



Human Rights
Law Centre

A Sound Baseline for Human Rights in Australia

Submission to the
Attorney-General's Department on the consultation draft of the
Baseline Study

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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Acronyms

Australian Human Rights Commission	AHRC
Convention on the Elimination of All Forms of Discrimination against Women	CEDAW
Convention on the Protection of the Rights of all Migrant Workers and Members of their Families	CPRMW
Convention on the Rights of the Child	CRC
Disability Discrimination Act	DDA
Human Rights Committee	HRC
Human Rights Law Centre	HRLC
Office of the High Commissioner for Human Rights	OHCHR
International Convention on the Elimination of All Forms of Racial Discrimination	CERD
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	CESCR
Lesbian, Gay, Bisexual, Transgender, Intersex, Queer	LGBTIQ
Non-Government Organisation	NGO
Organisation for Economic Co-operation and Development	OECD
Public Interest Law Clearing House (Vic)	PILCH
Same Sex Attracted and Gender Questioning	SSAGQ
Sex Discrimination Act	SDA
Universal Periodic Review	UPR

1. Introduction

1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to provide this submission to the Commonwealth Attorney-General's Department on the Consultation Draft of the Baseline Study (the **Draft**).¹ The HRLC considers the National Human Rights Action Plan (**NAP**) as central to driving and sustaining practical action and improved policy development to improve the protection and promotion of human rights in Australia.
2. The HRLC has significant expertise and experience in both domestic and international human rights concerns. The primary mandate of the HRLC is to promote legal protection of human rights. The Centre has undertaken a range of NGO engagement activities in relation to a NAP, including raising awareness of the NAP process and facilitating discussion among the NGO sector through a series of workshops with NGOs across Australia and developing a dedicated website to facilitate education and information sharing among NGOs and the broader community.
3. This submission builds on a submission previously provided to the Attorney-General's Department, [*Making Rights Real: A National Human Rights Action Plan for Australia*](#) (**Making Rights Real**),² in response to the Background Paper entitled *A New National Human Rights Action Plan for Australia*, released by the Attorney-General on 16 December 2010 (the **Background Paper**). This submission does not seek to replicate the extensive recommendations made in *Making Rights Real* but rather seeks to provide detailed and constructive recommendations on the draft Baseline Study.
4. As a preliminary comment, this submission cannot and does not purport to identify and fill every gap and omission in the draft Baseline Study. The HRLC has provided detailed feedback on the areas in which it can draw on its expertise, namely: counter-terrorism, extra-territoriality, police use of force, international human rights obligations and refugees and asylum seekers. Where practicable, the HRLC has provided general comments and refers the Attorney-General's Department to more detailed submissions from other NGOs working with specific groups and affected communities and with expertise in relevant areas.
5. This submission sets out:
 - (a) general comments on the Draft;
 - (b) recommendations for amendments or additions in specific sections of the Draft;
 - (c) recommendations for additional sections or topics to be added to the Draft; and
 - (d) where appropriate, we have made suggestions as to additions or refinements to the lists of "issues a national action plan could consider" in the Draft, but otherwise refer

¹National Human Rights Action Plan, *Baseline Study: Consultation Draft* (June 2011).

²Human Rights Law Centre, *Making Rights Real: A National Human Rights Action Plan for Australia* (February 2011).

the Government to the more detailed suggestions as to substantive areas and actions that could be included in the National Action Plan set out in *Making Rights Real*.

2. General Comments

2.1 General comments on the draft Baseline Study

6. The HRLC commends the federal government on taking steps to implement a National Human Rights Framework with a draft Baseline Study. The Baseline Study provides a starting point for future action and a strong commitment to protecting and promoting human rights in Australia. In particular, the HRLC supports the open public consultation process for seeking feedback on the draft Baseline Study (the **Draft**) but notes that procedural aspects of the development of the Draft have not been aligned with the recommendations made in *Making Rights Real*. These recommendations were based on international best practice and reflected the guidance set out in the *Handbook on National Human Rights Plans of Action* (the **UN Handbook**).³ Such recommendations included, for example, expanding the membership of the steering committee to include a broad range of actors including non-government members (see section 4.1 of *Making Rights Real*).
7. The HRLC also commends the Australian government's commitment to include the accepted recommendations from the Universal Periodic Review (**UPR**) process in the NAP. This is a promising step towards incorporating the international community's human rights concerns into domestic legislation and policy for the benefit of all Australians.
8. However, the HRLC is concerned that the Draft could be a more comprehensive and robust assessment of Australia's human rights from which future progress can be measured over time. The HRLC hopes that the final version of the Baseline Study will account for the breadth of available evidence from the international community and within Australia.
9. The Draft highlights numerous positive examples of initiatives and developments in particular States and Territories. However, the Draft fails to identify the problems, deficiencies or "gaps" in other States and Territories. The purpose of a Baseline Study is to provide a comprehensive picture of the situation of human rights in Australia. Without referring to the gaps in all of Australia, the Baseline Study runs the risk of ignoring critical human rights concerns.

³Office of the High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action*, UN Doc. HR/P/PT/10 (29 August 2002) (**UN Handbook**).

General recommendations:

The HRLC has six general recommendations concerning the Draft as a whole:

- (a) critical areas affecting human rights should be discussed in greater detail;
- (b) all key sources of prior authoritative research and data should be incorporated;
- (c) all international recommendations from treaty bodies, reports of Special Procedures of the UN Human Rights Council and the UPR process should be referenced;
- (d) gaps and deficiencies in current data collection, including methodology and scope, should be identified with greater specificity (discussed further below);
- (e) monitoring, evaluation and accountability mechanisms should be incorporated, including a set of human rights indicators (discussed further below); and
- (f) where relevant, discussion of actions to promote and protect human rights should include details of how they are sustainable (eg through funding and infrastructure).

2.2 Intersectionality and structure

10. During the workshops conducted by the HRLC, a number of recommendations were raised by NGOs about the general approach of the Draft. A recurring concern was the lack of discussion about “intersectionality”; that the Draft fails to recognise how the various factors affecting human rights can overlap and intersect. The HRLC suggests that it would be beneficial to include a separate introductory section addressing the issue of “intersectionality”. This section would also outline how the Baseline Study intends to assess and monitor the status of human rights over time with due consideration to these complexities.
11. Many of the workshop participants also criticised the structure of the document, preferring the approach adopted by the New Zealand Baseline Study,⁴ which structures the report around particular rights rather than population groups. This approach allows key economic, social and cultural rights to be fully canvassed and recognised as serious to the everyday lived experiences of disadvantaged groups. The HRLC recommends that whatever approach taken by Government, an exhaustive list of human rights should be dealt with in the Draft.

Recommendation:

The Baseline Study should incorporate more complex understandings of intersectionality where different sections overlap.

⁴Human Rights Commission, *Human Rights in New Zealand Nga Tika Tangata O Aotearoa* (2010) <http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/Human_Rights_Review_2010_Full.pdf>.

2.3 Indicators and data

12. The Draft does not include any reference to indicators and primarily focuses on “inputs” rather than specific outcomes that are required in order to achieve compliance with human rights obligations. The Government may be planning to address these issues over the coming months.
13. As the UN Handbook confirms, a Baseline Study should act as a source of information and operate as a vehicle for developing indicators to assess future action. The HRLC has made a number of recommendations in *Making Rights Real* in relation to indicators and data. As *Making Rights Real* sets out, the Baseline Study should develop a clear and comprehensive list of indicators, identify gaps in data and establish a system for collecting the necessary data, to measure and assess the change in human rights over time. A number of participants from workshops conducted by the HRLC expressed further concern over the lack of detail in the Draft about indicators and data, and about the selective use of examples and data. Data collected by the Australian Institute of Health & Welfare was identified as a key source that should be utilised in the Draft and eventual NAP.
14. The HRLC continues to recommend that Government develop a list of indicators. These indicators should set out:
 - (a) the structures that are already in place, or should be put in place, to protect rights, such as laws and policies;
 - (b) process indicators, such as the extent to which people actually use laws or agreements already available to defend their human rights; and
 - (c) outcome indicators that show the impact of laws or policies or gaps in laws and policies, such as the numbers of people whose human rights are either being respected or denied (rather than input based measures which discuss what actions have been taken, irrespective of their effect).⁵
15. In relation to data, the final Baseline Study should identify the gaps in relevant data and take steps to collect and publish missing data. It should involve :
 - (a) effective use of existing data collected by NGOs and other bodies;
 - (b) identification of key gaps and where data sets should be gathered; and
 - (c) development of disaggregated data sets based on race, sex, disability, age, CALD background, sexual orientation, sex and/or gender identity or expression, socio-economic status and other factors.

