territory legislation conform with CERD standards.²⁹ In particular, the Committee expressed concern with mandatory sentencing and provisions of the *Native Title Amendment Act 1998 (Cth)*. Whilst Federal governments have intervened to override legislation in the past,³⁰ they have not acted similarly regarding the legislation of concern to the CERD Committee and of concern in this report. There has also been criticism that the Federal government has not adequately funded States to implement the necessary laws, policies, and programmes.

30

Recommendation:

that the Australian government develop a national Bill of Rights, in consultation with the community.

Inadequate Human Rights Action Plan

The government's apparent lack of commitment to promoting human rights and the elimination of racial discrimination is also evident in the second Australian Human Rights Action Plan which was finally completed in December 2004,³¹ five and a half years after it was announced that the National Action Plan would be reviewed. While the draft was shared with NGOs in May 2004, many of the comments made by NGOs have not been constructively incorporated into the final action plan. In particular the
40 plan still emphasises past achievements and current policies and programmes of the government rather than identifying concrete actions and timelines for the future. For

²⁷ Interview with John Laws, 2UE Radio.

²⁸ Under Section 51(xxix) of the Constitution, as per *The Commonwealth of Australia v. Tasmania* (The Tasmanian Dam Case) (1983) 158 CLR 1

²⁹ CERD/C/304/Add.101, paragraph 7.

³⁰ For example, by overriding the Northern Territory's legislation on euthanasia, and enacting the *Human Rights (Sexual Conduct) Act 1994* to override Tasmania's criminal laws regarding gay male sexual activity.

³¹ www.ag.gov.au/agd/WWW/civiljusticeHome.nsf/AllDocs/0F9F219C19427392CA256F6C00150967?OpenDocument

example, the plan does not identify what concrete steps will be taken to enable Australia to enact appropriate legislation and remove its reservations to CERD.

Furthermore, the plan does not adequately identify measures to address several human rights issues that impact on groups vulnerable to racial discrimination and that are known to the government and to the international community, including: freedom of speech;³² the limitations on civil liberties stemming from anti-terrorism legislation; the removal of ATSIC; the detention of asylum seekers; children's issues including mandatory sentencing and children in immigration detention; and religious vilification.

10

Lack of response to WCAR

The Australian government's inaction is also displayed in their inadequate response to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), and resultant Platform for Action. The Platform placed emphasis on legislative and institutional policies and programmes for ensuring the rights, and eliminating racial discrimination against Indigenous peoples, refugees and migrants.³³

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In particular the Platform urged states to consult Indigenous representatives in the process of decision-making concerning policies and measures that directly affect them. It also called on states to review and revise immigration laws, policies and practices so that they are free of racial discrimination and compatible with states' obligations under international human rights instruments; and that host countries of migrants and refugees provide adequate social services, in particular in the areas of health, education and adequate housing, as a matter of priority. In light of the multiple forms of discrimination faced by them, it was recommended that specific attention be paid to the needs and rights of women in these vulnerable groups. The platform also urged states to combat racism through human rights education and positive portrayals of Indigenous peoples, migrants and refugees in the media.³⁴

30

As outlined in subsequent areas of this report, the government has implemented laws, policies and programmes that do not adequately fulfil many of the WCAR commitments, particularly the removal of ATSIC, inadequate provision of services for people from culturally and linguistically diverse backgrounds (including housing and health), and the increased negative portrayals of Muslim and Arab communities in the media since the events of September 11 2001, which occurred shortly after WCAR.³⁵

Recommendation:

that the government review and amend all legislation, policies, and programmes that are inconsistent with the commitments made in the WCAR outcomes document.

40

Lack of consultation and threat to NGOs

The government lacks a consultative approach to human rights issues, as evidenced by their approach to the Human Rights Action Plan, which lacked sufficient community consultation. Often calls for input by government agencies are inadequately

³² For example, defamation and contempt laws.

³³ Paragraphs 15-36.

³⁴ Paragraphs 117-146.

³⁵ Other examples include: the failure to implement HREOC's recommendations on the "stolen generation", threats to reduce the role and authority of HREOC, the continuation of migration and humanitarian policies that contravene international human rights and humanitarian obligations, and the discriminatory impact of anti-terror legislation.

promoted, and timelines do not allow for sufficient consultation with people 'at the grass roots' level, particularly for NGOs with limited resources and who may rely on a volunteer workforce.

Recommendation:

that the government's consultation processes be broadened, including the dissemination of reports in electronic format, and that the input from NGOs and other individuals and organisations be sought and constructively incorporated.

10 The Charities Bill 2003³⁶ has concerned many NGOs due to the definition of, and restrictions upon, charities and advocacy. For example, clause 8(2) of the Bill states that organisations can be disqualified from being a charity if they undertake activities that 'seek to change the law or government policy' or 'advocate a cause', if they are more than ancillary or incidental to the dominant purpose of the organisation. This has serious implications for the funding and taxation of NGOs which fit this description.

A recent report³⁷ recognises the many pressures on NGOs and asserts that NGOs provide a voice for marginalised groups in Australian society and are a necessary component of a healthy and robust democracy, where they act as intermediaries between the community and government. However, the report finds that there has been serious deterioration in relations between the government and NGOs, and that NGOs believe they have been 'frozen out' and fear withdrawal of funding.³⁸

Recommendation:

that the legitimate and vital role that NGOs play in civil discourse and social protection must be recognised and protected, and that they must be able to openly express their views without fear of funding cuts or other forms of retribution.

20

Diminishing role of HREOC

The HREOC fulfils a vital role within the Australian polity as a watchdog for human rights. It represents one of the checks and balances on the power of the Executive. In working to challenge discrimination and promote equality, a strong and independent national human rights institution that can, without being subject the vagaries of political will, exercise its functions consistent with human rights principles and practices, is essential.

30 The Federal government has been reluctant to give HREOC further powers and resources with which to promote and enforce human rights protection in Australia. The past six years have seen the insidious shrinkage of the capacity of Commissioners to adequately exercise their functions. Due to substantial funding cuts since 1996, HREOC's work force has been reduced by about one third, which has severely affected its ability to effectively handle individual complaints, education, public inquiry and policy work. Since 1997, the responsibilities and functions of the Disability Discrimination Commissioner have been added to those of the Human Rights

³⁶ *A Bill for an Act to define charities and charitable purpose, and for related purposes 2002/2003*, (The Charities Bill 2003).

³⁷ Maddison, S. et al, June 2004, *Silencing Dissent, Non-government organisations and Australian democracy*, The Australia Institute, Discussion Paper Number 65. www.tai.org.au.

³⁸ Contributors to this submission have participated in consultations in researching the *Silencing Dissent* report, and confirm that based on their experiences, this report is an accurate assessment of the condition of NGOs in Australia.

Commissioner. In addition, since 1998 one Commissioner has carried responsibilities for Aboriginal and Torres Strait Islander Social Justice and Race Discrimination.

10 In 2003 the government introduced the Australian Human Rights Commission Legislation Bill 2003 (the Bill). One of the provisions of that Bill gave the Attorney General the power to veto a decision of HREOC to intervene in legal proceedings. The intervention power is a particularly important role for HREOC to play. As such, it should not be limited by the political considerations of the Attorney General who represents the Federal government. This is particularly so in circumstances where HREOC may intervene in a matter in which a Federal government Minister is a party and may also be presenting submissions which oppose that Minister. It is essential that HREOC should have an independent right to intervene in court proceedings without the requirement of the Attorney General's consent.

20 The Bill also proposed to abolish each of the specialist commissioners, including the Race Discrimination Commissioner, and the Aboriginal and Torres Strait Islander Social Justice Commissioner, replacing them with three 'general' Human Rights Commissioners, thereby reducing the number of commissioners, and removing specialisation functions and responsibilities. The specialist Commissioners have performed a vital role as an independent and often critical voice regarding Australia's compliance with its international obligations, particularly CERD. It is critical that there should be one person who is publicly designated as the Commissioner responsible for protecting the right of all Australians to live in freedom from discrimination and vilification on the ground of ethnicity or race.

30 While the Bill ultimately did not proceed, due to strong objection by human rights groups and the community, it is again evidence of the Federal government's lack of interest in the protection of human rights in Australia. In addition, there are fears in the community that after 1 July 2005, when the government will have a majority in the Senate, bills such as this will be re-introduced, effectively diminishing the protection of human rights in Australia.

Recommendation:

- that the government support HREOC's role in building a human rights culture, and that Commissioners are given the necessary resources to develop an appreciation of the various needs of individuals and communities, particularly those who suffer social and cultural disadvantage.

- that any future proposals to remove the Race Discrimination Commissioner and other specialist commissioners do not proceed, as the separate offices of Race Discrimination Commissioner and Social Justice (Indigenous) Commissioner are crucial and irreplaceable in Australia's multicultural society.

Article 2 (1) (a) Ensure authorities do not engage in racial discrimination

Child protection

10 Indigenous children and young people are over represented within the care and protection system. For example, a study carried out in Victoria³⁹ found that although comprising less than 1% of Victorians aged 0 -17 years, Indigenous children represent 8% of the total number of clients within the child protection system and are six times more likely to be removed from their family by Child Protection Services.⁴⁰ Indigenous children and young people are also often placed in non-Indigenous care. The Australian Institute of Health and Welfare cites that in Victoria, the notification substantiation rate ratio for Indigenous children to non-Indigenous children was 9.5 : 1, the Care and Protection Orders rate ratio for Indigenous to non-Indigenous children was 12.4 : 1, and the children in Out-of-Home Care rate ratio for Indigenous children to non Indigenous was 13.8 : 1.7.⁴¹

Recommendation:

- that national principles and action be developed for child protection throughout Australia, drawing on the knowledge, skills and experience of Indigenous people and communities, to ensure that the child protection systems, including preventive models are culturally appropriate.
- that an increase in placement options is made available to ensure that, where out-of-home placement is necessary, Indigenous children and young people are placed in Indigenous care, with regard for the child's religious, cultural and linguistic background.

Article 2 (1) (c) Removal of racial discrimination in legislation and policy

20

Tendering out of Indigenous legal services

30 On 4 March 2004, the Federal government released the *Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians* (draft RFT). In this draft RFT, Aboriginal and Torres Strait Islander Services (ATSIS), the administration arm of ATSIC, proposed an open competitive tender for current and future legal services for Indigenous Australians. The draft RFT significantly reduces the range of services that are currently provided by Aboriginal and Torres Strait Islander Legal Services (ATSILS), including removing vital core services such as those related to prevention, education, test cases, policy analysis, and law reform.⁴² The draft RFT was created without consulting with Indigenous organisations, and fails to acknowledge ATSILS and Indigenous family violence units as the current primary providers of legal services to Indigenous people in Australia. The tender structure and

³⁹ Department of Human Services, 2003, *Public Parenting: A review of home-based care in Victoria*, p.111.

[http://hnb.dhs.vic.gov.au/commcare/ccdnav.nsf/fid/EC867EAC3C42CE31CA256E9E000EBC94/\\$file/ccd_public_parenting.pdf](http://hnb.dhs.vic.gov.au/commcare/ccdnav.nsf/fid/EC867EAC3C42CE31CA256E9E000EBC94/$file/ccd_public_parenting.pdf).

⁴⁰ Victorian Council of Social Services, 2003, *Plan and Deliver: access and opportunities for all Victorians: VCOSS State Budget submission 2004-5*, p.34.

⁴¹ Johnstone, H. 2002, *Child protection in Australia 2001-02: First National Results*, Child Welfare Series Number 31, Australian Institute of Health and Welfare, Canberra.

⁴² The draft RTF is also likely to prevent the legal services from making complaints to international treaty bodies on behalf of their clients. In the past this has taken place, for example the North Australian Aboriginal Legal Aid Service lodged an individual communication with the UN Human Rights Committee under the ICCPR regarding mandatory sentencing laws in the NT.

policy appears to be premised on conceptualising indigenous legal services as being provided by private law firms, adding some minor cultural sensitivity requirements.

Detrimental changes incorporated in the draft RFT include:

- Reducing the accessibility and cultural sensitivity of services by establishing a very low standard for this requirement. “Demonstrated capacity to provide an accessible and culturally sensitive service” is allocated a rating of only 30%, which will reduce the effectiveness of Indigenous legal services and divert funding to non-Indigenous service providers;
- 10 • Disadvantaging Indigenous organisations by providing funding in arrears. Most organisations would not have the cash flow to be able to manage funding in this way;
- Reducing “detention in custody” to a low priority category for Indigenous people; and
- Restricting Indigenous people from accessing legal services and representation, where that person has been charged with a crime of violence once, and then is charged with a crime of violence a second time or more, and where the cases are the same or similar, (referred to as “one strike you are out”).⁴³

20

ATSILS, the ATSI Social Justice Commissioner from HREOC, and other Indigenous, legal and community organisations raised their strong opposition to the draft RFT specifically, for its retrograde and discriminatory processes and content. The Federal government has ignored the skills and experience of Indigenous organisations and communities, and the considered submissions of Indigenous and non-Indigenous organisations. In addition, the tendering out of Indigenous Legal Services breaches many international human rights principles, including the right to self-determination.

30

Notwithstanding the groundswell of opposition to the draft RFT, on 30 June 2004, the Federal government announced its intention to proceed with the tendering out of ATSILS. The responsibility in government for ATSILS was moved to the Attorney General’s portfolio. Attorney General Ruddock in his media release said:

“The Government is determined to ensure that Indigenous Australians have access to high quality legal services across the country and that taxpayers can be confident they are receiving best value.”⁴⁴

40

The Attorney General has focused on the cost benefits without the government having costed the proposals contained in the draft RFT. While the government purports to have taken on board the recommendations from submissions received on the topic, it has not released a further draft, nor further documented more information on the tender or proposed policies underlying the provision of Indigenous legal services.

Recommendation:
that the current policy and practice of tendering out Indigenous legal services, which undermines the self-determination of Indigenous people, be abolished.

⁴³ Note that a person need only be charged with such an offence for them to not be able to access legal services and representation.

⁴⁴ Media release, 31 August 2004.

Article 4 (a) Establishing criminal offences related to racial discrimination

Inadequacies of current Federal legislation

In its previous concluding observations, the CERD Committee recommended that Australia:

10 "continue making efforts to adopt appropriate legislation with a view to giving full effect to the provisions of, and withdrawing its reservation to, Article 4 (a) of the Convention."⁴⁵

This was following the Federal government's adoption of the *Racial Hatred Act 1995*⁴⁶, which introduced a civil, but not criminal, prohibition against racial vilification. The Commonwealth government has not removed its reservation and has not legislated to make racial vilification a criminal act. Currently, while the (RDA) prohibits discrimination and vilification on the ground of race, colour, descent, and national or ethnic origin, it does not prohibit discrimination or vilification on the ground of religion. This leaves a significant gap in the Federal system of protection against discrimination. In the current climate engendered by the "War on Terror", the Muslim community is especially affected by this gap, as it is a community comprised of heterogeneous membership, spanning various ethnic and racial backgrounds. Muslims who experience religious discrimination where it is not hostility based on nationality or race are unable to avail themselves of existing anti-discrimination mechanisms. This situation is distinct, for example, from that of Australia's Jewish and Sikh population who can seek recourse to RDA on the basis of belonging to the Jewish or Sikh 'race'.

20 The absence of Federal laws prohibiting discrimination and vilification on the ground of religion becomes even more pertinent in light of extensive reports of discrimination and vilification against the Muslim community, as documented by HREOC in its recent report, *Isma*.⁴⁷ This report, which documents national consultations on eliminating prejudice against Arabs and Muslims, found that the majority of respondents had experienced some form of harassment and prejudice based on their religion. In particular, since September 11, women whose clothing identifies them as belonging to a particular ethnic or religious community have experienced increased incidents of racism, especially women of the Islamic faith. This clearly threatens people's rights to freedom of thought, conscience and religion.⁴⁸

30 Furthermore, Commonwealth and much State and Territory legislation provides civil remedies, such as damages and injunctions for apologies or retractions or against repetition. Whilst these remedies are useful in dealing with the mainstream media, they are often ineffective in the face of committed racial propagandists.