⁵See, eg, structural, process and outcome indicators as explored by the UN Handbook, available at: <http://www2.ohchr.org/english/issues/indicators/docs/HRI.MC.2008.3_en.pdf>.

16. However, the Baseline Study and National Action Plan should also acknowledge that importance of social issues should not be diminished because data is unquantifiable in a particular area of concern.⁶

Recommendation:

The Baseline Study should:

- (a) recognise gaps in data collection and implementation to ensure Government policy is properly evidence-based; and
- (b) include indicators, as set out in the UN Handbook and recommended in *Making Rights Real*, to ensure the National Action Plan is accurately measured against the Baseline Study over time.

2.4 International Human Rights Mechanisms

12. The Australian Government committed to incorporating all of the accepted recommendations from the UPR process into the NAP.
13. The HRLC suggests that the issues raised in all UPR recommendations should be reflected in the Baseline Study under the relevant thematic areas, including noting key recommendations rejected by the Australian Government. The voluntary commitments made by Australia throughout the UPR process should also be reflected in the Baseline Study and NAP.
14. The Draft refers to most of the UPR recommendations which Australia accepted or accepted-in-part. However, references to the UPR recommendations throughout the Draft are often cursory or partial. For example, section 1.5.2 of the draft Baseline Study discusses funding for the human rights education and training aspects of the Australian Human Rights Commission, but not for its other functions. As such, it is not immediately apparent whether: (a) any existing human rights mechanisms will rectify them; or (b) any human rights policies will be implemented in the future to address them.
15. The Draft does not include reference to the recommendations that Australia accepted to:
- (a) adopt a rights-based approach to climate change policy;⁷
 - (b) adopt legislation to ensure no one is extradited to a State where they would be in danger of the death penalty;⁸
 - (c) increase the use of non-custodial measures;⁹

⁶Rosga & Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27(2) *Berkeley Journal of International Law*, 253.

⁷Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, UN Doc A/HRC/17/10 (24 March 2011) (UPR) recommendation 31.

⁸*Ibid*, recommendation 34.

⁹*Ibid*, recommendation 94.

- (d) take regular measures to prevent hate speech, including prompt legal action against those who incite discrimination or violence motivated by racial, ethnic or religious reasons;¹⁰
 - (e) remove restrictions on the right to strike as recommended by the CDESCR Committee;¹¹
 - (f) institute a formal reconciliation process with Aboriginal and Torres Strait Islander peoples;¹²
 - (g) include recognition and adequate protection of the culture, values and spiritual and religious practices of Aboriginal and Torres Strait Islander peoples into Australia's national norms;¹³ and
 - (h) investigate allegations of torture in the context of counter-terrorism measures, give publicity to the findings, bring perpetrators to justice and provide reparation to the victims.¹⁴
16. A number of UPR recommendations accepted by the Australian Government are broadly addressed but not explicitly referred to in the draft Baseline Study. These recommendations urge Australia to:
- (a) ratify the Convention for the Protection of All Persons from Enforced Disappearance;¹⁵
 - (b) ratify ILO Convention No. 169;¹⁶
 - (c) step up human rights education in universities to promote equality, non-discrimination, inclusion and tolerance;¹⁷
 - (d) encourage multiculturalism including in relation to cyber racism, Australian Arabs and Muslims and foreign students;¹⁸
 - (e) improve the human rights training of law enforcement personnel;¹⁹ and to
 - (f) support Official Development Assistance in the context of the international financial crisis and bring it to the internationally agreed target of 0.7 per cent of Australia's GDP.²⁰
17. In addition, the following recommendations rejected by the Australian Government and not present in the Draft should be explicitly recognised in the Baseline Study as gaps in the protection and realisation of human rights:

¹⁰Ibid, recommendation 98.

¹¹Ibid, recommendation 100.

¹²Ibid recommendation 103.

¹³Ibid, recommendation 108.

¹⁴Ibid, recommendation 136.

¹⁵Ibid, recommendations 6-9.

¹⁶Ibid, recommendations 11-12.

¹⁷Ibid, recommendations 57-58.

¹⁸Ibid, recommendations 59-65.

¹⁹Ibid, recommendation 96.

²⁰Ibid, recommendation 135.

- (a) adopt a comprehensive Human Rights Act;²¹
- (b) ratify the International Convention on the Rights of Migrant Workers;²²
- (c) prohibit corporal punishment within the family;²³
- (d) recognise same-sex marriage including overseas marriages;²⁴
- (e) establish a National Compensation Tribunal to provide compensation to Aboriginal and Torres Strait Islander people negatively affected by the assimilation policy, particularly concerning children unfairly removed from their families;²⁵
- (f) revise punitive provisions of the Migration Act;²⁶
- (g) do not detain migrants other than in exceptional cases, limit detention to six months and bring detention conditions into line with international human rights standards;²⁷ and
- (h) ensure all irregular migrants have equal access to and protection under Australian law.²⁸

18. Given the nature of the UPR process, the scope and content of human rights issues raised are not comprehensive. In developing the Draft, the Government has rightly looked further to other sources of evidence and recommendations on human rights issues within Australia.

Recommendation:

The Baseline Study should account for all of the recommendations made throughout the UPR process, including recommendations “already reflected” or “rejected” in Australia’s response.

2.5 Issues that a National Action Plan could address

19. The Draft sets out a number of “Issues that a National Action Plan could address”. However, in many cases the Draft falls short of sufficiently articulating the priority issue requiring action or rectification. Instead, these issues are phrased as potential actions from which an underlying issue may be implied.
20. To the extent that the Baseline Study sets out issues that the National Action Plan could address, these sections should:
- (a) clearly articulate the issue or problem in question; and
 - (b) where appropriate, identify where additional research or data is required.

²¹Ibid, recommendation 22.

²²Ibid, recommendations 9-10.

²³Ibid, recommendation 75.

²⁴Ibid, recommendation 70.

²⁵Ibid, recommendation 97.

²⁶Ibid, recommendation 126.

²⁷Ibid, recommendation 132.

²⁸Ibid, recommendation 133.

21. Where actions are proposed in these areas, they often do not fulfill the expectations or requirements for action points as set out in the UN Handbook. The actions should be developed to include specific time frames and targets to drive and measure progress over time.
22. In terms of additional issues that should be included in these sections, the HRLC refers to the suggestions and recommendations contained in *Making Rights Real* for areas and potential actions that a NAP should incorporate.

Recommendation:

The “Issues a National Action Plan Could Address” sections of the Baseline Study should clearly articulate the issues in question. To the extent that actions are proposed, these should be structured as action points following the guidelines set out in the UN Handbook.

3. Chapter One: Institutional and legislative protection and promotion of human rights

3.1 Australia’s international human rights obligations

Inclusion of unratified international human rights treaties

23. Section 1.1.1 should also include the human rights treaties and optional protocols which Australia has not ratified. As a minimum, the Baseline Study should include the international human rights treaties referred to in recommendations during the UPR process. By explicitly referring to these recommendations, the Australian Government can indicate that it is serious about its role in developing human rights internationally and setting a transparent standard for measuring future improvements to human rights in Australia. The HRLC supports the UN OHCHR submission in urging the Australian Government to prioritise the ratification of the Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights* (CESCR) to bolster Australia’s international standards and confirm its commitment to the Millennium Development Goals.
24. Australia has yet to ratify the following international human rights treaties, despite recommendations from the international community:
 - (a) the Convention for the Protection of All Persons from Enforced Disappearance (CED);²⁹
 - (b) the International Convention on the Protection of the Rights of All Migrant Workers and their Families (CPRMW);³⁰

²⁹See Human Rights Council, UPR, above n 6, recommendations 6 to 9; *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, 46th sess, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010) recommendation 49.

- (c) the ILO Convention No 169,³¹
- (d) the ILO Convention No 102,³²
- (e) the ILO Convention No 103,³³
- (f) the ILO Convention No 183,³⁴ and
- (g) the Optional Protocol to CESCR.

Where the Australian Government is unwilling to implement treaty body recommendations in full, the Baseline Study should nonetheless acknowledge this. In line with good governance practice, the Australian Government should list the reasons for partial implementation or rejection of human rights obligations. These reasons should be made available to the public for community debate in line with key democratic principles of transparency and accountability.

Acknowledgement of declarations and reservations

25. Chapter One briefly canvasses Australia's declarations and reservations under ratified treaties, stating that the Government keeps these "under review". Some reservations, such as the reservation to article 37(c) of the Convention on the Rights of the Child, are included in the Draft.³⁵ However, not all declarations and reservations are referred to in the Draft. The HRLC urges the Australian Government to provide greater detail in the Baseline Study about the effect of these declarations and reservations on human rights in Australia.

Systematic consideration of treaty body views and recommendations

26. Section 1.1.2 states that the views of UN human rights treaty bodies should be "considered in good faith" and "given significant weight" in interpreting Australia's obligations. A number of UN treaty bodies have commented on Australia's failure to consider treaty body views and recommendations, or to incorporate international human rights obligations into domestic law.³⁶ However, section 1.1.2 does not refer to any systems or mechanisms, or acknowledge a lack thereof, to ensure the systematic review, consideration or implementation of treaty body recommendations into domestic law.

³⁰See Human Rights Council, UPR, above n 6, recommendations 9 to 10; *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, 46th sess, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010) recommendation 49.

³¹See Human Rights Council, UPR, above n 6, recommendations 11 to 12; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) recommendation 15.

³²*Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) recommendations 20 to 21.

³³Ibid.

³⁴Ibid.

³⁵See Draft, above n 1, section 3.3.3.

³⁶See, eg, *ibid* [8]; *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [1]; *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, 46th sess, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010) [25].

Australia's contribution to the international human rights system

27. Section 1.1.2 does not refer to any of the gaps in the international human rights system which Australia could improve. If Australia is truly committed to developing human rights and engaging in the UN system, the Draft should refer to areas where Australia can assist and show leadership in the development of the international human rights system. It is only through advocating for stronger international human rights standards that Australia can promote global adherence and protect people all over the world (including Australians abroad).

Recommendation:

The Baseline Study should:

- (a) refer to the international human rights treaties which have not been ratified despite pressure from the international community, including reasons for being unwilling to ratify these;
- (b) set out the declarations and reservations to international human rights treaties and a timeline for ratifying them in line with Baseline Study indicators;
- (c) set out how the Australian Government assesses treaty body views and recommendations, including any institutional accountability mechanisms for situations in which these views and recommendations are not considered; and
- (d) include steps that Australia could take to strengthen the international human rights system's effectiveness.

3.2 Australia's constitutional system

28. The HRLC commends the Australian Government on considering a constitutional amendment to remove racially discriminatory provisions and recognise the Aboriginal and Torres Strait Islander peoples as the original inhabitants of the land.
29. The HRLC suggests that the Australian Government conduct an inquiry into constitutional amendments enshrining substantive human rights in the Constitution, particularly the right to equality. To ensure this is effective, additional data is needed. The Baseline Study should recognise the potential problems of the Constitution not enshrining substantive rights, leading to key human rights being overridden through legislation. As a minimum, the Baseline Study should set out steps towards enshrining core, non-derogable human rights into the Australian Constitution.

Recommendation:

The Baseline Study should set out processes for assessing the need for, and conducting inquiries into, constitutional amendments to enshrine substantive rights.

3.3 Australia's democratic institutions

Adequate and effective consultation

30. The Baseline Study does not guarantee consultation with relevant stakeholders in the legislative development of human rights, including the anti-discrimination law consolidation process. The role and method of democratic institutions engaging individuals and groups affected by discrimination should be stated in section 1.3.
31. The Baseline Study should refer to the need for sufficient opportunities for adequate and effective participation from particular groups, including Aboriginal and Torres Strait Islander peoples and people with disability. There is more detailed discussion of the need for particular steps to ensure adequate participation in consultation for these groups in the relevant sections below. In addition, the Baseline Study should set out the methodology for engaging in meaningful and ongoing consultation, by working with communities and organisations, funding NGOs and supporting sustainable human rights programs.

Joint Parliamentary Committee on Human Rights

32. In section 1.3, the Draft highlights the role of parliamentary committees in scrutinising proposed laws for their effect on human rights. The Baseline Study should reflect and respond to the question from the Committee against Torture as to whether the Joint Parliamentary Committee on Human Rights will be granted investigative powers and the mandate to follow up on UN treaty body views and recommendations.³⁷

Australian Human Rights Commission

33. Section 1.3 does not consider UN treaty body recommendations to strengthen the mandate of the Australian Human Rights Commission (AHRC), to make it more effective.³⁸ The Baseline Study should recognise that the AHRC currently does not have the power to make enforceable determinations. Further, there should be an acknowledgment that there is no requirement that the Australian Government implement or even respond to the AHRC's recommendations.
34. In section 1.5.2, the Draft states that funding has been set aside for the AHRC's education and training functions, but does not refer to funding for the AHRC's other functions despite recommendations of the CAT and CESCR Committees.³⁹ If the AHRC does not receive

³⁷ Committee against Torture, *List of Issues Prior to Submission of 5th Periodic Report: Australia*, 45th sess, UN Doc CAT/C/AUS/Q/5 (15 February 2011) recommendation 2.

³⁸ *Concluding Observations of the Committee against Torture*, Australia, 40th sess, UN Doc CRC/C/AUS/CO/3 (22 May 2008); *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009).

³⁹ *Ibid.*

sufficient funding, there is a risk that it will not be able to properly conduct its functions and activities.

Funding for non-government organisations

35. Section 1.3 acknowledges the central role of the Not For Profit Sector in assisting the most vulnerable, disadvantaged and marginalised members of Australian society. However, the Draft does not acknowledge the need for NGOs to be adequately funded for human rights advocacy and policy work. Nor does the Draft discuss the extent to which the regulatory framework (including tax and charity laws) enables or inhibits human rights advocacy by NGOs.

Recommendations:

The Baseline Study should:

- (a) include clear frameworks for conducting consultation with stakeholders in protecting human rights, particularly for the consideration of anti-discrimination legislation;
- (b) identify the powers of the Joint Parliamentary Committee on Human Rights, particularly in relation to considering Australia's international human rights obligations;
- (c) recognise the need for the AHRC to be funded sustainability in order to fulfill its mandate; and
- (d) acknowledge the critical role of NGOs in protecting and promoting human rights and the effect of limited funding and arbitrary laws on supporting a sustainable Not For Profit sector.

3.4 Legal protections

Unavailability of remedies for human rights violations

36. Section 1.4 does not refer to the availability of remedies for human rights violations. Most rights contained in key ratified international treaties such as the *ICCPR and CESC*R are not directly justiciable or enforceable in Australian courts or tribunals. Even where a human right is found to be violated by the AHRC, this may not lead to a clear remedy for individuals affected. Similarly, a declaration of inconsistency under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) or the *Human Rights Act 2004* (ACT) is not binding on the Victorian or ACT governments. The CESC

comprehensive legislation to give effect to all economic, social and cultural rights with effective judicial remedies.⁴⁰ This should be reflected in the Baseline Study.

Acknowledgement of the Human Rights Act

37. Section 1.4 does not reference the National Human Rights Consultation conducted into the need for a comprehensive judicially enforceable Human Rights Act and the recommendation made to enact such an instrument in Australia. The ICCPR Committee recommended that Australia adopt a Human Rights Act or similar legislation.⁴¹ Although the Australian Government's current position is that it will not be implementing a Human Rights Act, as reflected in UPR process, the Baseline Study should nonetheless refer to the recommendations made in the National Human Rights Consultation Report and set out the reasons for refusal.

Recommendations:

The Baseline Study should:

- (a) explicitly refer to the availability of remedies for human rights violations for individuals and to promote systemic change; and
- (b) refer to treaty body recommendations and National Human Rights Consultation findings and recommendations for a comprehensive judicially enforceable Human Rights Act and explain the reasons why such a proposal was rejected by the Government.

3.5 Australia's Human Rights Framework

Consolidation of anti-discrimination legislation in line with international human rights obligations

38. Section 1.5.3 discusses Australia's commitment to reduce regulatory overlap and to make the anti-discrimination system more user-friendly. In addition, the Baseline Study should state the goal of enhancing these laws to more effectively promote substantive equality or discuss the relationship between the Consolidation Project and the promotion of substantive equality. It should include a description of how the anti-discrimination process will better align Australian law with key international human rights instruments. For example, section 1.5.3 states that the consolidation process will include protections from discrimination on the basis of sexual

⁴⁰ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) recommendation 11.

⁴¹ *Concluding Observations of the Human Rights Committee: Australia*, 95th sess, UN Doc C/PR/C/AUS/CO/5 (7 May 2010) recommendation 8.

orientation and sex and/or gender identity and expression. However, it does not reference or commit to ensuring anti-discrimination legislation is drafted in accordance with the Yogyakarta Principles.