Inadequacies of current State legislation

40 In February 2001 a Labour government was elected in WA with a stated commitment to review laws on racial and religious vilification. At the time WA had no laws protecting the community from acts of religious vilification, and the situation with regard to racial vilification was only marginally better.⁴⁹

⁴⁵ CERD/C/304/Add.101, paragraph 14.

⁴⁶ Inserted into Pt IIA of the *Race Discrimination Act 1975*

⁴⁷ HREOC 2003, *Isma Consultations*.

http://www.hreoc.gov.au/racial_discrimination/isma/consultations/index.html.

⁴⁸ As protected under Article 5(d)(vii) of CERD.

⁴⁹ With regard to racial vilification, the Criminal Code had been amended in 1990 to include incitement to racial hatred; however, these Racial Hatred laws were largely ineffective because they required proof

By mid-2004 the WA government had done nothing to further its vilification commitments. However, this approach changed in mid-2004 following public outcry and media attention when mosques, synagogues, Chinese restaurants and other buildings were covered in offensive racist propaganda posted by a white supremacist group. In response, the government released a discussion paper in August 2004 asking for public submissions on enacting religious and racial vilification legislation and considering other remedies and programmes. Shortly afterwards the government introduced an amendment to the Incitement to Racial Hatred provisions of the *Criminal Code WA* to make it easier to prosecute those who incite racial hatred. Under the changes there were two levels of offences that could be prosecuted. The more serious offence that still requires the proving the intent of the perpetrator carries with it a maximum jail sentence of fourteen years. The lesser offence carries a five-year maximum sentence and does not require proof of the perpetrator's intent in vilifying someone on racial grounds.

However, the government appears to have discarded its commitment to religious vilification. The State government has been accused of "absolute hypocrisy" in dropping the idea of criminal laws against religious vilification, and it has been reported that the WA Premier said that one person's religious affirmation can be someone else's vilification.⁵⁰ The discussion paper made considerable references to the vulnerable position of certain religious groups, particularly Muslims, yet the WA government chose not to pursue the religious vilification amendments. Currently there is no indication of when the WA government may act on the matter of religious vilification. This lack of action leaves certain religious groups, including Muslims, exposed because they do not have recourse to any protective legislation at the State or Commonwealth level.

In NSW, there is no prohibition against religious discrimination or vilification, rather discrimination on the ground of ethno-religious origin is unlawful. However, this ground has been interpreted narrowly and does not include discrimination or vilification on the basis of religion alone. Further the NSW provision for a criminal offence of serious racial vilification has never been applied in practice. The elements of the offence, which include both incitement of hatred and a threat of physical harm, are very difficult to prove. Also prosecution requires the consent of the Attorney General, which has never been given. The NSW provisions have been used as a model by the Australian Capital Territory (ACT), South Australia (SA) and Queensland (QLD).

The Victorian legislation is the only law which provides criminal sanctions for racial and religious incitement in a useful form. Sections 24(2) and 25(2) of the *Racial And Religious Tolerance Act 2001* make it a criminal offence in Victoria to "intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule".

that a person *intended* to racially vilify and only related to certain types of printed material. The penalties provided for under these provisions were also woefully inadequate and the WA Police service had not undertaken any prosecutions in the 14 year history of that legislation until 2004 when they launched the first prosecution following a spate of racist graffiti attacks.

⁵⁰ President of the WA Ethnic Communities Council (ECCWA), following a meeting with the WA Premier, quoted in the *West Australian* newspaper.

Recommendation:

- that Federal and State governments enact legislation to prohibit discrimination and vilification on the ground of religion and to criminalize such activities, or in the absence of a Bill of Rights, that a bipartisan approach to proposed amendments to the Commonwealth *Crimes Act* be adopted.

- that the Australian government withdraw its Article 4(a) reservation.

Article 4 (b) Prohibition of organisations which incite racial hatred

Media's role in perpetuating racial hatred and discrimination

10 In 2003, the NSW Anti-Discrimination Board (ADB) launched its *Race for the Headlines* report, which examined the ways in which issues and discourse relating to race have manifested in the media in NSW. The ADB witnessed the damage done by news coverage using race as its angle. It found that in the 18 months following 11th September 2001, issues such as the Bali bombing, the international "war on terror", the prospect of US-led attacks on Iraq, the *Tampa* incident,⁵¹ Australia's policies regarding asylum seekers, and the ongoing debates about law and order in Sydney, have had the cumulative effect of generating a "moral panic" in Australia. It concluded that race was a central feature linking, simplifying, and blurring these debates, and that it encompassed concepts of ethnicity, culture, religion and nationality. The ADB also concluded that the media representation of these issues:

20 "...contributed to a heightened level of racial vilification and discrimination in Australia in this period. Australians perceived to be 'Arabic' or 'Middle Eastern' and Muslim in particular have experienced abuse, harassment and vilification. This has taken place in shopping centres, in streets, on public transport, in schools and workplaces."⁵²

The most serious breaches of responsibility in the Australian media, when it comes to anti-Semitism included the publication of racist anti-Jewish "letters to the editor".⁵³ There are some columnists and other contributors who also contributed material which would have promoted anti-Semitism and encouraged active anti-Semites.

30 The Internet is also a cause for concern in promoting racial and religious hatred. In 2002 there were 25 Australian-created racist websites on the Internet.⁵⁴

⁵¹ A synopsis of the *Tampa* incident referred to in this report is as follows. On the 26th of August 2001 the Norwegian vessel, MV *Tampa*, picked up 433 asylum-seekers from a boat sinking in international waters close to Australia. The Australian government ordered the *Tampa* not to enter Australian waters but Captain Rinnan of the *Tampa*, fearing for the safety of his crew, his vessel and his new passengers, defied the order and moved towards Christmas Island. There the *Tampa* waited for permission to land. That permission was categorically denied. Australian Special Air Services were ordered to board the vessel and they transferred the asylum seekers to Nauru. Nauru had agreed to assist with the asylum seekers in return for a \$20 million assistance package from the Australian government. To validate the government position, the Border Protection Bill was rushed through parliament. On the 27 September 2001, amendments were made to the *Migration Act 1958*. These amendments were called 'the Pacific Solution'.

⁵² Anti-Discrimination Board, NSW, *Race for the Headlines: Racism and media discourse*. <http://www.lawlink.nsw.gov.au/adb.nsf/85b15a3388df13624a2565c6001633d9/bbed51f388c7ed7dca256ce60022240a?OpenDocument>.

⁵³ Jones, J. 2004, *Report on Antisemitism in Australia*. Available from the Federation of Ethnic Community Councils Australia.

⁵⁴ HREOC 2002, *Example of Racist Material on the Internet*. http://www.hreoc.gov.au/racial_discrimination/cyberracism/examples.html.

The recent HREOC national consultations, *Isma*, on eliminating prejudice against Arab and Muslim Australians highlight a rise in discrimination, abuse and violence experienced by Arab and Muslim Australians since September 11 2001.⁵⁵ The increase in racist incidents may be fed by increasing fears and community insecurity attributed to the use of “loaded language” by many in the media, and by government representatives at State and Commonwealth level. In a recent study, many interviewees cited the media as a central source of racial vilification.⁵⁶

10 Negative media coverage has a detrimental effect on Indigenous people’s ability to access housing. Indigenous people are heavily discriminated against in the private rental market of WA⁵⁷ as they are stereotyped as destructive, aggressive and anti-social. The media plays a central role in the vilification of Indigenous people, particularly through gross sensationalism, emotive use of language, and use of selective images, specifically in the area of housing.

Recommendation:

- that the government, through their instrumentalities such as the Australian Broadcasting Authority, ensure that media organisations fulfil their obligation to be socially responsible, fair, accurate, thorough, comprehensive, and balanced.
- that the government support increased representation of people from culturally and linguistically diverse backgrounds on the editorial and management boards of major print and broadcast media bodies.
- that governments ensure that the right to freedom of expression is balanced by respect for the rights and reputations of others.

Article 4(c) Prohibition of promotion of racial discrimination by authorities

20 Australian government’s role in perpetuating racial hatred and discrimination

Often the media are simply reporting the words of government spokespersons, who, for example, describe asylum seekers as “illegals”, “queue jumpers”, “non-legal aliens” or, even worse, as “potential terrorist infiltrators”. The *Children Overboard*⁵⁸ and *Tampa*⁵⁹ incidents are examples of where the media has experienced barriers in accessing the people involved, to allow them to tell their own stories; and where loaded language has been consistently used by government sources. The

⁵⁵ HREOC 2003, *Isma Consultations*.

http://www.hreoc.gov.au/racial_discrimination/isma/consultations/index.html.

⁵⁶ Poynting, S. & Noble, G. 2004, *Living with Racism: The experience and reporting by Arab and Muslim Australians of discrimination, abuse and violence since 11 September 2001*, Report to The Human Rights and Equal Opportunity Commission.

http://www.hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf.

⁵⁷ Solonec, T. 2000, *Racial Discrimination in the Private Rental Market*, Indigenous Law Bulletin (ILB), September 2000, 5:2, pp 4,5.

⁵⁸ A synopsis of the *Children Overboard* incident is as follows. On 7 October 2001, a boat carrying asylum seekers got into difficulty off the coast of Australia; however, under the pacific solution asylum seekers could not be rescued. Many people, including children, ended up in the ocean as their boat broke up. In the media that day, Mr Ruddock, the Minister for Immigration, accused the asylum seekers of throwing their children overboard ‘with the intention of putting us under duress’. The Prime Minister Mr Howard said: “I express my anger at the behaviour of those people... I can’t comprehend how genuine refugees would throw their children overboard.” While his Foreign Minister, Alexander Downer said “They’re not types of people we want... people who throw children overboard”. The Australian navy intervened and successfully rescued all the people on board. The following day photos emerged which had been taken by the navy, however when released to the media by the government, the notes and dates had been removed. They showed people in the water, and were used by the government to substantiate their claims, when in fact the photos had been taken after the boat sank.

⁵⁹ Refer to number 51 above for a synopsis of the *Tampa* incident.

accusations made by the government against asylum seekers during the *Children Overboard* incident have since been discredited. Senate Inquiries have found that navy personnel did not suggest that children had been thrown overboard in their briefings to the government and its ministers. The photos used extensively in the media were in fact taken after the boat had sunk when all of its passengers were in the water. Labelling and negative stereotyping of asylum seekers and refugees creates enormous barriers to promoting understanding between races, breaches Article 4(c) of CERD and contravenes the spirit and intent of the instrument.

Recommendation:

that the government reaffirm its commitment to Article 4 of CERD and acknowledge that its handling of the *Children Overboard* affair was a clear breach of that article.

10

Anti-terrorism legislation and promotion of racial hatred⁶⁰

Australia's recent anti-terrorism legislation may breach Article 4(c) by actively contributing to increasing racial and religious discrimination. The skewed impact of the legislation has been evidenced by the fact that only Muslims have been arrested under the new laws to date.⁶¹ Moreover, all seventeen of the terrorist groups prohibited have some connection to Muslim / Islamic organisations. The disproportionate effect of the application of the laws is clear, and has a singular, adverse impact on Muslims. A consequence is that the general public is more likely to form or hold the view that Muslims are associated with terrorism, and there is little if anything being done by the government to actively discourage that view. Considering the rise in discrimination, abuse and violence experienced by Arab and Muslim Australians, as noted in HREOC's *Isma* report, legislation that effectively stigmatises the Muslim community even further can only endanger the rights that Article 4 seeks to protect.

20

Recommendation:

- that the parliamentary review of some of the anti-terrorism laws planned for 2005, be extended to include all laws relating to national security and anti-terrorism
- that the review specifically examine indirect and systemic racial and religious discrimination.

Article 5 (a) Equal treatment before the law

30 Equal treatment for people from culturally and linguistically diverse backgrounds

There are numerous breaches of Article 5(a) of CERD occurring daily in Australia. Many Australians from culturally and linguistically diverse backgrounds find the justice system intimidating, and experience many barriers to equality before courts and tribunals. For example, a diversity audit carried out by the Family Court of Australia identified key gaps in service delivery that had a negative impact on people from ethnically and culturally diverse backgrounds.⁶² Time pressures, lack of appropriate and up-to-date multilingual resources to support the work of both counter staff and legal staff, compulsory client information sessions conducted only in English, and lack of appropriate interpreter and translator support, were some of the key issues

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⁶⁰ Australia's anti-terrorism legislation is described in more detail under Article 5(a) of this report.

⁶¹ Public Interest Advocacy Centre's submission to this report.

⁶² Family Court of Australia 2002, *Diversity audit Report and Recommendations*.

<http://www.familycourt.gov.au/presence/resources/file/eb000d4250660c5/Diversity%20Audit%20Report.pdf>

identified in the audit. Staff clearly identified clients who do not speak English as more likely to experience a less equitable outcome from their involvement with the Court. The Family Court has responded to this audit and can now be seen as exercising best practice in Australia's legal system regarding client access and equity.

Indigenous people's right to equal treatment

10 Increasing incarceration rates and deaths in custody⁶³ of Indigenous people and the lack of fair treatment under the criminal justice system all constitute serious breaches of Article 5(a) of CERD. Indigenous peoples in Australia are amongst the most highly incarcerated peoples in the world, and on average they are incarcerated at sixteen times the rate of non-Indigenous people.⁶⁴ Indigenous women are imprisoned at a much greater rate than other women in the community. The rate of imprisonment of Indigenous people has been of ongoing concern to the CERD Committee.⁶⁵

20 The extent of incarceration of Indigenous people, and the link between this level of incarceration, and the historical dispossession and social disadvantage of Indigenous communities was extensively investigated and documented in the *Royal Commission into Aboriginal Deaths in Custody* in 1991.⁶⁶ More than ten years later, the rates of imprisonment of Indigenous communities, and women in particular, have continued to rise. At the time of the Royal Commission, Indigenous people made up 14.3% of the prison population. HREOC reported that by 2001 that percentage of the prison population had increased to 20%, whilst only around 2% of Australia's population identifies as Indigenous, and that:

30 "Since the Royal Commission, the greatest relative increase in incarceration has been for Indigenous women. The Indigenous female prison population increased by 262% between 1991 and 1999 (compared with an increase in non-Indigenous women of 185%). In June 2003, Indigenous women were incarcerated at a rate 19.3 times that of non-Indigenous women."⁶⁷

People with disability, particularly those with intellectual disability, mental illness or acquired brain injury - are significantly over represented among Indigenous people in juvenile and criminal justice facilities.⁶⁸

40 Indigenous children and young people are over represented in the juvenile justice system particularly in rural and regional areas.⁶⁹ Research suggests that in Victoria, Indigenous young people are around fourteen times more likely to be detained in juvenile justice facilities than non-Indigenous young people.⁷⁰ In addition, there is concern that Indigenous young people in Victoria do not receive the benefit of

⁶³ This is discussed in more detail under Article 5(b) of this report.

⁶⁴ Cited on University of Newcastle website. www.newcastle.edu.au/centre/airn/nodes-justice.html

⁶⁵ CERD/C/304/Add.101, paragraph 15.

⁶⁶ *Royal Commission into Aboriginal Deaths in Custody 1991, National Report.*

⁶⁷ Human Rights and Equal Opportunity Commission 2004, *A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia*. www.humanrights.gov.au/social_justice/statistics/index.html. See also Aboriginal & Torres Strait Islander Social Justice Commissioner 2002, *Social Justice Report 2002* (Human Rights and Equal Opportunity Commission, Section on Indigenous Women and Corrections – A Landscape of Risk).

⁶⁸ Information provided by People With Disability Australia in their submission to this report.