Hate speech and cyber racism

39. The Draft does not include any reference to hate speech (particularly where motivated by racial, ethnic or religious reasons) despite it being a key human rights concern raised during the UPR process.⁴² Racially motivated hate speech can have an insidious impact on ingraining racism and discrimination, and is a key concern of the community.⁴³
40. Nor does the Draft refer to the problems of cyber racism, despite Australia accepting a recommendation concerning cyber racism during the UPR process.⁴⁴ The Australian Human Rights Commission receives a number of complaints about racial hatred on the internet each year, and recognises that the number of internet and social-networking sites devoted to “racism, hate and militancy” has increased.⁴⁵ The UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance similarly acknowledged that internet usage “for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance” can affect the enjoyment of human rights.⁴⁶

Human rights education

41. Section 1.5.2 discusses human rights training in primary and secondary schools and in the public sector, and sets out funding for NGOs and the Australian Human Rights Commission. However, the Draft does not specifically refer to the need to improve human rights training and education in universities and for law enforcement personnel, despite the Australian Government accepting recommendations to this effect during the UPR process.⁴⁷

⁴²Ibid, recommendation 98.

⁴³See, eg, Australian Human Rights Commission seminar series, *Words that Wound: Freedom of Speech and Race Hate Speech in Australia* (18 November 2008) <http://www.humanrights.gov.au/human_rights/UDHR/seminars/freedom_of_speech.html>.

⁴⁴Ibid, recommendation 65.

⁴⁵Australian Human Rights Commission website, 2. *How Prevalent is Cyber Racism?* <http://www.hreoc.gov.au/racial_discrimination/publications/cyberracism_factsheet.html#s2>.

⁴⁶Ibid fn 4.

⁴⁷See Human Rights Council, UPR, above n 6, recommendations 57, 58 and 96.

Recommendations:

The Baseline Study should:

- (a) incorporate a discussion of substantive equality and the Yogyakarta Principles when referring to Consolidation Project;
- (b) discuss human rights concerns surrounding hate speech and cyber racism; and
- (c) refer to human rights education at the tertiary level and human rights training tailored for law enforcement personnel.

4. Chapter Two: Human rights concerns relating to access to justice, governmental accountability and extra-territoriality

4.1 Access to justice

42. In *Making Rights Real* access to justice issues were raised particularly in the context of Aboriginal peoples and culturally and linguistically diverse communities. *Making Rights Real* noted the marked decrease in real funding to Aboriginal and Torres Strait Islander legal services and the Legal Aid for Indigenous Australians program.⁴⁸
43. The Draft acknowledges these issues but it states that “the Government’s focus is to move beyond courts being the primary means by which people resolve their disputes,” and to encourage “early and low cost resolution of disputes wherever appropriate.”⁴⁹ Chapter Two’s suggested inclusion in the National Action Plan in relation to access to justice is to “Examine options to improve access to justice, including measures to promote early intervention or resolution of issues to avoid escalation or additional problems.” The Draft should clearly acknowledge the funding shortages for legal aid programs and that the issue of unmet legal. Whilst alternative dispute resolution techniques are an important element of reducing the costs of the legal system, they should not be characterised as the solution to the underfunding of Legal Aid and unmet legal need generally.
44. The Draft should also reference the various recommendations to improve funding of Legal Aid services from relevant domestic NGOs,⁵⁰ the National Human Rights Consultation Report,⁵¹

⁴⁸*Making Rights Real*, above n 2 [116]. See also the 2008 ANAO Report on the Legal Aid for Indigenous Australians Program, which found that “...based on stakeholder feedback there continue to be major constraints on fully effective program performance relating to program funding limits which restrict the capacity of Providers always to provide high-quality services, particularly in regional and remote areas.” [16]

⁴⁹See Draft, above n 1, s 2.1.2.

⁵⁰NGO Submission to the UN Committee on the Elimination of Racial Discrimination, *Freedom, Respect, Equality, Dignity: Action* (2010) [40] & [182-187]

⁵¹Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 203.

the Senate Legal and Constitutional Affairs Committee,⁵² CERD,⁵³ and most recently the Human Rights Council in the context of the UPR.

45. The Attorney-General's own Access to Justice Taskforce has specifically called for improvement in access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians and more support for Legal Aid centres.⁵⁴ The HRLC also wishes to draw the Government's attention to one of the Taskforce's other recommendations in particular – that the Government work with universities to provide opportunities for undergraduate law students to do clinical placements and pro bono work in community and Indigenous legal centres.⁵⁵ This and other initiatives aimed at encouraging legal professionals to participate in pro bono work should be included in the National Action Plan.

Barriers facing people with a disability

46. The Draft does not explicitly refer to the barriers facing people with disability from accessing the justice system. In Victoria, although administrators are empowered under section 58(B)(2)(1) of the *Guardianship and Administration Act 1986* (Vic) to pursue legitimate causes of action on behalf of their clients, guardians are not similarly empowered, and many administrators will be unable to for fear of having an adverse costs order made against them where costs are not recoverable from the estate of the person they represent.⁵⁶ This limits the rights of people with disability – including the increasing number of older Victorians with disability. The existing litigation guardianship scheme in Victoria not only prevents people with disability from commencing proceedings to vindicate their rights but may also prevent defendants from bringing cases against people with disability.

⁵²Senate Legal and Constitutional Affairs Committee, *Access to Justice Inquiry Report* (2009) recommendations 3, 6, 9, 13, 18, 22, 23, 25, 27 and 28.

⁵³See *Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 77th sess, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) [19].

⁵⁴See: *Attorney-General's Strategic Framework for Access to Justice in the Federal Justice System*, recommendations 11.4 & 11.5.

⁵⁵*Ibid*, Recommendation 12.2.

⁵⁶ See Seniors Rights Victoria, *Submission to the Victorian Law Reform Commission Regarding Guardianship Consultation Paper 10* (3 June 2011) 20-22

<<http://www.pilch.org.au/Assets/Files/SRV%20Submission%20to%20the%20VLCRC%20regarding%20Guardianship%20Consultation%20Paper.pdf>>.

Recommendation:

The Baseline Study should:

- (a) identify the extensive evidence and recommendations which raise the issue of unmet legal need in Australia and the need to strengthen Legal Aid and other legal assistance services;
- (b) consider incorporating initiatives to encourage more pro bono work, including initiatives aimed at undergraduate law students, into “Issues a National Action Plan could consider”; and
- (c) recognise the specific barriers faced by people with a disability in the area due to rules around litigation guardians.

4.2 Counter-terrorism measures

Complicity in torture or ill-treatment

47. The Draft fails to acknowledge evidence of Australian knowledge of or complicity in the use of torture or ill-treatment as a method of interrogation in terrorism investigations, including at Guantanamo Bay, Afghanistan and in Abu Ghraib.⁵⁷ The Draft should identify the criticism that failure to institute effective accountability and redress mechanisms allows Australian officials to operate in a ‘culture of impunity’.⁵⁸ This diminishes the effectiveness of prohibitions on the use of torture or cruel, inhuman or other degrading treatment - which are often cited by the government as a safeguard on ASIO’s expanded powers post-9/11.⁵⁹
48. The *Australian Security Intelligence Organisation Act 1979 (ASIO Act)* requires a detainee to be treated with humanity and respect for human dignity. However, the *ASIO Act* provides no penalty for contravention. The government notes that the use of torture is a criminal offence,⁶⁰ however these provisions do not cover conduct which may not amount to torture but could be considered cruel, inhuman or degrading.
49. The Baseline study should acknowledge the lack of accountability, monitoring and redress for ill treatment. In particular, the Baseline Study should recognise that currently victims of over-zealous counter-terrorist measures do not have access to appropriate remedies. Further, there are currently very limited means to initiate prosecution of the responsible individuals. In addition, there are no safeguards preventing the use of evidence obtained under torture or

⁵⁷ See *Making Rights Real*, above n 2, 48-49, [126]-[128].

⁵⁸ *Ibid* 200.

⁵⁹ Amnesty site (2009) <<http://www.amnesty.org.au/hrs/comments/20599/>>; Draft, above n 1, 11, fn 31.

⁶⁰ Committee against Torture, *List of Issues Prior to Submission of 5th Periodic Report: Australia*, 45th sess, UN Doc CAT/C/AUS/Q/5 (15 February 2011) 1. See also *Crimes (Torture) Act 1988* (Cth) and *Criminal Code Act 1995* (Cth) ss 268.13, 268.25, 268.73 and Div 274.

other prohibited conduct from being used in other contexts outside proving the commission of torture, cruel, inhuman or degrading treatment.

50. The current system under the Inspector-General of Intelligence and Security (**IGIS**) is insufficient as it does not investigate on its own motion and operates within the culture of secrecy. Publicising such investigations and outcomes would ensure that Australia does not, and is not seen to, condone the use of torture.⁶¹
51. The Baseline Study should acknowledge that allegations of the commission or knowledge of torture or other cruel, inhuman or degrading treatment by Australian officials:
 - (a) do not require independent investigation;
 - (b) do not result in appropriate remedies for victims; and
 - (c) may not lead to any prosecution of the responsible individuals.
52. Further, the Baseline Study should recognise that, contrary to CAT, there is not an absolute bar in Australia on the use of evidence obtained by torture or other cruel, inhuman or degrading treatment.

Overbroad Definitions and Powers

53. Section 2.2 provides almost very little discussion of the definitions and powers available in exercising counter-terrorism powers, and the criticisms that have been made over their unnecessary breadth, including:
 - (a) the overbroad definition of 'terrorist act';
 - (b) the grounds for proscription of a terrorist organisation; and
 - (c) the declaration of an area as a 'prescribed security zone'.
54. If the aim of Australia's counter-terrorism legislation is to ensure collective security with minimal encroachment on individual rights and freedoms,⁶² then the current definition of 'terrorist act' must be considered over-inclusive. Currently, the definition of 'terrorist act' fails to distinguish between acts of an ordinary criminal nature and those which are indisputably acts of terrorism,⁶³ which has flow on implications within all areas of counter-terrorism as well as the rights of individuals.⁶⁴
55. The HRLC is especially concerned with the grounds on which the Attorney-General may declare an organisation a 'proscribed terrorist organisation'. The Baseline Study should acknowledge that the inclusion of 'praise' as a ground on which an organisation may be proscribed a terrorist organisation under the *Criminal Code Act 1995* s 102.1(1A)(c) may

⁶¹ *Making Rights Real*, above n 2 [9.2].

⁶² See Draft, above n 1, 11.

⁶³ *Making Rights Real*, above n 2 [161] – [162].

⁶⁴ *Ibid* 62.

operate to vilify religious groups without warrant in violation to the right to religious freedom under the Australian Constitution and the ICCPR.

56. Given the consequences of associating with a proscribed organisation,⁶⁵ this definition is unworkably broad and disproportionate, providing for the banning of organisations on the basis of some vaguely expressed view which may, at some time in the future, have an effect on an observer of the organisation. As recommended by the Security Legislation Review Committee, criminalising expression rather than conduct and intention disproportionate interferes with fundamental freedoms of expression and association.⁶⁶
57. Further, decisions of the Attorney-General under this provision should be subject to judicial merits review by the Administrative Appeals Tribunal, as the consequences of proscription are far-reaching.⁶⁷ The Baseline Study should comment on the inability of proscribed organisations to appeal their proscription to the Administrative Appeals Tribunal or similar body for an independent merits review.
58. The traditional requirement that police officers have a 'reasonable suspicion' of criminality before exercising their stop and search powers operates as a safeguard against abuse and a standard against which police conduct can be measured. Removal of this requirement under the amended *Anti-Terrorism Act 2004* is especially concerning.
59. Where the Attorney-General, under broad powers conferred in the 2004 amendments, declares an area a 'prescribed security zone', police have the power to stop and search anyone in that area for any reason. International evidence indicates that such powers, in other countries with similar laws, are disproportionately exercised against peaceful protestors and ethnic minorities,⁶⁸ and breach human rights.⁶⁹ Negative impacts may be witnessed in relation to rights of liberty, security of person, equality before the law and the right to demonstrate peacefully. The Baseline Study should discuss the lack of safeguards against misuse of Division 3A of the *Crimes Act 1914* (Cth), including the designation of a 'prescribed security zone'. At the very least, the Baseline Study should comment on the fact that the designation does not have clearly prescribed time or geographical limits and does not include 'reasonable necessity' as a precondition of the exercise of the declarative power.

ASIO detention powers

60. The Draft does not refer to the secrecy provisions which apply to ASIO's exercise of its powers of detention and interrogation, including ASIO's ability to:

⁶⁵ *Criminal Code Act 1995* (Cth) s 102.7.

⁶⁶ Security Legislation Review Committee, *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and *Criminal Code Act 1995* (Cth), *Report of the Security Legislation Review Committee* (2006)9, 21, 73. See also *Making Rights Real*, above n 2 [10.5].

⁶⁷ See *Making Rights Real*, above n 2 [160].

⁶⁸ *Ibid* [166].

⁶⁹ *Ibid*.

- (a) prohibit or restrict who the person in custody can contact;⁷⁰
 - (b) question the person in the absence of a lawyer;⁷¹
 - (c) deny the person's legal representation access to information in relation to the reasons for, condition of and treatment during detention;⁷² and
 - (d) prohibit the person from disclosing information about their detention (at a risk of 5 years imprisonment).⁷³
61. As a further limitation on the public accountability of ASIO officials for their conduct during terrorism investigations, the person's lawyer, parents or guardian may be imprisoned for up to 5 years if they disclose any information in relation to the fact or nature of the detention.⁷⁴
62. The Draft should contain a detailed discussion of the concerns raised by the lack of public monitoring and accountability consequent to the secrecy of the counter-terrorism framework. Though the government 'emphasis[es] that these powers for ASIO are a measure of absolute last resort and ensured that important safeguards exist and must be complied with',⁷⁵ the severely restrictive conditions placed on the publication of information relating to the detention of an individual makes any real public accountability of such conduct impossible.
63. While the government's recent appointment of an Independent National Security Legislation Monitor is welcomed,⁷⁶ the gap in oversight of human rights-compliance of security organisation behaviour persists.

Conditions of Detention

64. Section 2.2 offers very limited discussion in regard to the conditions of detention, including:
- (a) preventative detention orders;⁷⁷
 - (b) pre-charge detention; and
 - (c) the presumption against bail.

Preventative Detention Orders

65. Section 2.2 states that the use of this measure is one of last resort.⁷⁸ The existence of a regime which allows for the detention of a person for up to 14 days⁷⁹ on unsubstantiated information with no ability to appeal is a grave affront to human rights. The Baseline Study

⁷⁰ *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) s 34K.

⁷¹ ASIO Act s 34ZP.

⁷² ASIO Act s 34ZT.

⁷³ ASIO Act s 34ZS(2).

⁷⁴ ASIO Act s 34ZS(1).

⁷⁵ See Draft, above n 1, 11.

⁷⁶ *Ibid* 12.

⁷⁷ *Criminal Code 1995* (Cth) Div 105.

⁷⁸ See Draft, above n 1, 11.

⁷⁹ See *Making Rights Real*, above n 2, 55 [143].

should discuss the effect of powers of preventative detention on human rights, particularly Division 105 of the *Criminal Code 1995* (Cth) and complementary State legislation.

Pre-Charge Detention

66. Section 2.2 refers to the reduction of time suspects are allowed to be held prior to being charged. The power of the Australian government to hold suspects for up to 8 days without charge⁸⁰ is out of step with internationally recognized standards capping pre-charge detention to 12 hours. The Baseline Study should recognise that pre-charge detention in terrorism cases which exceeds 48 hours may threaten the human rights of suspects, and may cause long-standing harm without cause.

Presumption against bail

67. Section 2.2 does not discuss that section 15AA of the *Crimes Act 1914* (Cth) imposes a presumption against the grant of bail unless 'exceptional circumstances' justify its grant. The reversal of this presumption is contrary to Australia's obligations under the ICCPR⁸¹ and impacts heavily on the presumption of innocence.⁸²

Control Orders

68. Section 2.2 emphasises that control orders are a measure of last resort and that only two have been issued to date.⁸³ The government ensures there are strict safeguards in place and that control orders are only issued where 'necessary to protect national security and public order.'⁸⁴
69. Despite the limited use of the power to issue control orders, such orders can have serious effects on human rights. There is no need for a criminal conviction in order to be subject to a control order. A lower burden of proof applies in the granting of a control order. Control orders can be made on an ex parte basis. Control orders can be renewed indefinitely. The conditions imposed severely restrict the subject's entire spectrum of human rights, including the right to liberty, presumption of innocence, right to a fair trial, freedom of expression, freedom of association and right to privacy and severely undermines principles of the rule of law.⁸⁵
70. The Baseline Study should discuss the effect of control orders, particularly:
- (a) the ability to make an 'interim' control order on an ex parte basis;
 - (b) the fact that the order is not restricted to pending investigations for prosecution;

⁸⁰Under the *Crimes Act 1914* (Cth) an accused may initially be held for four hours (ss 23C(4) and 23D(5)) which can be extended by another 20 hours (ss 12CA(4) and 23DA(7)).