⁶⁹ Youth Affairs Council of Victoria and Youthlaw 2004, *Implementation of the Convention on the Rights of the Child in Victoria: What do we know and what can we do?*

www.yacvic.org.au/includes/pdfs_wordfiles/croc_report.pdf

⁷⁰ Bareja, M. & Charlton, K. 2003, *Statistics on Juvenile Detention in Australia: 1981-2002*, Australian Institute of Criminology Technical and Background Paper Series No 5.

diversionary programs such as police cautions to the same extent as non-Indigenous young people. From July 2000 to June 2001, Indigenous young people received fewer cautions than non-Indigenous young people. Whilst this research relates to Victoria, it is considered to be representative of the situation of Indigenous youth throughout Australia.

10 Throughout Australia, many Indigenous people, particularly those living in remote areas, are faced with cross-jurisdictional issues when trying to access justice. Such cross-jurisdictional issues do not necessarily fit into the Indigenous context of the division and responsibility for country.

Recommendation:

- that more focus be placed on preventive programs to reduce the over representation of Indigenous people in the criminal justice system and of Indigenous children / young people in the juvenile justice system.
- that greater access to diversionary programs within the juvenile justice system is offered, and that all those within the juvenile justice system, including police and Magistrates, having appropriate and ongoing training in ensuring their work with Indigenous children and young people is culturally sensitive and respectful.
- all those working within the juvenile justice system should use interpreters to ensure children and young people can participate fully and understand their rights.

Mandatory Sentencing

20 The CERD Committee has previously expressed concern about the impact upon Indigenous peoples of the minimum mandatory sentencing schemes that have operated in Western Australia (WA) and the Northern Territory (NT) and has recommended that Australia “review all laws and practices in this field”.⁷¹ The NT mandatory sentencing laws were repealed in 2001, following election of the Labour Government in NT. Whilst this is a welcome and positive development, the number of sentenced, Indigenous people in full-time custody in NT has risen since 2001.⁷²

30 The WA mandatory sentencing laws have been neither repealed nor amended. In 2003 the current State Labour government re-affirmed its commitment to mandatory sentencing in spite of evidence that these laws ignore fundamental human rights, increase costs in the criminal justice system, interfere with judicial discretion, and clearly impact more severely on Indigenous youth than on other young people.⁷³ Those laws provide that a person (including a child) who is convicted of entering a house with intent to commit an offence must be imprisoned for at least 12 months if that person has two previous convictions for similar offences. The effect of the law is that circumstances of the offence and the circumstances of the offender must be ignored. A 13 year old Indigenous child who enters a home looking for food because he is hungry is treated in exactly the same way as an adult “career criminal”.

The Australian government report offers two reasons for not taking any steps to repeal the laws in response to previous CERD Committee recommendations. Firstly, the government relies upon the conclusion of a review of the *Criminal Code (WA)* that mandatory sentencing “has had little effect on the criminal justice system” and did not

⁷¹ CERD A/55/18 (2000), [39].

⁷² Australian Bureau of Statistics 2004, *Corrective Services*.
<http://www.abs.gov.au/Ausstats/abs@.nsf/e8ae5488b598839cca25682000131612/9b3f80c43a73af6cca2568b7001b4595!OpenDocument>.

⁷³ Australian Institute of Criminology, *Mandatory Sentencing*.
<http://www.aic.gov.au/library/cinch/subjects/ms-list.html>.

recommend any changes to those provisions.⁷⁴ However, the Australian government's report does not include the specific findings of the review on the discriminatory impact of the mandatory sentencing laws. This is the relevant paragraph of the review:

10 "Overall the amendments have had little effect on the criminal justice system, being ineffectual in the adult courts, which generally sentence offenders with the required offence history to periods of imprisonment greater than 12 months. It has been used only rarely (143 occasions) in the Children's Court, *but where it has been used it has significantly impacted on Aboriginal juveniles primarily from non-metropolitan areas.*"⁷⁵
(Emphasis added)

20 The above quotation suggests the law is incompatible with CERD and independent research confirms this finding. Associate Professor Neil Morgan⁷⁶ has explained the manner in which the laws have a discriminatory impact on Indigenous people; he found that the WA laws "target offences in which young, minority and lower socio-economic groups are over-represented".⁷⁷ Indigenous people are thus disproportionately represented among persons convicted of the target offences. Indigenous young people, who are a small fraction of the youth population of WA, comprise three quarters of mandatory sentencing cases. Associate Professor Morgan also explains that Indigenous children in WA are less likely to access diversionary schemes than non-Indigenous children with the consequence that a "third strike" comes more quickly for an Indigenous child. Secondly, Australia states that:

"the provision for mandatory sentencing in the *Criminal Code (WA)* [is] a sentencing issue rather than a racial issue, as the law applies to all people in WA without discrimination on the basis of race."⁷⁸

30 This statement overlooks the fact that the CERD prohibition of racial discrimination includes a prohibition of *indirect* racial discrimination. The Committee has observed that "in seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable *disparate impact* upon" a racial group.⁷⁹ The mandatory sentencing laws of WA have an unjustifiable disparate impact upon Indigenous people.

Recommendation:

- that all measures necessary, including legislative measures, be taken to secure the repeal of the WA mandatory sentencing laws, and
- that high levels of incarceration rates among Indigenous people be addressed with proactive measures taken to reduce them.

⁷⁴ CERD/C/428/Add.2 2004, [157].

⁷⁵ WA Department of Justice 2001, *Review of the Operation and Effectiveness of Section 401 of the Criminal Code*.

⁷⁶ Director of Studies of the Crime Research Centre of the University of Western Australia.

⁷⁷ Morgan, N. 2001, *Mandatory sentences in Australia: where have we been and where are we going?* Judicial Conference of Australia.

⁷⁸ CERD/C/428/Add.2 2004, [156].

⁷⁹ CERD General Recommendation XIV (Forty-second session, 1993): On Article 1, Paragraph 1, of the Convention, A/48/18 (1993) 114 at paragraphs 1-3.

Interpreting and culturally appropriate services

10 The lack of adequate interpreting services also serves to deny people access to equal treatment before the tribunals and all other organs administering justice under Article 5(a). In its report,⁸⁰ the Australian government has stated that the Translating and Interpreting Service (TIS) provides an efficient and cost-effective service to Australian residents. However, in reality the provision of interpreters has declined over recent years. These services are not meeting the needs of many people who access, or seek to access, legal services for advice and representation and who require the assistance of interpreters. These services are not meeting the needs of many people appearing in courts and tribunals.

20 The TIS provides free telephone interpreters during business hours and after hours, and a limited number of free face-to-face interpreters during business hours only. Face-to-face interpreters are needed to translate or draft written documents, and to check understandings due to the difficulties incurred when relying on verbal communication alone. However, free face-to-face interpreters are not available after hours when many Community Legal Centres (CLCs) have their advice clinics. The demand for interpreter services, particularly face-to-face interpreters, is greater than the availability.

Prior to 1998, the NSW Ethnic Affairs Commission (now the Community Relations Commission) provided face-to-face interpreters to clients of CLCs on request and at no charge. Since then, a change of policy and exemption guidelines for CLCs, made without consultation with CLCs, has meant that interpreters are no longer provided for clients requiring advice about Commonwealth law matters and for some State matters.⁸¹

30 NSW Local Court policy provides for free interpreters for defendants in criminal matters, all domestic violence matters, interviews with a chamber magistrate in relation to criminal or apprehended violence order matters, and parties in care proceedings in the Children's Court. However, it is of concern that people appearing at court in civil matters, or appearing in tribunals on discrimination matters, are generally required to meet their own interpreting costs. To require citizens to pay for interpreter services in order to access core services such as the Local Court, to which English speaking people have free access, creates a discriminatory burden on non-English speaking people.

40 The lack of culturally appropriate services and interpreting services for Indigenous people, for different cultural and language groups, and across the diversity of legal problem and assistance types, is also a breach of Article 5(a). Notwithstanding the work and goodwill of many organisations providing legal services to the Indigenous community, the different legal needs across a range of problem types, conflict of laws (where Indigenous laws are ignored in non-Indigenous legal structures, processes and philosophies, or are reflected in an *ad hoc* manner), and the lack of interpreting services generally, create additional barriers to accessing justice for Indigenous people.

50 In WA for example, there is only one designated interpreting service based in Broome and servicing the entire Kimberley region, in which Indigenous people from a large

⁸⁰ Paragraphs 194 – 197.

⁸¹ For example, a woman who has been the victim of domestic violence and seeks information about apprehended violence orders and family law advice will not be able to obtain advice about the family law aspect of her legal problem because that falls within the Commonwealth jurisdiction.

number of diverse language groups reside. Other interpreting services are offered as one service from Language Resource Centres in regions throughout WA.

Information about languages spoken at home and language proficiency, collected during the census, is essential for effective planning of all human services in the fields of health, housing, education and training, employment, and community support services, for young people, older persons, children and families and people with disability. "Language Spoken at Home" and "Language Proficiency" are the two most important aspects of the census that are indicators for the need for language services.

10 Therefore, it is of concern that proposed changes to census questions may limit languages spoken at home to "English" or "Other". If these proposed changes proceed, it will make it much more difficult for services to effectively assess and meet the needs of people from culturally and linguistically diverse backgrounds.

Recommendation:

- that free face-to-face interpreters be available after hours and the quota system abandoned.
- that interpreting services be provided free of charge to all litigants in courts and tribunals.
- that culturally and linguistically appropriate legal services be made available to all Indigenous Australians.⁸²
- that information concerning access to the justice system be made available to culturally and linguistically diverse communities, where appropriate in community languages.
- that information on "Language Spoken at Home" and "Language Proficiency" continues to be collated as part of the census.

Indigenous women and access to justice⁸³

20 The challenges facing Indigenous women in accessing justice include access to legal aid and legal assistance. Access to justice encompasses access to information, Indigenous and non-Indigenous people working together in a cross-cultural environment, addressing of systemic discrimination and barriers, acknowledgment of and addressing issues barring equitable access for Indigenous women in rural, regional and remote areas, access to appropriate counselling and other ancillary services.

30 The establishment and incorporation of the National Network of Indigenous Women's Legal Services Inc (NNIWLS), a national peak body for Indigenous women's legal services in Australia, and the work of Aboriginal Legal Services (WA) in its appointment of a Women's Officer are to be commended. Family Violence Units (FVUs) and Indigenous Women's Projects (IWPs) within community legal centres in WA are an invaluable and intrinsic aspect of ensuring access to justice for Indigenous women. However, further consultations are required with IWPs, FVUs and local communities in a manner and context that is facilitated by local Indigenous communities, to determine the true unmet legal needs of Indigenous women and communities. This also requires a sharing of knowledge between legal aid services, including Aboriginal Legal Services (WA), CLCs, Legal Aid WA and native title representative bodies.

⁸² This recommendation is especially salient with regard to the proposed tendering out of Indigenous Legal Services as described under Article 2 in this report.

⁸³ This section is based on Western Australian experience.

Access to Legal Aid WA is often difficult for Indigenous women. Indigenous women are often refused grants of aid, notwithstanding significant safety and child welfare issues, as the issues for which aid will be granted are not reflected in the application for aid. Legal Aid WA often relies on IWP and FVU workers to facilitate communication between the client and themselves so that all of the legal issues are brought to the attention of the assignments section of Legal Aid WA.

10 Other systemic barriers to accessing justice include lack of understanding of culture, which affects Indigenous women seeking legal assistance.⁸⁴ Further, access to courts and tribunals, and ancillary services such as counselling services, often create barriers for Indigenous women's access justice. For example, the Family Court of WA sits in Perth, and on circuit in rural areas, perhaps three or four times per year. The Family Court Counselling Service, which prepares family reports in family law children's matters, does not engage Indigenous people to prepare welfare / family reports for Indigenous families. Similarly the gender of the Indigenous person and the counsellor, and whether an Indigenous woman can speak with a non-Indigenous man about certain issues, is not always given consideration when considering access to such services.

20 Senate inquiry into legal aid and access to justice

An Inquiry into Legal Aid and Access to Justice was conducted in 2003 by the Australian Senate Legal and Constitutional References Committee. In its final report in June 2004, the majority of the Committee made several recommendations that are relevant to government's obligations under CERD.⁸⁵

The Committee recommended that:

- 30 • The Federal government urgently increase the level of funding to Indigenous legal services in order to promote access to justice for Indigenous people; and consider issues of language, culture, literacy, remoteness and incarceration rates in calculating the cost of service delivery;
- The Federal and State / Territory governments provide resources to support the expansion and development of available services for Indigenous peoples in rural and remote areas;
- The Federal government undertake a comprehensive national study to determine accurately the legal needs of Indigenous women;
- The Federal government conduct a legal needs analysis for Indigenous people throughout Australia involving all Aboriginal and Torres Strait Islander legal services, legal aid commissions, community legal centres and other key stakeholders;
- 40 • The Federal and State / Territory governments improve, develop and promote appropriate legal and community services, community education programs, domestic violence support networks and funding models, to ensure that the experience of Indigenous women within the justice system is fair and equitable. In implementing this recommendation, Indigenous women should be widely consulted with, so that the impetus for change comes from Indigenous women themselves;
- The Federal government allocate sufficient funding to Indigenous legal services and Indigenous Family Violence Prevention Legal Services to enable adequate provision of effective legal services for Indigenous women in family law and family

⁸⁴ For example, an Indigenous woman having to give instructions in relation to a sexual assault to a non-Indigenous male person might create a barrier to the woman being able to give full and frank instructions.

⁸⁵ The dissenting report by Coalition Government members on the Committee did not support all the recommendations.

violence matters, including funding for additional culturally sensitive services in areas of highest need;

- The Federal and State / Territory governments jointly fund a \$100,000 pilot program in each jurisdiction of a "one-stop-shop" interpreter service for community legal centres and legal aid services, to be administered by the legal aid commissions;

While the above recommendations from the Committee were supported by the Senators, they did not support the following recommendations:

- 10
- Commonwealth Priorities and Guidelines relating to the provision of migration assistance be amended so that assistance for preliminary and review stages of migration matters (including challenges to visa decisions and deportation orders) is made available to applicants meeting the means and merits tests; and that the Federal Government provide funding to legal aid commissions to meet the need for such services; and
 - Immigration Advice and Application Assistance Scheme be administered by the Commonwealth Attorney-General's Department as opposed to the Department of Immigration and Multicultural and Indigenous Affairs.

Recommendation:

that the government ensure full and timely implementation of the recommendations made by the Australian Senate Legal and Constitutional References Committee in the 2003 Inquiry into Legal Aid and Access to Justice.

20

Anti-terrorism legislation and equality before the law

Australia's recent anti-terrorism legislation erodes a number of civil and political rights; this is of interest in this report due to the disproportionate negative effect of the legislation on Muslims. As described in the section of this report regarding Article 4(c), only Muslims have been arrested under the new laws to date, and all seventeen of the proscribed terrorist groups have a connection to Muslim / Islamic organisations. The application of the legislation breaches the right to equal treatment before the tribunals and all other organs administering justice.

30

In 2002, legislation⁸⁶ was introduced to enable the Australian Security and Intelligence Organisation (ASIO) and the Australian Federal Police to detain people who *may have information* related to an anti-terrorism investigation. ASIO can hold detainees for up to seven days without charge, during which time the person may be interrogated for a maximum of 24 hours, or 48 hours if an interpreter is required.

40

In addition, the *Anti-Terrorism Act 2004 (Cth)* doubled the questioning time for a person held on suspicion of being involved in terrorist activity from a maximum of 12 hours to a maximum of 24 hours. However, this interrogation time can be delayed or suspended for indefinite periods in specified circumstances.⁸⁷ In addition, this extensive interrogation time can be applied to minors and to Indigenous Australians, despite recognition in the *Crimes Act 1914 (Cth)* that these groups should not be detained for as long as non-Indigenous adults.⁸⁸

⁸⁶ *Security Legislation Amendment (Terrorism) Act 2002 (Cth)*.

⁸⁷ Unlike the legislation in countries such as Canada, the Australian laws have no absolute limit on the time that a person can be detained without charge.