⁸¹Which states: 'It shall not be the general rule that persons awaiting trial shall be detained in custody.'

⁸²See also *Making Rights Real*, above n 2, fn236.

⁸³See Draft, above n 1, 11.

⁸⁴Ibid.

⁸⁵See also *Making Rights Real*, above n 2 [10.3].

- (c) includes 'having trained with a terrorist organisation' as a ground for application of a control order, rather than as a criminal offence; and
- (d) allows broad conditions restricting freedom of movement (eg 'house-arrest' and 'internal exile').

Recommendations:

The Baseline Study should discuss the serious human rights concerns surrounding the counter-terrorism framework instituted post-9/11, including:

- (a) the sanction and use of torture of terrorism suspects by Australian officials;
- (b) the breadth of essential definitions and discretionary powers;
- (c) the breadth of ASIO's detentions powers, including powers relating to pre-charge detention;
- (d) the reversal of the presumption of innocence;
- (e) the conditions of detention for alleged terrorism suspects; and
- (f) the application and use of control orders.

4.3 Police use of force

- 71. The discussion in section 2.3 is primarily limited to the use of Tasers and should be supplemented with comprehensive discussion of the range of human rights issues raised by the use of force in Australia and policing more broadly.
- 72. Section 2.3 of the Draft refers to Taser use by police but does not discuss other weapons. The discussion should be expanded to include use of firearms, OC spray/foam, batons, and the use of force in hand to hand combat or otherwise without weapons. There have been a number of concerning and high profile incidents involving excessive use of force by law enforcement officers in Australia. These incidents and the issue of excessive use of force should be discussed in further detail in the Baseline Study. For example, the death of Mulrunji on Palm Island, the death of a Queensland man after he was Tasered up to 28 times and the shooting death of a 15-year old boy by the Victoria police. The Draft should reference the high levels of police shootings in Victoria. For example, in this year alone in Victoria there has already been one fatal police shooting and at least two non-fatal shootings.⁸⁶ In the ten years to 2010, 11 people were shot dead by Victoria police.⁸⁷ The Draft should also reference the alarming frequency of other uses of force. For example, an incident involving Victoria police

⁸⁶Adam Carey, 'Second police shooting in 24 hours' (*The Age*, 3 May 2011)

<<http://www.theage.com.au/victoria/second-police-shooting-in-24-hours-20110502-1e54t.html>>.

⁸⁷Office of Police Integrity, *Review of the Investigation of Deaths Associated with Police Contact* (2010) 21.

and use of force occurs, on average, every 2.5 hours.⁸⁸ Almost three quarters of those incidents involve OC spray or foam,⁸⁹ and some within the police force have suggested that OC spray is often used even before attempts to communicate with the public.⁹⁰

International human rights obligations

73. The Baseline Study should include reference to all relevant criticisms made by UN treaty bodies, rather than merely those which relate to Taser use. As referenced in *Making Rights Real*, Australia has been criticised in relation to use of force by law enforcement officers by the Human rights Committee (**HRC**).
74. The Baseline Study should reference the concern expressed at the reports of excessive use of force by law enforcement officials against groups, such as indigenous people, racial minorities, persons with disabilities, as well as young people.⁹¹ Specific actions were recommended by the HRC to remedy this issue (see *Making Rights Real* at [215]). These suggested actions should inform the development of the NAP.
75. The Baseline Study should also include a reference to the UPR recommendation that Australia improve the human rights elements of training of law enforcement personnel.⁹² The Draft currently refers to consistency of use of force guidelines with the Australia New Zealand Policing Advisory Agency (ANZPAA). The Baseline Study should also provide an assessment of compliance with international human rights standards and principles such as the *UN Code of Conduct for Law Enforcement Officials* and the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officers*.

Independent Investigations

76. As referred to in *Making Rights Real*, both the right to life and the freedom from torture and ill-treatment impose on the Government a positive obligation to adopt measures to safeguard life; in particular, to establish independent and effective procedures for the investigation and monitoring of the use of force, including deadly force, by state authorities such as the police (see section 14.3 of *Making Rights Real* and sources referred to therein).
77. A significant omission in the section 2.3 is any reference to the lack of a comprehensive, independent, effective and adequate system for the investigation of complaints about police in the majority, if not all, of Australian jurisdictions. The Baseline Study should reference the

⁸⁸Office of Police Integrity, *Review of the Use of Force by and against Victorian Police* (2009) 8.

⁸⁹Ibid 26.

⁹⁰Michael Williams (Victoria Police), *Meeting Operational Safety and Tactics Training and Critical Incident Management Training Standards* (2009) 7.

⁹¹Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2 April 2009) [21].

⁹²See Human Rights Council, UPR, above n 2, recommendation 96.

HRC comments in this regard.⁹³ Whilst there have been some positive developments in recent times – such as, the recent announcement of reforms to the management of police complaints, discipline and misconduct in Queensland⁹⁴ -- unfortunately at the present time most complaints and allegations of police misconduct are investigated by other members of the same police force, and often by officers from the same police station (see *Making Rights Real* at [219]).

78. In addition, there is no reference in section 2.3 of deaths in custody (although it is mentioned briefly in section 3.1). The Human Rights Council through the UPR recently recommended that Australia introduce a requirement that all deaths in custody be reviewed and investigated by independent bodies tasked with considering prevention of deaths and that the recommendations of Coronial investigations be implemented.⁹⁵ It also recommended the implementation of specific steps to combat the high level of deaths of Aboriginal and Torres Strait Islander persons in places of detention. Similar recommendations have already been made by the Human Rights Committee. These recommendations were also detailed in *Making Rights Real* and should be incorporated into the Baseline Study.⁹⁶

Stop and Search Powers

79. The Baseline Study should raise the issue of legislation that has been introduced and implemented in a number of states and territories which extends the coercive powers available to police to search and apprehend individuals including, in some instances, without any need for suspicion on reasonable grounds regarding the commission of an offence.⁹⁷
80. The Baseline Study should identify the disproportionate affect and impact on young, Aboriginal and Torres Strait Islander peoples, homeless and mentally ill individuals. The Baseline Study should also reference the issue of over-policing and/or discriminatory practices towards certain communities by police, particularly young men of African descent and Aboriginal and Torres Strait Islander peoples. For example, recent reports in Victoria have identified that young men of African descent experience more difficulty with police than other youth, were less likely to have their rights respected, were more likely than other youth to feel that they experienced some form of inappropriate treatment by police and reported feeling racially targeted by the police.⁹⁸

⁹³Human Rights Committee, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2 April 2009) [21] where the HRC stated that it 'regrets that the investigations of allegations of police misconduct are carried out by the police itself'.

⁹⁴Government Response to the Independent Review of the Queensland Police Complaints, *Discipline and Misconduct System* (August 2011)

⁹⁵See Human Rights Council, UPR, above n 6, recommendation 81.

⁹⁶See *Making Rights Real*, above n 2, [82].

⁹⁷*Ibid* [81].

⁹⁸See ZrinjkaDolic 'Race or Reason?: Police encounters with young people in the Flemington Region and Surrounding Areas' Flemington and Kensington Community Legal Centre, Melbourne, Vic, 1.

Recommendations:

The Baseline Study should:

- (a) discuss other forms of police use of force besides Tasers.
- (b) include data and information about use of force incidents and identify gaps and improvements that could be made in monitoring and data collection;
- (c) reference the UPR recommendation that Australia improve human rights training for law enforcement personnel and all relevant recommendations of the HRC referenced in *Making Rights Real*;
- (d) discuss deaths in custody in greater detail including the sources referred to in *Making Rights Real*;
- (e) discuss the issue of police stop and search powers and refer to over-policing and discrimination which has a disproportionate affect on racial minorities, homeless people and those with a mental health disorder; and
- (f) discuss the need for adequate systems for investigating complaints about police use of force and refer to relevant recommendations and sources of evidence.

4.4 Human trafficking

Nature and extent of people trafficking in Australia

81. Section 2.4.1 of the Draft states that there is “little reliable data” about people trafficking. Section 2.4.1 should include a clearer indication of areas where research and data concerning people trafficking involving Australia is needed. The particular difficulties of under-reporting and unreliable statistics (particularly when relying solely on trafficking victims who come into contact with Australian officials)⁹⁹ should also be referred to in the Baseline Study. Existing research on people trafficking may also be useful to inform the Government’s approach in the Baseline Study.

Support for victims

82. Section 2.4.3 outlines the range of support services provided to victims of trafficking. The Baseline Study should also include a brief overview of the problems facing victims of trafficking in Australia. These include:
- (a) physical and/or psychological abuse;

⁹⁹ Project Respect, *How Are Women Trafficked?* <http://projectrespect.org.au/our_work/trafficking/why_trafficking>; Fiona David, ‘Trafficking of Women for Sexual Purposes’ (Research and Public Policy Series No 95, Australian Institute of Criminology, 2008) 6.

- (b) unsafe working conditions;
- (c) poor and unsanitary accommodation;
- (d) limited freedom of movement and choice; and
- (e) lack of appropriate pay with potential consequences including economic dependence on traffickers, excessive risk-taking to pay off debts and insufficient funds to meet basic living costs.

Forced and Servile Marriage

83. Section 2.4 on trafficking does not consider the issue of forced and servile marriage. Forced or servile marriage is a 'practice similar to slavery' and is therefore covered by the *United Nations Trafficking Protocol*.
84. There is a lack of reliable information about the nature and extent of forced marriage in Australia and this gap in data should be filled, or at least acknowledged in the baseline study.
85. There are also gaps in Australia's legal framework dealing with forced and servile marriage. The Baseline study should identify this gap, noting that the government is currently examining the need for legislative reform to address the practice of forced and servile marriage in Australia and issued a discussion paper on this issue in late 2010.¹⁰² The discussion paper notes the concern that the current trafficking offences in Division 271 of the Criminal Code do not expressly protect children or adults from being trafficked into forced or servile marriage. The discussion paper canvasses several options for reform, including the creation of a specific offence of forced and servile marriage¹⁰³ and amendment of the definition of 'exploitation' in the Criminal Code to include forced and servile marriage.¹⁰⁴

Recommendation:

The Baseline Study should:

- (a) include an overview of the problems facing victims of trafficking in Australia; and
- (b) consider the issue of forced and servile marriage.

4.5 Focus areas to be included in Chapter Two

Torture

¹⁰² Criminal Justice Division, Attorney-General's Department, Australian Government, *Discussion Paper: Forced and Servile Marriage* (2010).

¹⁰³ The discussion paper states that under this offence:

'An individual could also be prosecuted if they knew, or were reckless as to whether the marriage was to occur without the full and free consent of the victim. This would capture those who 'aid and abet' the contracting of such marriages, and those who profit from procuring and trafficking individuals into such marriages'. Ibid 14.

¹⁰⁴ Ibid 15.

86. The Draft contains sections on counter-terrorism and police use of force, but Australia's obligation to prevent and prohibit torture and other cruel, inhuman or degrading treatment or punishment ('ill-treatment') is broader than these areas. The HRLC believes that section 2.3 should be renamed "Prevention and prohibition of torture and other cruel, inhuman or degrading treatment or punishment." In the context of prohibition, it should refer to the recently-enacted Division 274 of the Commonwealth Criminal Code, and in the context of prevention it should discuss the Government's commitment to the Optional Protocol to the Convention against Torture (even if this just refers readers to section 3.9.3). The Committee Against Torture has made a number of recommendations, including that Australia:
- (a) ensure torture is adequately defined and criminalised;¹⁰⁵
 - (b) ensure accused remand prisoners are treated differently than convicted persons;¹⁰⁶
 - (c) make non-custodial measures and alternatives available in immigration detention;¹⁰⁷
 - (d) educate law enforcement and military personnel (including contractors, and particularly those deployed overseas) about interrogation rules, instructions, methods and reporting;¹⁰⁸
 - (e) improve the arrangements for custody of persons deprived of their liberty (including overcrowding, child incarceration, mental health care, mandatory sentencing and deaths in custody);¹⁰⁹
 - (f) extend the right to rehabilitation to all victims of torture, including those on bridging visas;¹¹⁰
87. Also missing from the Draft is recognition of the need to investigate allegations of torture committed against Australian citizens Mamdouh Habib and David Hicks and the need for Australian evidence law to incorporate a specific provision prohibiting the admission of any evidence obtained by means of torture or other ill-treatment. These subjects are treated in detail in *Making Rights Real*.¹¹¹ During the UPR process, Australia accepted the recommendation to investigate allegations of torture in the context of counter-terrorism measures, give publicity to the findings, bring perpetrators to justice and provide reparation to the victims.¹¹² However, the Draft does not address this recommendation. In light of the recent Australian Story profile of David Hicks¹¹³ in which he gave further detail on the treatment to which he was subjected, the need for an investigation is all the more pressing.

¹⁰⁵ *Concluding Observations of the Committee Against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) [8].

¹⁰⁶ *Ibid* [10].

¹⁰⁷ *Ibid* [11].

¹⁰⁸ *Ibid* [21].

¹⁰⁹ *Ibid* [23].

¹¹⁰ *Ibid* [29].

¹¹¹ *Making Rights Real*, above n 2, 48-50.

¹¹² See Human Rights Council, UPR, above n 6, recommendation 136.

¹¹³ <<http://www.abc.net.au/austory/specials/hicks/default.htm>>.

Recommendations:

The Baseline Study should include information about allegations of torture or other cruel, inhuman or degrading treatment or punishment against Australian citizens or residents, or involving Australian officials, during the so-called 'War on Terror'. It should also provide further detail about safeguards to ensure evidence obtained through torture is inadmissible (except to prove that the torture occurred).

Poverty

88. Chapter Two of the Draft does not include a section explicitly dealing with poverty and how socio-economic disadvantage leads to a lesser enjoyment of human rights. The HRLC recommends that a section on poverty be added which considers CESCRC Committee recommendations to reduce poverty in Australia.¹¹⁴ This includes a realistic assessment of the adequacy of social security in line with increasing living costs and housing shortages for people whose income is supported by social security.¹¹⁵ In addition, a range of policies operate to prevent breaking the cycle of poverty, such as credit and lending schemes which disadvantage people with a poor credit rating, informal lending schemes, inflexible infringements, high pressure debt collection and a lack of financial assistance and counseling.
89. This section should also discuss the other issues raised in *Making Rights Real*, including that newly arrived migrants and others are not able to access social security.¹¹⁶
90. This section should also discuss social inclusion from the perspective of people living in poverty and identify the need to underpin Australia's Social Inclusion Agenda with a human rights framework. In this section the Baseline Study should also reference the UPR recommendation that Australia develop a comprehensive strategy on poverty reduction and social inclusion.¹¹⁷

Recommendation:

The Baseline Study should include a consideration of the human rights implications of poverty, including considerations of CESCRC Committee recommendations to alleviate poverty and relevant UPR recommendations which relate to poverty and social inclusion.

¹¹⁴ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [24].

¹¹⁵ Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari: Mission to Australia*, 4th sess, UN Doc A/HRC/4/18/Add.2, (11 May 2007) [48].

¹¹⁶ See *Making Rights Real*, above n 2 [261] to [266].

¹¹⁷ See Human Rights Council, UPR, above n 6, recommendations 32-33.

Mutual assistance, extradition and the death penalty

91. The Draft does not discuss Australia's approach to mutual assistance or extradition despite the recommendation that Australia adopt legislation to ensure no one is extradited to a State where they would be in danger of the death penalty during the UPR process.¹¹⁸
92. In *Making Rights Real*, the HRLC addressed another critical aspect of Australia's obligations in relation to torture, namely, *refoulement*. The Migration Amendment (Complementary Protection) Bill 2011 is referred to in passing in section 3.10, but deserves fuller treatment in Chapter 2. At present, Australia has an ad hoc system relying on Ministerial Intervention under the Commonwealth Migration Act¹¹⁹ to implement its *non-refoulement* obligations (i.e. obligations not to deport individuals to places where they face a real risk of being subjected to ill-treatment or the death penalty). As explained below (see *Refugees and Asylum seekers*), Ministerial Intervention is not an appropriate vehicle for the implementation of such important obligations with potentially deadly consequences. The Baseline Study should identify this as a protection gap and the National Action Plan should emphasise the Government's commitment to the Complementary Protection Bill.
93. The Baseline Study should also acknowledge the several UPR and other treaty body recommendations that Australia should adopt domestic laws which prohibit the extradition or *refoulement* of people, particularly asylum seekers, to States where they would be in danger of torture or death.¹²⁰

Recommendations:

The Baseline study should:

- (a) refer to the extradition, deportation or removal of people from Australia to countries where they face a substantial risk of being subject to torture or ill-treatment; and
- (b) refer to law enforcement officials providing assistance in evidence gathering or the provision of any other assistance where the person in question faces a substantial risk of torture or other cruel, inhuman or degrading treatment or other flagrant human rights violation.¹²¹

Environmental impacts and climate change

94. The Draft does not include any discussion of whether Australia will take into consideration human rights in implementing - or failing to implement – action on climate change. Australia accepted the recommendation that it adopt a rights-based approach to climate change policy

¹¹⁸See Human Rights Council, UPR, above n 6, recommendation 34.