⁸⁸ *Crimes Act 1914 (Cth)* s 23C.

Recommendation:

- that an urgent review of the raft of counter terrorism laws that have been enacted since 2001 be conducted.
- that as a parliamentary review of some of the anti-terrorism laws is planned for 2005, consistency with all international human rights obligations be included as a fundamental ground of inquiry; that ethnic and religious groups be consulted; and that the discriminatory nature of the legislation be addressed.

Article 5 (b) The right to protection from violence

Deaths in custody

10 Under Article 5 (b) of CERD, the deaths of Indigenous Australians in custody continue to be of serious concern. In 2003, 75% of deaths in custody of prisoners detained for no more than public order offences were Indigenous Australians.⁸⁹ In 1991 large sums of money were spent on a Royal Commission to address these issues and deal with the 99 deaths that occurred in the preceding decade. Yet, despite the 339 recommendations which emerged, since that time the number of deaths has continued to increase parallel with the increasing rates of imprisonment of Indigenous people in this country. The government decided to stop funding to report on the implementation of these recommendations in 1997. The government has failed to adequately address these issues despite the fact that two major race riots have taken place in the space of ten months. These race riots were as a result of the following two tragic incidents.

20 In February 2004 a young Indigenous man was tragically killed while being followed by police.⁹⁰ This death, and the unrest that it caused in the Indigenous community, focused attention on the need to protect and support the human rights and community resources of the affected communities. The death in custody of an Indigenous man on Palm Island in November 2004 followed his physical injury while in police custody, and the subsequent failure to follow procedure as recommended by the Royal Commission into Aboriginal Deaths in Custody. The resulting riot in the community, in which a police station and court house were burnt down, has been followed by a breakdown of relations between the community and police who are still on the island in large numbers, many in riot gear.⁹¹

Recommendation:

that the government re-instigate the requirements of the first recommendation of the Royal Commission into Aboriginal Deaths in Custody, including annual reporting by State, Territory and Federal governments on the implementation of said recommendations.

30

Protection from racial violence

Australia is currently seeing an unusual and disturbing upturn in racial and religious violence and threats of violence. Recent incidents of racist vilification targeting high profile supporters of multiculturalism in WA, and an increase in racist propaganda on

⁸⁹ Information provided by CCLCG in their submission to this report.

⁹⁰ Redfern Legal Centre in their submission to this report, wished to acknowledge that they work on Aboriginal land, traditionally the home of the Gadigal people of the Eora Nation, and wished to extend their condolences to the family and community of the young man killed in Redfern while being followed by police.

⁹¹ ABC News. www.abc.net.au/message/news/stories/s1276346.htm.

some University campuses, demonstrate the urgent need for legislative reform. The WA government should be commended for recent changes to strengthen racial vilification legislation as a result of these threats; however, failure to include religious vilification is disappointing.

Recommendation:

- that current racial vilification laws be strengthened to afford proper protection from racist propagandists.
- that protections against religious discrimination, violence, and vilification be introduced at State/Territory and Federal levels.

Article 5 (c) The right to vote and participate in public affairs

10 Abolition of Aboriginal and Torres Strait Islander Commission (ATSIC)⁹²

Despite the CERD Committee's previous comments welcoming the establishment of ATSIC,⁹³ this organisation will now be abolished. The abolition of ATSIC breaches Article 5(c) of CERD as it deprives Indigenous Australians of proper representation. It means Indigenous People can no longer elect their own representatives in this way, nor will they have the same mechanisms for participation in governance and decision-making.

20 The main purpose of the ATSIC Bill is to abolish ATSIC in two stages. It proposes that the national Board cease to exist in 2004, and the Regional Councils in 2005.⁹⁴ Essentially, the Bill will eliminate the national elected Indigenous organisation within government, and replace it with national Indigenous Advisory Council *appointed by the government*, that lacks a legislative mandate. HREOC's Social Justice Commissioner has expressed concern that replacing ATSIC with a non-elected, non-representative Council impinges on Indigenous Australians' right to participation in "public affairs" guaranteed under Article 5(c) of CERD.⁹⁵

30 The Social Justice Commissioner has stated that the abolition of ATSIC and its proposed replacement, will inhibit dialogue and mean that the government will only have to deal with Indigenous peoples on its own terms, without reference to their stated aspirations and goals; accordingly, the new Board is unlikely to be enjoy the support of Indigenous Australians in representing their views and opinions.⁹⁶ Furthermore, the Social Justice Commissioner asserts that a national appointed Advisory Council will find it difficult to influence the national agenda or to ensure policy reflects the views and desires of Indigenous peoples rather than the priorities of the government, and the government will more easily sideline the new Board if it presents opposing views. He notes that the experience of the Aboriginal Coordinating Council (ACC) in QLD justifies this concern, as the ACC faced marginalisation and eventual threat of abolition in early 2004 after criticising the QLD government's stolen wages

⁹² Based on a paper by Toshi Kawaguchi, student placement at the Combined Community Legal Centres Group.

⁹³ CERD/C/304/Add.101, paragraph 11.

⁹⁴ Sch 1 Pts 1 and 3 ATSIC Bill 2004 (Cth).

⁹⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, 2003, *Submission to the ATSIC Review*, HREOC. www.humanrights.gov.au/social_justice/submissions.

⁹⁶ Aboriginal and Torres Strait Slander Social Justice Commissioner, 7 July 2004, *Submission to the Senate Select Committee on the Administration of Indigenous Affairs*. www.hreoc.gov.au/social_justice/submissions/Submission_July_2004.html.

offer.⁹⁷ Importantly, abolishing ATSIC contradicts the government's own findings in its Review of ATSIC in November 2003:

"ATSIC should be the primary vehicle to represent Aboriginal and Torres Strait Island peoples' views to all levels of government and to be an agent for positive change in the development of policy and progress to advance the interests of Aboriginal and Torres Strait Island Australians."⁹⁸

10 The *Social Justice Report 2003*,⁹⁹ and the Social Justice Commissioner's submission to the ATSIC Review team, not only supported the retention of ATSIC, but also recommended an enhancement of its power "by strengthening the scrutiny role of the national representative body over service delivery and program design by other government departments."¹⁰⁰ This was seen as critical in achieving the effective participation of Indigenous peoples in decision-making processes. Furthermore, the alternative policy arrangements that are replacing ATSIC are not the result of any evidence-based process of assessment, but rather, an ideological response premised on the perceived failure of "separate representation" for Indigenous people.¹⁰¹

20 Finally, the government's attempt to abolish ATSIC flies directly in the face of the CERD Committee's recommendations. The Committee expressed concern in March 2000 at the inequality experienced by Indigenous peoples in Australia and recommended that the government not institute "any action that might reduce the capacity of ATSIC to address the full range of issues regarding the Indigenous community".¹⁰² The Committee has further called upon State Parties to "ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decision directly relating to their rights and interest are taken without their informed consent".¹⁰³

Recommendation:

that the ATSIC Bill be subject to an urgent review, including consultation with Indigenous peoples to achieve an outcome based on their informed consent.

30 Effective participation on land rights

In the CERD Committee's previous concluding observations, it has reiterated the requirement that States parties should ensure effective participation by Indigenous communities in decisions affecting their land rights, in particular, the importance of securing the "informed consent" of Indigenous peoples.¹⁰⁴

It should be noted that the Federal Government through its Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

⁹⁷ The ACC was subsequently abolished as of 1 January 2005.

⁹⁸ Hannaford et al 2003, *In the Hands of the Regions – Report of the Review of the Aboriginal and Torres Strait Islander Commission*, Commonwealth of Australia, Canberra.

⁹⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner 2003, *Social Justice Report*. www.humanrights.gov.au/social_justice/.

¹⁰⁰ Aboriginal and Torres Strait Slander Social Justice Commissioner, 7 July 2004, *Submission to the Senate Select Committee on the Administration of Indigenous Affairs*.

www.hreoc.gov.au/social_justice/submissions/Submission_July_2004.html.

¹⁰¹ For example, The Age 16 April 2004, *Howard puts ATSIC to death*.

www.theage.com.au/articles/2004/04/15/1081998300704.html

¹⁰² CERD/C/304/Add.101, 19/04/2000, paragraph 11.

¹⁰³ Committee on the Elimination of Racial Discrimination, *General Recommendation XXII – Indigenous people*, 18 August 1997, UN Doc: A/52//18, annex V, paragraph 4(d)

¹⁰⁴ CERD/C/304/Add.101, paragraph 9.

dispute that Article 5(c) of CERD requires the Government to obtain the informed consent of Indigenous peoples in relation to their land rights. Indigenous peoples have never been granted a veto right in relation to land for which they have a native title right, but only a right to negotiate. However, even this right has been severely restricted by the 1998 amendments to the *Native Title Act* (NTA).

10 The Joint Parliamentary Committee was requested by the Senate to examine, among other things, the compatibility of the amendments to the NTA with CERD. They reported on their findings in 2000. In response to the Committee's concern regarding consultation and consent from Indigenous peoples concerning land, the Joint Parliamentary Committee asserted that the various inquiries and committees established to discuss possibilities for amending the NTA prior to 1998 were extensive and saw a great deal of Indigenous participation. However, there have been no attempts by the Federal government since the findings of the Joint Parliamentary Committee to assess the impacts of the amendments with Indigenous communities. Furthermore, the Joint Parliamentary Committee restricted its assessment of Indigenous participation to the amendments, not as an ongoing obligation.

20 Australian Federal elections

Further breaches under Article 5(c) were evidenced in the 2004 Federal elections. Political representation continues to be extremely limited, and affirmative action measures have not been put into place to address this. This was reflected in the lack of Indigenous candidates and elected parliamentarians in the 2004 Federal elections. The only Indigenous senator was not re-elected.

30 Furthermore, it is concerning that there were a high number of informal votes at the recent Federal election, and the electorates having the highest rate of informal votes were those with high proportions of voters from culturally and linguistically diverse backgrounds.¹⁰⁵

<p>Recommendation: that the Australian Electoral Commission broaden its engagement with culturally and linguistically diverse communities, and ensures that information about how to vote is produced in community languages.</p>
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Article 5(d) The protection from racial discrimination regarding civil rights

40 Article 5(d) of CERD refers to "other civil rights", and lists particular civil rights which are covered in the subsequent sections of this report. However, civil rights not specifically listed in CERD but protected in the ICCPR, are breached by the Australian government and result in indirect racial discrimination. In particular, Australia continues to ignore its international obligations in relation to asylum seekers and refugees. This is despite widespread condemnation and without regard to the recommendations made by the CERD Committee in the previous concluding observations, recommending that Australia:

“...implement faithfully the provisions of the 1951 Convention relating to the Status of Refugees, as well as the 1967 Protocol thereto, with a view to continuing its cooperation with the United Nations High Commissioner for

¹⁰⁵ Federation of Ethnic Community Councils Australia's submission to this report.

Refugees and in accordance with the guidelines in UNHCR's "Handbook on Refugee Determination Procedures".¹⁰⁶

Immigration detention

10 The Australian government maintains a harsh regime of deterrence of people seeking asylum in-country, arguing that this is necessary to protect the limited number of places it is willing to make available for resettlement of refugees who have been given that status after seeking asylum in other countries. People who arrive in Australia without a valid visa and seek asylum, largely 'boat people', are kept in immigration detention facilities until their claims for asylum are examined. Most of these asylum seekers are housed in immigration facilities in remote desert locations. If they are granted refugee status,¹⁰⁷ they are only given temporary refugee status (temporary protection visas). Those arriving by air with valid visas, usually tourist or student visas, who claim asylum within the first 45 days of arrival, are not kept in detention, but are allowed to live in the community with certain benefits, until their claims are processed. The refugee status success rate for these "air arrivals" is much lower.

20 This focus on 'boat people' indirectly discriminates against refugees of certain nationalities and is disproportionate, as around 10% of 'illegal' immigrants arrive by boat without valid visas, and the other 90% arrive 'legally' and then claim asylum or overstay their visas.¹⁰⁸ This meets the definition of discrimination in the Committee's General Recommendation 30 on Discrimination against Non-citizens.¹⁰⁹

30 Boat arrivals substantially diminished by December 2001, due to other government initiatives, such as pushing back boats or towing them to other countries. In the four years until December 2001, the vast majority of those arriving by boat were refugees from Afghanistan and Iraq. Asylum seekers from Iraq and Afghanistan may be more likely to arrive in Australia without a valid visa because of difficulties in accessing overseas channels through which to apply for a visa to come to Australia.¹¹⁰ The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) operates 50 missions overseas. The closest DIMIA offices for asylum seekers from Afghanistan and Iraq were in Islamabad (Pakistan), Tehran (Iran), Ankara (Turkey) and Beirut (Lebanon).

40 More broadly, the immigration policies of the Australian Government discriminate on the basis of race and nationality. This is done through the use of risk categories. These risk categories inhibit migration applicants based on the countries they come from, without regard to their personal circumstances.

The Universal Declaration of Human Rights enshrines the right to seek asylum, and Article 9 of the ICCPR on the right to liberty and security of person and the right not to be subjected to arbitrary arrest or detention is breached by the mandatory and

¹⁰⁶ CERD/C/304/Add.101, paragraph 17.

¹⁰⁷ 90% of those arriving by boat in the four years to the end of 2001 have been granted refugee status.

¹⁰⁸ Hogue, C. 2003, *Asylum-seekers in Australia's international relations*, Australian Journal of International Affairs, Vol. 57, No. 1, pp. 203–209

¹⁰⁹ CERD/C/64/Misc.11/rev.3.

"(1)(4) Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim..."

¹¹⁰ HREOC, *Are temporary protection visas racially discriminatory?*
www.humanrights.gov.au/racial_discrimination/Erace/tpvs/tpvs.html

unreviewable detention of all asylum seekers who arrive in Australia without a visa.¹¹¹ Section 189 of *The Migration Act* states that persons may only be released from immigration detention if they are either granted a visa or removed from Australia. The UNHCR Guidelines on the Detention of Asylum Seekers stress that viable alternatives to detention (such as reporting obligations) should be considered first unless there is evidence to suggest that such measures will not be effective, and stress the need for immigration detention to be reasonable and proportional to the ends achieved.

10 Australia's policy of immigration detention was considered by the UN Human Rights Committee in the 1997 case of *Applicant A v Australia*,¹¹² where the Committee held that the mandatory and non-reviewable detention of the complainant was arbitrary as the Australian government had not advanced any grounds particular to the complainant's case which would justify his continued detention. Seven years after the decision in *Applicant A*, the detention of asylum seekers in Australia remains mandatory and unreviewable by judicial authorities.

The table below indicates that those detained in immigration detention represent a very small number of nationalities of origin, and a smaller number of those in detention continuously for over three years, at 1 December 2004.

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Summary of persons in immigration detention facilities by nationality¹¹³

Nationalities	Adult		Child (Accompanied)		Child (Unaccompanied)		Total	Detained > 3 years
	Male	Female	Male	Female	Male	Female		
Afghanistan	69	3	4	3	0	0	79	79
Bangladesh	31	0	0	0	0	0	31	2
China, PR	190	52	6	8	1	0	257	
Fiji	19	10	4	3	0	0	36	
India	40	0	0	0	0	0	40	
Indonesia	20	16	2	2	0	0	40	
Iran	82	4	2	1	0	0	89	89
Iraq	38	9	8	3	0	0	58	58*
Korea, South	20	17	0	1	0	0	38	
Malaysia	21	4	0	1	0	0	26	
Pakistan	19	1	2	2	0	0	24	3
Philippines	0	0	0	0	0	0	0	
Sri Lanka	21	0	0	0	0	0	21	15
Thailand	5	5	0	0	0	0	10	
Tonga	11	3	6	6	0	0	26	
Vietnam	44	20	8	5	0	0	77	#
Other Nationalities	138	26	9	6	0	0	179	
Total	768	170	51	41	1	0	1031	246

Excludes 104 people held in "other facilities" such as hospitals, alternative detention pilot programs and correctional facilities - at 26 November 2004.

**27 Iraqis to be moved to Australia having been granted refugee status finally, including children, 2nd Dec 2004.*

#39 of these people have been on Christmas Island since being moved there from Pt Hedland in June 2003

Stateless persons are entitled to apply for citizenship in Australia only in extremely limited circumstances.¹¹⁴ If they are not eligible, they may be held in immigration detention indefinitely even if there is no country to which they can be returned.

¹¹¹ According to the United Nations Human Rights Committee, detention can be considered arbitrary if it is not reasonable, necessary or proportionate in the circumstances.

¹¹² CCPR/C/59/D/560/1993 (30 April 1997).

¹¹³ Department of Immigration and Multicultural and Indigenous Affairs and International Organization for Migration figures, December 2004, as compiled by A Just Australia.

¹¹⁴ According to the Australian Citizenship Act

Section 32 of the Convention Relating to the Status of Stateless Persons obliges all signatories (including Australia) to facilitate the assimilation and naturalisation of stateless persons as far as possible.

Case Study

Ali is an asylum seeker from a Middle Eastern country. He arrived in Australia in April 2000 and has been detained for over four and a half years. He is currently in an immigration detention centre. Ali's case is currently before the Refugee Review Tribunal for the third time as the Federal Court has twice identified legal mistakes in the decision to refuse him a visa. On account of his torture experience in his home country Ali has a chronic speech impediment that renders him mute when he gets anxious. Ali has been unable to effectively communicate in his two previous Tribunal hearings as they have been held by remote video link to the detention centre. Recently the Tribunal have advised Ali that they intend to conduct a third video hearing and have refused his request for a face-to-face hearing. Ali is discriminated against as an asylum seeker, and on account of his disability.

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A number of failed refugee applicants face detention for life as a result of the recent decision of the High Court majority in *Al-Kateb v Godwin*.¹¹⁶ In *Al-Kateb*, the High Court determined that it is constitutional and lawful under the *Migration Act 1958 (Cth)* to keep a person in immigration detention indefinitely. Without legislative reform, this decision results in a situation where someone who has committed no crime, who has requested removal, and who is co-operating with the Government, could be detained for the rest of their life because they are effectively stateless and cannot be removed. The Minister for Immigration has the discretion to grant humanitarian or bridging visas. However, this fails to address the fundamental principle that the Act currently allows for the indefinite detention of people in immigration detention. The harsh physical conditions and mental anguish of indefinite detention subjects detainees to torture or at least cruel, inhuman and degrading treatment, and is arguably a breach of both the ICCPR and CAT.

Recommendation:

- that *The Migration Act* be overhauled to ensure it complies with Australia's international obligations to refugees, asylum seekers and stateless persons. Urgent requirements are:
 - o the implementation of alternatives to mandatory detention of asylum seekers
 - o legislation to ensure that stateless persons not be held in immigration detention
- that if detention continues, safeguards be put in place to ensure the human rights of detainees are respected.
- following initial checks of asylum seekers, release into suitable accommodation in the community should be made.
- government reception centres must be located in surroundings that permit reasonable access of local service providers and community groups providing support for detained asylum seekers.

¹¹⁵ Case study provided by the Human Rights Working Group, Federation of Community Legal Centres, Victoria.

¹¹⁶ [2004] HCA 37

Children in immigration detention

Specific international human rights protections are provided for children. Article 37(b) of the Convention of the Rights of the Child (CROC) states that “no child shall be deprived of his or her liberty unlawfully or arbitrarily,” and according to CROC the detention of children must occur *only as a matter of last resort*.

- 10 HREOC in their report on children in detention, *A Last Resort*¹¹⁷, found that Australian laws and practices requiring and regulating the mandatory immigration detention of children resulted in numerous and repeated breaches of CROC. HREOC criticised the Australian government for maintaining a legal regime that failed to act in the best interests of the child, failed to ensure that children were detained only as a matter of last resort, and failed to ensure that children enjoyed their right to development, and to live in an environment which fostered their health, self-respect and dignity. HREOC concluded that the immigration detention of certain children amounted to cruel, inhuman or degrading treatment. There are presently approximately eighty-one children in detention centres in Australia.¹¹⁸

Recommendation:

- that the recommendations of the HREOC report into children in detention should be implemented as a matter of urgency - children should be released from immigration detention.
- family units and unaccompanied women and children should be allowed into receptive communities as soon as the required identity, health and security checks have been completed.
- all unaccompanied minors should be delivered into appropriate community care within 48 hours.

20 Temporary protection of refugees

Following the harsh detention regime described above, asylum seekers found to be refugees are not granted permanent protection in Australia. In October 1999, in response to growing numbers of 'unauthorised' boat arrivals, the Federal Government introduced the Temporary Protection Visa (TPV) for refugees who arrive in Australia without a valid visa. The TPV is a temporary three-year visa. Prior to this, all refugees in Australia had access to a Permanent Protection Visa, which entitled them to comprehensive settlement support. TPV holders, on the other hand, are denied a number of human rights:

- 30
- denial of security of residence in Australia, by reason of the temporary nature of the visa;
 - denial of family reunion eligibility, (compared to permanent protection visas which do provide for this);
 - denial of equal access to social security benefits;
 - no automatic right to re-enter Australia upon leaving, (compared to permanent protection visas which do provide for this right);
 - denial of access to most DIMIA funded settlement support services;
 - access to school education is subject to State-level policy, and there is effective preclusion from tertiary education due to imposition of full fees;

¹¹⁷ HREOC 2004, *A Last Resort? The Report of the National Inquiry into Children in Immigration Detention*.

http://www.humanrights.gov.au/human_rights/children_detention_report/

¹¹⁸ The Human Rights Working Group of the Federation of Community Legal Centres in their submission to this report.

- denial of access to Federally funded language training services.¹¹⁹

Of all of the rights denied, the prevention of family reunion is particularly painful. It can destroy family cohesion and enforce poverty. Even voluntary immigration is a stressful and disorienting time for people. However, for those tortured people who have experienced an often traumatic exodus, periods of detention or exploitation in transit camps, but who eventually arrive in Australia only to face years in detention, the psychosocial effects they experience are akin to adding a new torture on top of an already tortured existence. Australia's current detention regime can therefore be likened to institutional abuse for some asylum seekers.

- 10 The introduction of TPVs and the provision of differential services to refugees based on whether they arrived in Australia with or without a valid visa impacts disproportionately on refugees of particular national origins and has the effect of indirectly discriminating against refugees from Iraq and Afghanistan. The Refugee Council reports that by February 2004, DIMIA had granted 8,912 temporary protection visas: 3,661 to Afghans, 4,269 to Iraqis, 475 to Iranians and 507 to other nationalities.¹²⁰ This means that 89% of all TPVs have been granted to Afghan and Iraqi refugees. The DIMIA fact sheet on Australia's Refugee and Humanitarian Program provides the numbers of permanent and temporary visas granted in 2002 – 2003.¹²¹ Using these figures, it can be deduced that 88% of refugees from Iraq and 20 94% of refugees from Afghanistan are granted temporary visas. These percentages are disproportionate with the percentages of refugees from other countries granted temporary visas; for example, 0% of refugees from Egypt, Arab Republic and Colombia were granted temporary visas.

Recommendation:

- that people found to be refugees be granted permanent protection visas in Australia.
- should the TPV regime continue, that as a minimum the government provide TPV holders with equal treatment and full access to settlement assistance including health services, education, legal aid, social services, trauma counselling, English language training, and family reunion opportunities.

Immigration and disability

- 30 The Australian government's report to CERD includes information about migrant and refugee settlement and rights to citizenship.¹²² It omits any reference to the government's ongoing blatant discrimination in exempting the *Migration Act 1958 (Cth)* from the *Disability Discrimination Act 1992 (Cth)*. In reality this means that while disability discrimination is usually illegal, it is a condoned, standard practice for DIMIA officials when dealing with potential migrants with disability.

There are many visa categories under which people try to enter Australia. Within some categories the fact that an applicant or family member has a disability is offset against the value the potential migrant and their family may have for the Australian community. Under almost all categories, people are subject to stringent health

¹¹⁹ HREOC, *Are temporary protection visas racially discriminatory?* www.humanrights.gov.au/racial_discrimination/Erace/tpvs/tpvs.html

¹²⁰ Figures produced at the Senate Legal and Constitutional Legislation Committee Estimates on 17 February, 2004, cited by the Refugee Council of Australia. www.refugeecouncil.org.au/html/current_issues/tpv.html.

¹²¹ DIMIA, *Australia's Refugee and Humanitarian Program*, www.immi.gov.au/facts/60refugee.htm.

¹²² CERD/C/428/Add.2, paragraphs 165 – 173 and 189 – 191.

assessments, based on the assumption that if a person has a disability, they will be a financial burden to the community. This assumption flies in the face of other Australian government legislation and statements that people with disability are valued members of the community and make valuable contributions.

Case Study

In 2000, Mr Shazad Kayani, an Australian citizen of Pakistani background, doused himself in petrol and set himself alight in front of Parliament House, Canberra. He had been waiting six years to bring his family, including his daughter who has a disability, to Australia. Since 1995, after arriving on a visitor visa and then applying and being granted refugee status, Mr Kayani had tried to reunite with his family. All his efforts had come to nothing, largely because his daughter with the disability is considered to be “too much of a drain on the health system.”

10 Organisations working with people with disabilities¹²³ have many examples of families accepted for migration or refugee resettlement in Australia, except for the family member who has a disability. This discriminatory system separates people with disability from their families, frustrates people and puts their lives on hold and compounds the effects of the disability. In addition, these organisations have case examples in which people with disability, who are successful in migration applications, are not provided information on arrival on entitlements and the disability services.

Anti-terrorist legislation and civil rights

20 Since the terrorist attacks on New York on 11th September 2001, a steady stream of new so-called anti-terrorist laws have been introduced in Australia. As described elsewhere in this report, the legislation has been applied in such a way that it has had a disproportionate, detrimental effect on Muslims. The situation is even more serious considering the extreme breaches of fundamental civil rights under the legislation. Whilst derogation from some rights is permissible in times of public emergency, it is questionable whether a state of public emergency “threatening the life of the nation” under Article 4 of the ICCPR currently exists in Australia. Furthermore, derogation must be to the extent absolutely necessary in the situation, and finally the United Nations must be informed of derogation, which has not taken place in Australia’s case. The UN General Assembly has stated that:

30 “all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards”.¹²⁴

40 Terrorist acts under the legislation are defined as acts which intend to coerce the public or government to advance a political, religious or ideological cause, and include those that cause serious physical harm to a person, serious damage to property, endanger lives or interfere with infrastructure. While terrorist acts do not include advocacy, protest, dissent, or industrial action, the breadth of the acts considered as terrorist and the range of offences associated with these acts, is a fundamental concern. The anti-terrorism legislation has given ASIO broad new powers to detain people without charge for rolling periods of seven days. People may also be detained even if they merely *may have information* related to a terrorist offence. This is contrary to Article 9(1) of the ICCPR which guarantees the right to liberty and security of

¹²³ Including People With Disability Australia, The Multicultural Disability Advocacy Association of NSW and the National Ethnic Disability Alliance.

¹²⁴ Resolution 54/164.

person, and freedom from arbitrary arrest or detention, and Article 9(3), which states that anyone arrested shall be brought promptly before a judge and shall be entitled to trial within a reasonable time. Furthermore, the legislation curtails the right to legal representation, and ASIO may veto a person's choice of lawyer.

Recommendation:

- that a review of all anti-terrorism laws addresses their consistency with Australia's international human rights obligations, particularly in relation to indirect and systemic racial and religious discrimination.

Article 5 (d) (viii) The right to freedom of opinion and expression

10 Right to remain silent as an exercise of the right to freedom of expression

The anti-terrorism laws and laws establishing the power of statutory commissions, such as the Australian Crime Commission the Australian Securities and Investment Commission, the Independent Commission Against Corruption, and the Police Integrity Commission,¹²⁵ limit the right to remain silent under questioning. Even though these bodies are not courts, they can compel people to answer questions even if their answers might reveal that they have engaged in criminal conduct. Under the anti-terrorism legislation, a detainee does not have the right to remain silent; they may be imprisoned for failing to answer questions.

20

National security and freedom of speech

In 2003, Australia introduced further amendments to ASIO legislation,¹²⁶ which severely restrict the freedom of the press and the freedom of public discussion. It is now illegal for anyone, including lawyers, journalists or parliamentarians, to report on operational issues related to an ASIO anti-terrorism investigation for two years.

Recommendation:

- that the breaches to freedom of expression, including the right to remain silent currently entrenched in legislation be removed.

30 **Article 5(d) (ix) The right to freedom of peaceful assembly and association**

Young people's right to peaceful assembly

The rights of young people from culturally and linguistically diverse backgrounds to freedom of peaceful assembly and association under Article 5(d) (ix) are breached in Australia today. Policies and practices preventing young people from gathering in public places indirectly discriminate against young people from culturally and linguistically diverse backgrounds as they often come from collectivistic communities which place considerable emphasis on belonging to a group.

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¹²⁵ Respectively, the: *Australian Crime Commission Act 2002 (Cth)*, *Australian Securities and Investments Commission Act 2001 (Cth)*, *Independent Commission Against Corruption Act 1988 (NSW)*, and *Police Integrity Commission Act 1996 (NSW)*.

¹²⁶ *ASIO Legislation Amendment Act 2003 (Cth)*. Note this has not yet been consolidated, although it has been passed in the Senate.

The introduction of a curfew in WA is indicative of such discriminatory policies. In June 2003, the WA Government implemented a curfew policy prohibiting unaccompanied children from being in the inner city (Northbridge) area after dark, with a 10pm curfew for teenagers. This is an extreme example of increasing intolerance for young people accessing public space such as shopping centres, train stations, and inner city areas.

10 Young people who use these areas as meeting places have their behaviour criminalized, and are sucked into the criminal justice system as a direct result of their interaction with police enforcing the curfew. Many young people affected would not have any contact with either the police or the justice system if it were not for this curfew policy. Often such policies indirectly discriminate against Indigenous children and children from other highly visible ethnic groups.¹²⁷

Recommendation:

that a review of the curfew policy in WA take place as a matter of urgency and that governments at State and Federal level provide leadership and funding to ensure that police develop best practice protocols and policies for working with young people from culturally and linguistically diverse backgrounds.

Associating with organisations – anti-terrorism

20 The recently enacted *Anti-Terrorism Act (No 2) 2004 (Cth)* created the new offence of associating with an organisation deemed by the government to be a terrorist organisation. The government does not have to prove anything in court about an organisation in order to proscribe it; the power is based on broad, vague criteria. In previous times, these laws could have been used to ban organisations such as the East Timorese independence movement. The discriminatory application of the legislation is evidenced by the fact that all organisations banned so far under these laws have had links with Islamic / Muslim groups.

30 It is now an offence to direct, recruit for, train with, fund (directly or indirectly), or be a member of (formally or informally) or take steps to try and become a member of, a proscribed terrorist organisation; whether knowingly or recklessly. It is also illegal to associate with members and other persons involved with such organisations with the intention to support them.

While it is essential that governments address the serious threat of terrorism, the offence of association goes beyond what is necessary and proportionate to the actual threat of terrorist activity in Australia, and criminalizes the right to association. This enactment conflicts with the Article 5(d) (ix) right to peaceful assembly and association.

Recommendation:

that the breaches to freedom of association currently entrenched in legislation be removed.

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¹²⁷ Human Rights WA Inc 2004, *Human Rights in WA: A Report on Developments in 2003*.

Article 5(e) (i) The right to work and fairness in employment

Access to employment

10 Migrants to Australia are denied access to social security for a two-year period upon entry into Australia. This means that migrants have to find any form of employment which often means low paid and menial employment, or be completely dependent on their sponsors to cover their immediate needs. Many migrant communities endure unacceptably high levels of unemployment and under-employment, particularly women and people living in rural, regional or isolated areas of Australia. The system is harsh for skilled migrants who come to Australia expecting to find work, often only to discover that their qualifications are not recognised, no bridging training is provided, and no recourse to government programs is available to them. Further, there are many barriers to workers over 50 years of age finding suitable and fulfilling employment. These barriers are often compounded for people from culturally and linguistically diverse backgrounds who may have little or no opportunity to build their skills.

Recommendation:

- that fair and prompt recognition being given to qualifications of skilled migrants who are educated overseas, and that access to bridging training is promptly available.
- that employers' obligation to invest in building the skills of their employees is reinforced in industrial relations policies at all levels of government.
- that government funding for job placement programs focus on the needs of older workers from culturally and linguistically diverse backgrounds.

20 'Stolen wages' and entitlements¹²⁸

For much of the twentieth century, the NSW government, and other State and Territory governments, took money belonging to Indigenous people and placed it in trust accounts for which the government was legally responsible. It then resisted people who sought to have their own money returned to them, knowing that official records were poor and that large amounts had gone astray within the bureaucracy. Much of these monies were wages or entitlements. The government's actions breach Article 5(e) (i) of CERD.

30 Using the law to control earnings, savings and entitlements was official government policy in NSW and elsewhere, and part of a wider network of controls over Indigenous people's movement, labour, and land. In NSW, these controls were often exercised through the Aborigines Protection Board (APB), and these controls often had lasting consequences in terms of ill-health and poverty.¹²⁹ From at least 1905 the APB held trust accounts in the names of individual Indigenous people and controlled the funds.

¹²⁸ From *Stolen Wages and Entitlements – Aboriginal trust Funds in New South Wales*, Indigenous Law Centre, University of New South Wales. Further information relating to Indigenous trust monies in Queensland are included in a separate shadow report to the CERD Committee by Australians for Native Title and Reconciliation (ANTaR).

¹²⁹ In 1883 the NSW Government established the APB (which later became the Aborigines Welfare Board) whose powers were secured and extended with the *Aborigines Protection Act 1909*. The Act gave the APB authority to "exercise a general supervision and care of all matters affecting the interests and welfare of Aborigines", to manage and regulate reserves and stations upon which Indigenous people resided, and to provide for the custody, maintenance, and education of Indigenous children. It marked the official beginning of the 'protection' and (later) 'assimilation' eras in Australian history, periods which for many Indigenous people in NSW meant institutionalisation and government control over many aspects of their lives, including their finances.

While surviving documentation is patchy, it is possible to identify several categories of people whose wages or entitlements came under these controls and who may, therefore, have a legitimate claim under any proposed payback scheme. They include:

- child apprentices whose wages were controlled by the board;
- parents or legal guardians entitled to child endowment;
- people eligible for old age or invalid pensions whose money was paid direct to the Board and/or who never received their entitlement;
- those entitled to other social security benefits whose money was paid direct to the Board and/or who never received their entitlement;
- 10 • those whose lump sum entitlements also fell under board control.

They may also include adults whose wages were set off against rations or whose wages could be collected and spent by the Board.

The *Aborigines Protection Act* and other Acts imposed a number of obligations on the APB, in its capacity as guardian, trustee or warrantee. In addition, general legislation about officials handling money apparently applied to the APB and other officials involved in administering trust accounts, specifically the *Audit Act 1902* and its regulations. The *Audit Act* contained elaborate procedures for the collection, withdrawal and transfer of money held in trust. As a general proposition, breach of a statutory duty may be grounds for successfully suing a government authority. Also, if a person breaches their obligations as a trustee or fiduciary they can be required to restore any losses suffered by the beneficiary and/or surrender any gain they derived.

20

The issue of 'stolen wages' is not confined to NSW. In QLD, evidence of unpaid, missing and misused wages and savings has allowed some people to sue successfully for recovery of their money and created political pressure for a broad-based solution. Available records suggest it is likely that similar issues will come to prominence in other States and Territories, including under Commonwealth jurisdiction.

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Recommendation:

that the government launch a national inquiry into the stolen wages issue.

Australian Defence Industry's exemptions from anti-discrimination legislation

In breach of Article 5(e)(i) on the right to work, the Australian Defence Industry (ADI) is proposing exemptions which would allow them to discriminate against prospective and existing employees and others on the basis of their "place of birth (national origin)" and / or their "nationality". In July 2004, the ADI Limited and some of its related bodies corporate applied for an exemption from the *Equal Opportunity Act 1995* (VIC), the *Anti-Discrimination Act 1977* (NSW), and the *Equal Opportunity Act 1984* (WA) in respect of certain conduct. The exemptions seek to enable ADI to:

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"... meet specific requirements of the United States International Traffic in Arms Regulations (ITARs) and the United States Export Administration Regulations (EARs)."¹³⁰

ITARs are contained in Title 22 of the United States of America's Code of Federal Regulations (CFR).¹³¹ The CFR is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the

¹³⁰ Affidavit of Mr Andrew McKibbin, ADI's Commercial Manager, dated 7 July 2004, included in application for exemption from *Equal Opportunity Act 1984* (WA).

¹³¹ At parts 120–130.

Federal government. Together the EARs and ITARs prohibit the unlicensed export of specific technologies, for reasons of national security or protection of trade.

10 The RDA does not allow for exemptions; therefore the ADI has attempted to bypass this by making applications for exemption under the State specific anti-discrimination legislation where ADI's industries are located. Each State jurisdiction has its own anti-discrimination legislation, each with its own process for the application of exemptions. For example, in Victoria the application was heard and granted *ex parte* by the Victorian Civil and Administrative Tribunal on 5 July 2004. Details of the application were not made public and the Victorian Equal Opportunity Commission was not a party to the hearing. However, in WA the Equal Opportunity Commission is automatically a party to any application for exemption from the *Equal Opportunity Act 1984 (WA)*. Conversely, in NSW the process is entirely administrative; a recommendation is made by the Anti-Discrimination Board to the NSW Attorney General, and no information regarding the application is required to be made public.¹³²

20 Generally exemptions from anti-discrimination legislation are only granted where the rationale behind seeking an exemption is in accordance with the principles of the Act, for example, in the case of affirmative action. ADI's proposal for an exemption under the Act is unlike any of the previous applications for exemption in respect of the race discrimination prohibitions in the Act. On the contrary, the proposed exemption is likely to work to reinforce injustices for people of certain races. If the exemption is granted in NSW and WA, ADI will be able to restrict employee access to certain information, based on employee nationality and national origin. These practices may potentially lead to termination of the employment of some employees, through redundancies, or constructive dismissals. For example, an employee who is denied access to crucial information or is transferred out of a project may have no alternative but to resign from the company if there is no other suitable work available. The granting of the exemption may result in termination of employment by ADI for reasons including "national extraction" and is therefore inconsistent with CERD.

30 This application raises the issue of potential inconsistency between a State and Federal law, which may result in the State law being rendered invalid to the extent of the inconsistency.¹³³ The RDA incorporates much of CERD into domestic law and makes unlawful direct and indirect discrimination "based on race, colour, descent or national or ethnic origin".¹³⁴ To the extent that the exemption would allow conduct that is discriminatory on the basis of national origin, there is a direct inconsistency with the RDA.

40 While it is recognised that the current security concerns both nationally and internationally give rise to the need for specific measures to be implemented to protect against potential threats, such measures must be proportional, consistent with international human rights obligations, and relevant to the particular circumstances of the country implementing the measure. The issue of potential inconsistency of the proposed exemption with domestic Federal laws, and international human rights obligations, does not appear to have been raised or adequately addressed by ADI and

¹³² The NSW Law Reform Commission, Report 92 - Review of the *Anti-Discrimination Act 1977 (NSW)* (1999) discussed in detail the areas of and process for applications for exemptions from the Act. A recommendation was made "the public be notified in a specified manner of the existence of an exemption; [and] the granting of the exemption and any conditions which may apply should be subject to review by the ADT [NSW Administrative Decisions Tribunal] at the request of any person having sufficient interest in the existence or absence of the exemption": Recommendation 50. To date this recommendation has not been implemented.

¹³³ Under section 109 of the Constitution.

¹³⁴ Under section 9 of the RDA.

its related companies. Additionally, to grant the exemption would bring Australia into breach of its international obligation under CERD.

Recommendation:

- that the Federal government ensure the RDA is not undermined by exemptions under State / Territory anti-discrimination legislation that are inconsistent with the spirit of such laws, by strengthening RDA, and if necessary by using the “external affairs” power to override inconsistent State / Territory legislation.

Article 5 (e) (iii) The right to housing

Indigenous Australians and the right to housing

10 Multiple factors contribute to the extensive and disproportionate violation of the right to housing under Article 5(e) (iii) for Indigenous peoples in Australia. Indigenous Australians continue to be discriminated against on the basis of race in relation to home ownership, private rental, public and community housing, and the regulation of public space.

20 According to the findings of the 2002 Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, given the greater housing needs of Indigenous people, existing policies are ‘inequitable and inadequate’ and this justifies ‘increased resources being put into programmes directed specifically towards addressing their housing needs’.

Indigenous Australians are less likely to own or be purchasing a home than renting. In 1999, nearly 60% of Indigenous households were renting their homes, compared with 27% of non-Indigenous households.¹³⁵ The availability of affordable rental properties is on the decline, thereby greatly disadvantaging Indigenous people’s ability to secure this form of housing. This is compounded by the reduction in availability of social housing options.

30 Indigenous people experience racial discrimination in relation to housing on a daily basis. Contributing factors include application processes that are reported as being “exclusionary”, identification requirements, excessive up-front costs demanded at the commencement of a tenancy, exclusionary policies applied inconsistently, overt unfavourable treatment, and trivial issues of dispute unnecessarily exaggerated by neighbours as a result of racist attitudes.

40 In WA Indigenous Australians have lodged a large number of complaints pursuant to the *Equal Opportunity Act WA 1984*, alleging discrimination by Homeswest¹³⁶ in the provision of public housing. Only one has been upheld and then later overturned on appeal. Barriers facing complainants include; the adversarial nature of the legal system, demands for evidence, extenuating issues that do not fit comfortably within legal parameters, demonstration of cultural origins underpinning such claims, low literacy levels, limited income and lack of resources. Of significant concern is the high numbers of complaints that lapse due to lengthy investigation procedures.¹³⁷

¹³⁵ Australian Bureau of Statistics 2002, *Australian Social Trends 2001: Aboriginal and Torres Strait Islander housing in non-remote areas*. Indigenous statistics contained in ABS data are allegedly inaccurate due to being self-reported, resulting in figures being underestimated. Reportedly many Indigenous people are reluctant to identify their background for fear of discrimination.

¹³⁶ The West Australian public housing authority.

¹³⁷ During the 1998 / 1999 period lapsed complaints involving Indigenous complainants constituted 42%.

In recognising the frequency of these complaints and previous futile attempts to work with Homeswest, the WA Equal Opportunity Commission recently completed a two-year Inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Indigenous peoples in WA. The main issues raised included:

- Cultural and kinship obligations of Indigenous people to provide shelter to extended family leads to widespread overcrowding.
- 10 • Overcrowding has severe impacts on health, education and safety of children and to a loss of privacy.
- Overcrowding is often the result of an acceptance by Homeswest of the condition of “living with family or friends” as a viable housing option.
- Indigenous women seeking emergency housing, often facing situations of domestic violence, are offered houses that lack adequate security.
- Indigenous people are being offered substandard properties.
- Indigenous people suffer humiliation, having to make multiple attempts to find private rental property before being accepted onto the priority waiting list.
- Requests to the public housing authority for urgent maintenance are ignored.
- 20 • Decisions on whether to allocate houses are made on the basis of race, termed the ‘sensitive allocations policy’ (an informal policy). It was reported that when the name of an Indigenous person came to the top of the waiting list, ‘discretion’ would be exercised, meaning that the person may not be allocated the next available property.

Evictions

Rental arrears and allegations of ‘antisocial behaviour’ result in numerous Indigenous families being evicted daily on a national scale. The number of terminations and bailiff evictions of Indigenous tenants are three times higher than those of non-Indigenous public housing tenants.¹³⁸ Such realities are worthy of grave concern, given that Indigenous tenants constitute only 18% of public housing tenants. Developments in relation to anti-social behaviour include:

- The WA Minister for Housing and Works recently distributed a media release stating that the Department will be “cracking down” on antisocial tenants.¹³⁹
- The NSW government is currently in the developmental stages of “Acceptable Behaviour Agreements”, targeting public housing tenants that are identified as being problematic or engaging in activities or behaviours that are considered to be “anti-social behaviour”. The onus of proof is to be reversed, thereby demanding that the accused tenant facing eviction must provide justification as to why their tenancy should continue.¹⁴⁰ Such demands clearly place Indigenous tenants in tremendously difficult positions due to the complexity of a vast range of social issues that affect them disproportionately.

Clearly the targets of any programs or initiatives that target the issue of anti-social behaviour bear consequences for a proportion of Indigenous tenants. The term ‘anti-social behaviour’ should be well defined by governments to avoid indirect discrimination, and provisions pertaining to culturally specific behaviours, celebrations, activities and communication styles should be stated explicitly.

¹³⁸ Department of Housing and Works 2003, *Inquiry into Provision of Public Housing to Aboriginal People in Western Australia*.

¹³⁹ Minister for Housing and Works 2004, *Media Statement: Minister says anti-social tenants should be shown the door*.

¹⁴⁰ Shelter New South Wales, “Media Release: Shelter opposes tenancy law changes” (2004).

Housing and health

The provision of adequate housing is critical to the health, well being and cultural life of all Indigenous Australians. The absence of good housing conditions significantly compromises a person's quality of life and life chances, including employment, education, family relationships and community participation.¹⁴¹

- 10 Public housing stock allocations offered to Indigenous tenants are frequently found to be in poor condition.¹⁴² Indigenous housing conditions are compromised as a result of ineffective government responses, at both a State and Commonwealth level, resulting in high mortality rates, general poor health, and high levels of mental illness.¹⁴³ Premature death is the critical consequence suffered by Indigenous communities due to these shortcomings.¹⁴⁴

Homelessness and use of public space

- 20 Indigenous people are persistently over-represented in homelessness statistics. Shelter WA's recent survey on homelessness indicates that more than a third of WA's homeless are Indigenous and one third of homeless people are aged fourteen years and under.¹⁴⁵ Although only 2% of the national population identifies as Indigenous, Indigenous people represent around 13% of Supported Accommodation Assistance Program (SAAP) clients.¹⁴⁶

- 30 One aspect of the high rates of Indigenous homelessness is the lack of recognition of the cultural differences regarding Indigenous use of open (and usually therefore 'public') spaces. Traditional connections to places and cultural practices of gathering in open spaces for meeting and family business, coupled with the cultural inappropriateness of private dwelling options, mean that a high proportion of people living or regularly occupying public places are Indigenous. A proportion of Indigenous people would not consider themselves homeless, but rather that their human rights to culture, freedom of expression and movement are violated by the lack of respect for and control over the spaces and places that they consider home.¹⁴⁷

The most common response to Indigenous occupancy of public places continues to be criminalisation and the various forms of 'move on' powers. These laws and regulations are used particularly against Indigenous people in urban areas.

¹⁴¹ Department of Human Services 2004, *Aboriginal Service Plan key indicators report 2003*, State of Victoria.

¹⁴² Tenants Advice Service 2003, *Journey to Justice: Submission to the Equal Opportunity Commission's Investigation into the Provision of Public Housing To Aboriginal and Torres Strait Islander People in Western Australia*. www.taswa.org

¹⁴³ RMIT University Research Team 2001, *Indigenous Homelessness: A discussion Paper on Indigenous Homelessness in Victoria*.

¹⁴⁴ Purdy, J. *A danse macabre – homelessness, godliness and the (unfractured) skeleton of the common law*. A paper presented at the 19th Annual Law and Society conference "Forms of Legal Identity. Victorian Law School, University of Victoria. www.taswa.org/links

¹⁴⁵ Pendergast, 2004. www.sheterwa.org.au.

¹⁴⁶ RMIT/Aboriginal Housing Board of Victoria, 2001. www.ahbv.org.au/homelessnessreport/welcome.htm

¹⁴⁷ See Public Interest Law Clearing House et al, 'Homelessness and Human Rights in Australia: Submission to the Supported Accommodation Assistance Program (SAAP IV) National Evaluation' (Public Interest Law Clearing House, 2003).

Recommendation:

- that the violations of the right to housing for Indigenous Australians be viewed in the context of continuing racism, denial of native title and land rights, and the lack of recognition of self-determination rights.

- that government policies to address Indigenous disadvantage in the area of housing be developed in a manner which goes beyond basic housing provision:

“An adequate response to Indigenous homelessness and inadequate housing should not just focus ‘material’ provision but extend to a broader agenda of social justice and human rights. Arguably, for people who have been subjected to dispossession, dislocation and discrimination, the introduction of culturally appropriate policies and practices, developed and implemented by the Indigenous community, is an important premise for policy.”¹⁴⁸

Housing for culturally and linguistically diverse people with disability

10 There are critical shortages in appropriate housing options for Indigenous people with disability and their families. Housing is often inaccessible and there is no effective access to home modification schemes. The Multicultural Disability Advocacy Association of NSW (MDAA) conducted research on the difficulties of people from a non-English speaking background with a disability getting equitable access to public housing in NSW.¹⁴⁹ The main conclusions were that people from a non-English speaking background with disability did not understand the housing system and that the NSW Department of Housing had little idea of how a person’s culture and disability may affect their housing needs.

Recommendation:

that the recommendations contained in the MDAA report be implemented to ensure equitable access to public housing for people from culturally and linguistically diverse backgrounds with disabilities.

Article 5 (e) (iv) The right to health, medical care, and social services

Indigenous health

20 The state of Indigenous people’s health in Australia is a serious breach of Article 5(e) (iv) of CERD. The President of Australians for Native Title and Reconciliation has described the health and well being of Indigenous Australians as “the biggest crisis facing Australia” today.¹⁵⁰ The seriousness of the situation is reflected in the statistics below, which compare the standard of health and well being of Indigenous people in Australia with non-Indigenous people, and with Indigenous people in similar developed countries. The statistics are alarming, particularly considering that many of the medical conditions are treatable or preventable.¹⁵¹

- 30
- *Death rates for Australian Indigenous people are 3 times higher than for non-Indigenous people.* Indigenous people are 8 times more likely to die from

¹⁴⁸ RMIT/Aboriginal Housing Board of Victoria, 2001.

<http://www.ahbv.org.au/homelessnessreport/report8.htm>.

¹⁴⁹ Multicultural Disability Advocacy Association of NSW 2003, *Hitting the Roof*. www.mdaa.org.au.

¹⁵⁰ Australians for Native Title and Reconciliation Media Release, *Use Budget Surplus to Fix Indigenous Health Crisis – Says ANTaR*, 10 September 2004.

¹⁵¹ Australian Bureau of Statistics, the Australian Institute of Health and Welfare, 2001, *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples*.

diabetes, 3 times more likely to die from circulatory disease and 4 times more likely to die from chronic kidney disease; they also have one of the highest rates of rheumatic heart disease in the world, and suffer double the incidence of infant death and low birth weight. (This indicates poor nutrition).

- Median age at death for Indigenous people is currently about 53 years, which is 25 years less than that for non-Indigenous Australians. This is considerably lower than the median age at death for Indigenous people in other Western countries.¹⁵²
- Indigenous males born in 1999-2001 could be expected to live to 56.3 years, almost 21 years less than the 77.0 years expected for all males. For Indigenous females, the life expectancy is 62.8 years, almost 20 years less than the expectation of 82.4 years for all Australian females.¹⁵³
- Australian Indigenous life expectancy is 8-15 years less than that of Indigenous populations in Canada, the USA and New Zealand.¹⁵⁴
- Indigenous people are admitted to hospital at twice the rate of non-Indigenous people.¹⁵⁵
- Many Indigenous communities lack basic services and facilities such as adequate water, electricity and sewerage services.¹⁵⁶

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The quality of life for Indigenous people has declined over the last ten years in contrast to overall improvements for the non-Indigenous communities. Low levels of health and high mortality rates directly impact upon the capacity of Indigenous people to effectively participate in school, obtain and retain employment and to achieve secure and adequate housing, and have a substantial impact upon their level of poverty.

30

Blatant racial discrimination under CERD Article 5(e) (iv) is evidenced by the inequity in funding allocated to improving the health situation of Indigenous people in Australia. It has been revealed that by 2000 there was a funding shortfall of \$245 million per year; that is an additional \$245 million per year is required to overcome the inequitable funding of Indigenous health and address the disparities in health standards.¹⁵⁷ These estimates have been updated and currently show that \$250 million per year must be urgently spent on primary health care for Indigenous people; with recommendations that a further \$50 million be allocated to screening, health promotion and education, in order to slow the epidemic of chronic disease.¹⁵⁸

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Access Economics conducted research into government Indigenous health policy in July 2004. Their report found that Indigenous health is currently under funded by at least \$452.5 million a year, \$400 million of which relates to primary health care alone.¹⁵⁹ The 2004/05 Budget allocated \$40 million over four years (or \$10 million per year) in additional spending on Indigenous primary health care, which represents just 2.5% of what is required.¹⁶⁰ Current expenditure by the Federal government on health

¹⁵² Australian Bureau of Statistics, the Australian Institute of Health and Welfare, 2001, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*.

¹⁵³ Australian Bureau of Statistics 2002, *Deaths Australia 2001*.

¹⁵⁴ Australian Medical Association 2002, *Public Report Card, Aboriginal and Torres Strait Islander Health: No more excuses*.

¹⁵⁵ Australian Medical Association, Public Report Card 2003, *Aboriginal and Torres Strait Islander Health – Time for Action*.

¹⁵⁶ Australian Bureau of Statistics, 2002, *Housing and infrastructure in Aboriginal and Torres Strait Islander communities*.

¹⁵⁷ Deeble J. 2000, *How Much is Needed? A Funding Formula for Aboriginal and Torres Strait Islander Health*, Australian Medical Association and the Australian Pharmaceutical Manufacturers Association.

¹⁵⁸ McMullan, J. September 2004, at the *National Forum: Indigenous Health and the Treaty Debate: Rights, Governance and Responsibility*, University of New South Wales.

¹⁵⁹ Access Economics 2004, *Indigenous Health Workforce Needs*.

<http://www.ama.com.au/web.nsf/doc/WEEN-63Q9J7>.

¹⁶⁰ Budget 2004/2005, Primary Health Care Access Program for Indigenous Australians.

is less per capita than for other Australians. This is striking, considering the fact that the health, life expectancy and living standards of Indigenous people are drastically lower than that of the rest of the Australian population.

10 An issue of major concern is the shortage of doctors and other health professionals working in the field of Indigenous health, a factor obviously leading to poor access to health services for Indigenous people. Progress has been much too slow in providing access to health services for Indigenous communities. It has been estimated that at least 500 extra doctors, which is an increase of 60%, is required in Indigenous health to ensure equitable access to medical services for Indigenous people. Furthermore, a 25% increase in nursing staff is required, as well as reasonable increases of staff in other health professions.¹⁶¹

The Australian Medical Association has urged the Federal Government to ensure access to appropriate primary health care, clean water, sanitation and appropriate housing,¹⁶² however not enough has been done to date by the Federal Government to address this issue of national importance.

Recommendation:

- that the government urgently allocate additional funding to Indigenous health in order to redress the serious health issues facing Indigenous communities.
- that additional government funding for primary health care, prevention and training of health care workers be provided in order to ensure that all Indigenous people can obtain access to medical services.
- Federal and State governments must implement policies and action plans, to ensure available and accessible health care for all Indigenous people in the shortest possible period of time.

20 Disability among culturally and linguistically diverse communities

There is a serious lack of early identification of disability, leading to a failure to provide early intervention medical and allied health services that could avoid or reduce the impact of disability for Indigenous and other culturally and linguistically diverse communities.¹⁶³ People from these communities are often not provided with explanations regarding prognosis of disability at the time of diagnosis. Furthermore, information is provided in a clinical manner, which does not take into account language or cultural needs. Prognosis information needs to include what life may look like in the future, early intervention strategies and services.

30 Recent consultations in NSW with Indigenous people with disability has identified case examples who have never received social security entitlements, nor been made aware of their entitlements and other services available to people with disability. Examples include people who have been blind throughout their life who have never received Disability Support Pension (or equivalent), and have never received information regarding these and other supports.

In evidence to a NSW Parliamentary Inquiry in May 2002 the NSW Department of Ageing, Disability and Home Care acknowledged only 3% of disability service users

¹⁶¹ Ring, I. and Brown, N. 2002, *Indigenous Health: chronically inadequate responses to damning statistics*. Medical Journal of Australia.

¹⁶² Australian Medical Association 2001, *Policy Discussion, Indigenous Health*, AMA National Conference 25-27 May 2001.

¹⁶³ People with Disability Australia's submission to this report.

were from a non-English speaking background.¹⁶⁴ This indicates that services for people with disabilities do not accommodate diverse cultural and linguistic needs. Also, it is generally accepted that there is a much higher incidence of disability among Indigenous communities for a range of social and environmental factors. Mental health services for Indigenous people are in particular crisis across Australia.

In particular there is:

- a critical lack of culturally specific services for Indigenous people and other culturally and linguistically diverse groups;
- 10 • low levels of cultural competence in mainstream disability services in working with people from culturally and linguistically diverse groups with disability;
- consequent very low utilisation rates of disability services by people from culturally and linguistically diverse backgrounds, and their families

Furthermore, the increasing use of ‘user pays’ arrangements for translation and interpreter services has also had a serious adverse impact. In the absence of adequate translation and interpreting services it is very difficult for people from minority groups to learn about services and supports that might be available to them, negotiate access to these services, and inform these services about their needs.

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Article 6 Legal remedy and compensation for racial discrimination

Inadequacies of current legislation

Article 6 of CERD casts an obligation upon Australia to ensure that everyone has effective protection and remedies in national tribunals and State institutions for an act of racial discrimination that is contrary to CERD. Australia argues that this obligation is being met as a result of the legislative standards found in the RDA, and in the function of HREOC and the Federal Courts in determining complaints. The passage of the RDA and the functions performed by HREOC and the Federal Court are significant and positive steps towards ensuring that CERD obligations are discharged. However, there is evidence that these steps alone are insufficient to ensure that everyone enjoys effective protection from acts of racial discrimination.

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The key inadequacies of the existing steps include the fact that the RDA has never reflected all of the CERD obligations. For example, the Act does not, as required by Article 4 CERD, provide that it is an offence to disseminate ideas based on racial superiority. Furthermore, the RDA is vulnerable to repeal. The RDA in the form in which it was originally passed, reflected the CERD definition of racial discrimination and a number (but not all) of the obligations found in CERD. However, a statutory provision will be repealed if a subsequent statute is expressly or impliedly inconsistent with the earlier provision. This has happened with the *Native Title Amendment Act 1998 (Cth)* which expressly provided that aspects of the amendments were to prevail over the RDA.

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Another shortcoming is the fact that judicial interpretation of the RDA can be at variance with CERD. The Federal Court and the High Court have not always interpreted the RDA in a manner that is consistent with CERD. For example, in *Hagan v. Australia*,¹⁶⁵ the Committee’s recommendation on CERD text was at variance with

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¹⁶⁴ NSW Department of Ageing, Disability and Home Care 2002, *Making It Happen, Final Report on Disability Services*, Standing Committee on Social Issues, NSW Legislative Council. www.parliament.nsw.gov.au.

¹⁶⁵ Communication No. 26/2002, 20 March 2003, CERD/C/62/D/26/2002.

Australian Federal Court's interpretation of identical text in the RDA. The result was that Mr Hagan did not have an effective domestic remedy. The High Court interpretation of section 10 of the RDA (which is intended to implement Article 2(1)(c) CERD), in *Western Australia v Ward*¹⁶⁶ has had the effect that native title holders are likely to be statute barred from claiming compensation for the acquisition of their property in circumstances where non-Indigenous property owners will have received compensation.

10 The final inadequacy lies in the lack of resources available to HREOC, as discussed elsewhere in this report. HREOC does not have sufficient funds for an office at any location except Sydney, thus significantly impairing the ability of HREOC to promote compliance with CERD and to investigate infringements of CERD.

Recommendation:

that the Australian government increase the resources available to the HREOC and institute a review of the effectiveness of the *Racial Discrimination Act 1975 (Cth)*.

Lack of action on the 'Stolen Generation'

20 No "reparation or satisfaction for any damage suffered as a result of such discrimination" under Article 6 of CERD has been afforded to Indigenous people forcibly separated from their families. In their previous concluding observations, the CERD Committee made the following statement:

"Concern is expressed that the Commonwealth Government does not support a formal national apology and that it considers inappropriate the provision of monetary compensation for those forcibly and unjustifiably separated from their families, on the grounds that such practices were sanctioned by law at the time and were intended to "assist the people whom they affected". The Committee recommends that the State party consider the need to address appropriately the extraordinary harm inflicted by these racially discriminatory practices."¹⁶⁷

30 It has been more than six years since HREOC published its report on the 'stolen generation'.¹⁶⁸ The government has not adequately or appropriately implemented the recommendations as outlined in the report, including providing a formal apology and that reparations be made to respond to and redress violations of human rights in accordance with the van Boven principles.

Recommendation:

that a Reparations Tribunal be established.¹⁶⁹

¹⁶⁶ [2002] HCA 28.

¹⁶⁷ CERD/C/304/Add.101, paragraph 13.

¹⁶⁸ HREOC 1997, *Bringing Them Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*.

¹⁶⁹ As recommended by the Public Interest Advocacy Service in 2001 <http://www.austlii.edu.au/au/other/IndigLRes/2000/1/index.html>.

Article 7 Promotion of understanding and friendship among ethnic groups

Reconciliation

In its previous concluding observations, the CERD Committee recommended:

10 "that the State party take appropriate measures to ensure that the reconciliation process is conducted on the basis of robust engagement and effective leadership, so as to lead to meaningful reconciliation, genuinely embraced by both the Indigenous population and the population at large."¹⁷⁰

The movement for reconciliation aims to promote understanding of the history of contact between Indigenous and non-Indigenous people and develop better relations for the future. At the end of its statutory term, the Council for Aboriginal Reconciliation (CAR) submitted its final report in December 2000.¹⁷¹ In that report, the product of one of the most extensive public consultation processes in Australia, it recommended comprehensive action to address the many areas of 'unfinished business' of reconciliation.

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The report emphasised that reconciliation means addressing both practical measures to redress Indigenous disadvantage as well as legal steps to recognise and protect Indigenous rights, including:

- The Commonwealth Parliament prepare legislation for a referendum which seeks to a draft new preamble to the Constitution recognising Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.
- Section 25 of the Constitution be removed and a new section introduced making it unlawful to adversely discriminate against any people on the grounds of race.
- 30 • All Commonwealth and State parliaments recognise that the land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties.
- Recommending draft legislation to sustain the reconciliation process, including "to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved".

The government formally responded to CAR's final report in 2002, rejecting outright the majority of CAR's recommendations, for example:

40 "The Government's position on a treaty is that such a legally enforceable instrument, as between sovereign states would be divisive, would undermine the concept of a single Australian nation, would create legal uncertainty and future disputation and would not best harness the positive environment that now exists in relation to reconciliation. In fact, such a process could threaten that environment."¹⁷²

Similarly the government has refused to apologise for past wrongs to Indigenous peoples. Since December 2000, the Commonwealth government has confined its commitment to what it terms 'practical reconciliation', which focuses on improvements

¹⁷⁰ CERD/C/304/Add.101, paragraph 12.

¹⁷¹ Council for Aboriginal Reconciliation 2000, *Reconciliation: Australia's Challenge*.
www.austlii.edu.au/au/other/IndigLRes/car/2000/16/.

¹⁷² Commonwealth Government 2002, *The Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge*.
[/www.atsia.gov.au/media/reports/2609_reconcil.pdf](http://www.atsia.gov.au/media/reports/2609_reconcil.pdf).

in Indigenous disadvantage across a range of socio-economic indicators. Recently, with the demise of independent Indigenous representation and service delivery under ATSIC, the Commonwealth has returned Indigenous policy and funding responsibilities to mainstream departments, significantly reducing Indigenous involvement and participation in decision-making affecting their lives.

10 The work of CAR is continued by Reconciliation Australia (RA), an independent, non-profit foundation established in December 2000. Despite a one-off allocation of \$15 million to RA from the Commonwealth government in 2004, it is now widely regarded that reconciliation is no longer on the national agenda in Australia and that Indigenous rights are dead issues.¹⁷³

Recommendation:

that the government act upon the findings of the Council for Aboriginal Reconciliation to improve the rights of Indigenous peoples on a national level, and bring about reconciliation.

¹⁷³ For example, The Age 24 November 2004, *Howard's Quiet Revolution*.
www.theage.com.au/articles/2004/11/23/1100972391552.html

Appendix 1

National Network of Indigenous Women Legal Services Inc. (NNIWLS) Shadow Report to the Committee on the Elimination of Racial Discrimination

Welfare payments

Convention on the Elimination Of Racial Discrimination Shadow Report Meeting: Proposal by the Minister for Indigenous Affairs Announcement on a new Centrelink Policy in relation to Welfare Payment to Remote Aboriginal Communities.

10 The National Network of Indigenous Women Legal Services Inc. (NNIWLS) received a copy of a proposal by the Minister for Indigenous Affairs, Amanda Vanstone, who announced a new Centrelink policy in relation to welfare payments to remote Aboriginal communities, under which parents will only be paid welfare if 1) their children attend school and 2) their children attend school clean – i.e. education is to be made conditional on parents accepting government imposed standards on the communities meeting these new standards without receiving assistance need to meet them. It is being sold as “working together”.

20 The NNIWLS is appalled that the Minister for Indigenous Affairs, Amanda Vanstone, could even contemplate imposing such a punitive and discriminatory policy on Indigenous communities then sell it as “working together”. Whilst we are not aware of all the details explaining how it is to be implemented, the information we have received has alerted us that the policy is in breach of numerous Conventions and Covenants ratified by the Australia Governments: they are 1) Convention to Eliminate Racial Discrimination (CERD) 2) Universal Declaration of Human Rights 3) Convention on the Rights of the Child (CROC) 4) International Covenant on Economic, Social and Cultural Rights (CESCR), as well as policy directions implemented and initiated by the Australian Government.

Strategic leadership for Australia – policy directions in a complex world.

30 In 2002, the Government set down a policy direction document called “*Strategic leadership for Australia – policy directions in a complex world*”. The document identifies the philosophical underpinning of the Government approach to all policy making as “self-reliance, equality of opportunity and equality of treatment for all Australians, pulling together and having a go.”¹⁷⁴

40 Whilst the document does not make a single reference towards Indigenous people, the NNIWLS calls upon the Government to inform the Minister of Indigenous Affairs to adhere to policy directions outlined by the Government. In targeting only remote Aboriginal communities for their welfare payments if their children do not attend school and they are not clean is not only blatantly discriminatory but undermines the Governments philosophical policy approach “equality of treatment for all Australians”.

The NNIWLS consistently consult with Indigenous communities in remote and urban communities from throughout Australia. The NNIWLS would be more than willing to assist the Minister for Indigenous Affairs in adopting best practice policies when dealing with Indigenous Australians.

Health issues and further disadvantaging the most socio-economical disadvantaged group.

50 As highlighted by ACOSS given the fact this policy would not only impact on the immediate family but extended families and communities, as it would place a further financial burden on those who assist.

¹⁷⁴ Dr. William Jonas, AM,

By not giving social security payments to parents could only have a further negative impact on Indigenous peoples health, it may mean that a child or parent goes without a medication, food, electricity, not to mention they may become homeless due to rent not being paid regularly. The Government legally owes Indigenous social security recipients a duty of care, as well as a legal obligation under the CROC and CESCR.

10 Due to parents' reasons for not sending a child to school, children should not be forced to suffer, as denying a social security payment will not only be punishing and depriving the parents but the children as well, this policy is punishing and depriving innocent victims. Denying Aboriginal parents from essential social security payments may see an increase in Aboriginal suicide as Aboriginal parents may find that this policy further outcast them in Australian society, therefore having a devastating affect upon the children.

20 The worst case scenario of this policy would be if a parent or child dies because the parent could not afford the medication. We may even see an increase in stillbirths or child mortality in isolated communities due to lack of medical attention or nourishment. Epidemics and diseases may become more prevalent in Indigenous communities due to a lack of nourishment or medication.

All these scenarios may become a reality due to parents not receiving social security payments. This policy could only be seen as having dangerous ramifications. We may even see an increase in removals, as parents or sole parents (mainly Indigenous women) may feel they have no alternative other than to hand their children over to the authorities as they are financially unable to cope. The Government has a legal obligation to financially assist parents under CROC and CESCR.

Equality for all

30 The NNIWLS is aware that farmers living in remote communities receive an allowance from the government to assist them provide their children with educational and living costs.

The NNIWLS want to know would the Government be extending the same assistance to Indigenous families living in remote and isolated communities?

Children's issues

Indigenous children as carers

40 The policy does not take into account children carers, whose parents suffer from a health disorder. As we know Aboriginal people have higher rates of ill health than any other group in Australia. The Australian Bureau of Statistics (ABS) estimates that there are between 418,800 and 476,900 indigenous people in Australia. Of all the States and Territories, Victoria has the lowest number of indigenous people, accounting for only 0.5 per cent of the population. Compared to Aboriginal people living in other parts of Australia, the Victorian Koori population reports the highest rates of recent illness (53.4%), chronic illness (46.3%) and cigarette smoking (57.1%). According to the Victorian Aboriginal Health Service, some of the main health issues confronting Koori people include smoking, diet, diseases (such as cardiovascular disease, diabetes and high blood pressure), stress, drugs, alcohol and poor children's health. It is not uncommon for many Indigenous young people to be caring for their ailing parents.

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Children's health issues

The infant mortality rate among indigenous people is three times higher than the national average, or 15.2 deaths per 1,000 births compared to five per 1,000. Other major health concerns include:

- Newborns are more likely to be underweight.

- Around nine out of 10 children aged five years and under are constantly exposed to cigarette smoke in the home.
- Middle ear infections are common, which contributes to hearing problems and can cause speech or schooling difficulties.

Health problems by age group

Indigenous people are nearly, twice as likely to be admitted to hospital than non-indigenous people. The main reasons for hospitalisation by age group for Koori people include:

- 10• **15 years and under** - diseases of the chest and throat, injuries from accidents, middle ear infections.
- **Adult men** - injuries from accidents, diseases of the heart and chest, substance abuse, diseases of the digestive system.
- **Adult women** - pregnancy and birth, diseases of the urinary and reproductive systems, injuries sustained in accidents.

Contagious diseases

Aboriginal people have much higher rates of infection for many contagious and potentially life threatening diseases, including:

- 20• Gonorrhoea
- *Haemophilus influenzae* type b (Hib)
- HIV/AIDS
- Meningitis
- Salmonellosis
- Syphilis
- Tuberculosis

Diet and nutrition

- 30 Traditional diets were rich in nutrients and low in fat. Modern urban diets tend to be high in fat and sugar, but low in nutrition. High fat, low fibre diets have been linked to a number of disorders including obesity, cardiovascular disease and diabetes.

Causes of death

Indigenous people have a shorter life expectancy - around 18 to 19 years less than non-indigenous people. The average life span is 57 years for an Aboriginal male and 62 years for an Aboriginal female. The most common causes of death include:

- **Circulatory diseases** - including heart disease and stroke. The number of deaths caused by conditions such as coronary heart disease is double that of the non-indigenous population.
- 40• **Diabetes** - and other diseases of the endocrine system. The rate of diabetes is six times higher among Indigenous people. It is estimated that diabetes affects between 10 to 30 per cent of the Aboriginal population.
- **Injuries** - sustained in accidents such as car crashes. An Indigenous person is three times more likely to die in an accident than a non-Indigenous person. The Aboriginal population also has high rates of suicide and homicide.
- **Respiratory system diseases** - deaths from chronic disease are three to five times more common. Around half of the diseases are caused by infections. Respiratory infections are 10 times more common in the Indigenous population.
- 50• **Cancer** - particularly lung, cervical and liver cancer. According to the South Australian Cancer Registry, the death rate among the Indigenous population is higher because the cancers are typically diagnosed at a later stage.

A punitive approach to a social problem

Evidence has shown that financially disadvantaging someone does not deter behaviour, research has proven that people who receive parking fines, will re-offend in the future, people who receive speeding fines, continue to speed. Governments benefit immeasurably from fines and in¹⁷⁵ many instances fines are a good way for Governments to raise revenue.

Social Security is a recognised right to all Australians in times when they need it, denying people their social security payments should never be confused with adopting best practices to encourage Indigenous parents to send their children to school.

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Government withholding social security may even see an increase in crime, the children may steal because they are hungry or the parents, realistically how many good, caring, and responsible parents will be able to allow their children to starve. We could mince words on the term “responsible”, the Government may argue that an Indigenous parent not sending their children to school is irresponsible, but what about the Governments responsibility of providing all Australians a social security payment?

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NNIWLS want to know will the Government provide a social security payment to the children if their parents are denied a social security payment, or will the Government allow the children to suffer as well?

Indigenous peoples’ cultural rights

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Whilst NNIWLS understands the benefit of an education, it is also aware many educational institutions have failed to accommodate the needs of Indigenous children. Governments should be consulting with Indigenous parents in order to find the reasons to why parents are not sending their children to school. Indigenous parents may not see the importance of an education in a remote community, due to lack of employment opportunities. Or Indigenous parents may see a bush education as the realistic alternative, as children are taught to hunt and therefore put food on the table, or to preserve their cultural identity.

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The Government should be looking to set up schools that promote these concepts. Research and evidence have alerted Government to the high drop out rate of Indigenous children attending mainstream educational institutions. Indigenous children tend to drop out of schools, as schools as an institution have been used to in various causes of pacification, christianisation, europeanisation, or to protect white interest, maintain segregation, and assist with racial integration¹⁷⁶. Whilst some schools have adopted good cultural practices and accommodated Indigenous means interests, the majority of schools still are within a “white” framework.

CESCR recognises the State Parties do have an obligation to provide and promote an education, but CESCR also recognises that the State Parties to also take steps to achieve cultural development as well an education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

Cleanliness policy

¹⁷⁵ Cited on website:

http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Aboriginal_health_issues.

¹⁷⁶ JJ Fletcher, “Clean, Clad and Courteous, A History of Aboriginal Education In New South Wales”, back cover, Southwood Press, 1989.

10 The NNWLS is concerned that this policy would have such a detrimental affect on Indigenous people living in remote communities as it would be further disadvantaging people who do not have access to clean water, are not in a financial position to afford to buy a washing machine, or perhaps not even in a position to afford to buy their children clothes. The cost of living in a remote isolated community is astronomical, paying for freight then GST. Then there are those people who travel to the larger towns that are roughly 2-4 hours drive away. This policy will only add a further burden to parents, who already send their children to school, even though their children may not be clean. Schools already teach personal hygiene in Physical Education and Health, and the NNWLS supports and promotes these subjects being taught in the schools.

NNIWLW want to know would the Government be willing to place shower blocks and washing machines in remote communities, to ensure that parents are not further disadvantaged through this policy?

20 Historical racist stereotypes of dirty, diseased Aborigines to persuade the decisions makers to exclude Aboriginal children from schools were unfounded. In the 1940s whenever the health of these Aboriginal pupils was actually tested by qualified examiners, those arguments for exclusion based on poor health and lack of cleanliness disintegrated: either the medical examination found them to be, no more worse than their white counterparts.¹⁷⁷

30 Regardless what the Government concerns are about health issues or personal appearance, the linguistic meaning for the word "education" is learning, promoting, training and guidance, the word cleanliness is not found in the meaning of the word education. The introduction of this policy is moving backwards as to receive an education should not be reliant upon ones appearance, but ones intellectual ability to learn.

In the situation of good teachers going to Third World countries teaching disadvantaged children, surely these teachers or Governments can not stipulate that the children must come to school clean. And given the fact that many Aboriginal people still live in Third World conditions, can our State Parties really stipulate such discriminatory policies?

40 What Indigenous people need is compassionate teachers who want to teach and further Indigenous peoples intellectual abilities not be obsessed with appearance. No schools should be promoting polices based on "teen flick" concepts that education is all about competing appearances. Young people already have enough to contend with in society where society and advertising make them feel like social outcasts and misfits, let alone Governments promoting these mindless concepts.

A mainstream education may not be the solution

50 In the late 1930s when the 'equal with white' policy¹⁷⁸ was implemented in New South Wales, to ensure that Indigenous children would assimilate in the school system, the policy makers expected that once Aboriginal pupils were educated with white children they would perform equally as well, making their assimilation much easier.

¹⁷⁷ JJ Fletcher, 'Clean, Clad and Courteous, A History of Aboriginal Education in New South Wales', p.8. Southwood Press Pty Ltd, 1989.

¹⁷⁸ Whilst reference is made to the New South Wales Education System, this policy or similar policies were implemented in other parts of Australia, with the same results.

It took nearly three decades after 1940 to achieve integrated schooling, by which time it was becoming clear that merely being educated in the same schools did not mean that Aboriginal pupils were achieving 'equal with white'".

This is one of the reasons why in more recent years there have been calls to introduce Aboriginal studies into schools in order to reduce racial prejudice and raise the respect for Aboriginal culture which is held probably in the lowest respect of all of the various cultural groups that make up Australia today.¹⁷⁹

- 10 In 1961 the Teachers Federation came to the realization that any improvements in Aboriginal education was inseparably linked with the provision of adequate housing and the improvement of employment opportunities.¹⁸⁰

20 Governments should not presume that a mainstream education is the only solution to many Indigenous people's problems. Many Indigenous people worked and still do work alongside non-Indigenous Australians in the mine fields, as stock hands, fruit pickers, shearers, farmers, jackaroos, etc. Many of these people did not and still today do not have a formal education and given the fact that many jobs in remote communities rely on unskilled labour. The reality is many jobs reliant upon unskilled labour are slowly diminishing due to the nature of technology.

Whilst the Government may be concerned that Indigenous people need an education to assist with employment opportunities, the reality for Indigenous people living in remote and isolated Indigenous communities is the Government's response to unemployment has seen the introduction of Community Development and Employment Program (CDEP). CDEP should never be confused as employment, as many Indigenous people view CDEP as ways of occupying their time, until they obtain employment.

- 30 Many benefits afforded to pay employees are not afforded to recipients on CDEP such as superannuation and increases in payment for identified skills. There are many highly skilled Indigenous recipients on CDEP who are unable to obtain employment.

Working together

40 From the issues raised by the NNIWLS, we are concerned that the Government is taking a punitive approach to a social problem and this policy approach will not see an overall increase in school attendance and cleanliness but create further social problems. As mentioned this policy not only has dangerous social ramifications and omits ignorant approaches of the past, it is blatantly discriminatory in that it is oppressive, punitive and essentially denies Indigenous Australians their basic human rights and fundamental freedoms.

Recommendation

The NNIWLS encourages the Minister for Indigenous Affairs to consult with NNIWLS, other Aboriginal organisations and individuals to find a solution. Let's work together, in obtaining equality for all Australians.

¹⁷⁹ JJ Fletcher "Clean, Clad and Courteous, A History of Aboriginal Education in New South Wales, p9, Southwood Press Pty Ltd, 1989.

¹⁸⁰ Ibid, p.273.