¹¹⁹*Migration Act 1958* (Cth) s 417.

¹²⁰See Human Rights Council, UPR, above n 6, recommendations 34, 124, 125; *Concluding Observations of the Committee Against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) [15], [16], [20].

¹²¹*Concluding Observations of the Committee Against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) [30].

during the UPR process.¹²² However, the Draft does not refer to this recommendation and should contain a discussion of how Australian government will consider the full impact of human rights in enacting climate change policy.

95. In addition, the Draft does not discuss the impact of environmental factors on human rights; for example, the effect of industrial developments (e.g. mining, deforestation, desalination) on access to basic resources including food sustainability and potential violations to health in dealing with the short and long term consequences of natural disasters.

Recommendation:

The Baseline Study should include the human rights concerns in responding to negative environmental impacts and climate change.

Australia's commitment to development assistance

96. In section 1.1.2, the Draft does not explicitly set out the Australian Government's approach to development both within Australia, and more broadly to the region and internationally. Section 2.4.7 provides that Australia provided \$4.3 billion in development assistance in 2010-11 to reduce poverty and promote sustainable development. The HRLC commends the Australian Government on addressing violence against women and children and people trafficking.
97. The OECD DAC Action-Oriented Policy Paper on Human Rights and Development¹²³ sets out best practice for implementing a rights-based approach to development. Without a clear commitment to rights-based approaches, development assistance without full consideration of the inherent rights and dignity of human beings may be undermined.
98. The Draft does not discuss Australia's commitment to support Official Development Assistance in the context of international crisis by bringing it to the internationally agreed target of 0.7 per cent of Australia's GDP.¹²⁴ In 2009/2010, Australia only contributed 0.29% of its GDP to official development assistance.¹²⁵ Australia accepted a recommendation during the UPR process to increase its contribution to international development,¹²⁶ and has committed to increasing its assistance to 0.5% of GNI by 2015-2016.¹²⁷ The HRLC believes that the Baseline Study should include Australia's commitment to international development.

¹²²See Human Rights Council, UPR, above n 6, recommendation 31.

¹²³DCD/DAC(2007)15/FINAL.

¹²⁴See Human Rights Council, UPR, above n 6, recommendation 135; *International Covenant on Economic, Social and Cultural Rights* article 2.1; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) recommendation 12.

¹²⁵*Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009).

¹²⁶See Human Rights Council, UPR, above n 6.

¹²⁷Australian Government Budget 2010-2011, Australia's Development Assistance Program, <http://www.budget.gov.au/2010-11/content/ministerial_statements/ausaid/html/ms_ausaid-03.htm> as at 20 October 2010.

Recommendation:

The Baseline Study should discuss Australia's commitment to international development in accordance with human rights principles.

Foreign policy and international relations

99. The Draft does not discuss the effect of Australian foreign policy on human rights in countries with which Australia has recurring relationships. This is particularly pertinent for countries within the region where Australia may be called upon to offer assistance, such as East Timor. The Independent Expert on the Effects of Foreign Debt recently raised concerns that Australia failed to:
- (a) implement a human rights-based approach to Australia's aid program in the design and delivery of Australian aid;¹²⁸
 - (b) direct AusAID to undertake human rights impact assessments to inform the design, implementation, monitoring and evaluation of its development programs;¹²⁹
 - (c) provide local capacity building to develop self-sustainable communities without Australian assistance;¹³⁰ and
 - (d) ensure development assistance is not made conditional on Pacific island countries entering trade agreements.¹³¹
100. The Baseline Study should acknowledge the concerns of Australia engaging with other countries without a fully realised system for ensuring human rights are respected, supported and protected. In particular, whether Australia intends to adopt a human rights-based approach towards foreign policy in the areas of trade, investment, business, labour, migration, defence, military cooperation, security and the environment should be discussed.

Recommendation:

The Baseline Study should include a discussion of Australia's international and foreign policy human rights objectives and priorities.

Business and human rights

101. The Draft does not discuss the role of Australian companies in promoting and protecting human rights both within Australia and internationally. There are a number of Australian companies whose actions and/or activities have had a severe impact on the human rights of

¹²⁸Human Rights Council, *Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, Cephas Lumina: Mission to Australia and Solomon Islands*, 17th sess, UN Doc A/HRC/17/37/Add.1(25 May 2011) [93]-[94].

¹²⁹Ibid [95].

¹³⁰Ibid [96]-[97].

¹³¹Ibid [98].

individuals across the world.¹³² However, Australia does not have a comprehensive legal for ensuring Australian corporations respect, protect and support Australia's international human rights obligations.¹³³ The Baseline Study should also take into account the recommendation from the CERD Committee to regulate the activities of Australian mining companies working overseas to prohibit negative impacts on Indigenous peoples.¹³⁴

102. The CERD Committee recommended that Australia 'take appropriate legislative or administrative measures to prevent acts by Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad'.¹³⁵ In addition, the Independent Expert on the Effects of Foreign Debt recently discussed:

- (a) the lack of transparency in activities undertaken by the Export Finance and Insurance Corporation which may have adverse environmental and social impacts; and
- (b) the lack of domestic legislation to curb "predatory activities of vulture funds" which facilitates debt recovery of exorbitant amounts in a way that undermines Australia's contributions to multilateral debt relief schemes.¹³⁷

Recommendation:

The Draft should discuss the role of Australian companies in promoting and protecting human rights both within Australia and internationally and relevant evidence and recommendations.

Religious discrimination

103. The Draft does not include a discussion of the issue of religious vilification or discrimination, despite this remaining a pressing issue in ensuring all religious beliefs and practices are respected and protected. The Consolidation Project could be referred to in this context.

Recommendation:

The Baseline Study should discuss the issue of religious discrimination and vilification, particularly against minority faiths.

¹³² Australian Human Rights Commission, *The Australian Mining and Resource Sector and Human Rights*, <http://www/hreoc.gov.au/pdf/human_rights/corporate_social_responsibility/factsheet3.pdf>.

¹³³ Australia does not have a federal bill of rights. Two jurisdictions in Australia (Victoria and the ACT) have enacted dedicated human rights legislation, but that legislation has only limited application to private companies exercising functions 'of a public nature' and the legislation is presumed not to operate extra-territorially. The *Racial Discrimination Act* protects people from racial discrimination in Australia but is presumed not to have any extra-territorial effect.

¹³⁴ See CERD, above n 53 [13].

¹³⁵ *Ibid.*

¹³⁷ *Ibid* [100].

5. Chapter Three: Human rights experiences of specific groups

5.1 Aboriginal and Torres Strait Islander peoples

104. The HRLC endorses the NATSILS submission on the Baseline Study.
105. The beginning of section 3.1 should identify and characterise the unacceptable levels of disadvantage experienced by Aboriginal peoples in the language of rights, that is, breaches of fundamental rights and the need to work towards the protection and realisation of the human rights of Aboriginal and Torres Strait Islander peoples. It would be appropriate for the Draft to acknowledge in the introduction that the inequality suffered by many Aboriginal and Torres Strait Islander peoples is one of the most pressing human rights problems faced by Australia today.
106. Section 3.1 should reference the fact that the COAG target areas do not include target areas relating to the justice system. Inclusion of a national agreement relating to justice targets could also be a potential action for the NAP. The COAG framework is also not a rights-based policy and has not been incorporated into the broader policy settings.¹³⁸ The CERD committee has also emphasised the importance of allocating resources to ensure “Closing the Gap” is sustainable.¹³⁹
107. Section 3.1 states that the Declaration on the Rights of Indigenous Peoples is not binding but sets important international principles for nations to aspire to. This characterisation is inadequate and should include a more detailed discussion and description of the Declaration, its place in the international human rights law landscape, and outline the significance and importance of the Declaration as a guiding framework for the development of Government policy and legislation. Crucially, the Draft should also identify the need to work with Aboriginal and Torres Strait Islander peoples towards implementation of the Declaration and acknowledge the steps that have been taken to date towards this goal (for example, work undertaken by the Australian Human Rights Commission). This includes involving Aboriginal and Torres Strait Islander peoples in a broad discussion, including awareness raising about the meaning of self-determination and other articles of the Declaration, for Aboriginal and Torres Strait Islander peoples.
108. As a general point, this section does not incorporate all relevant recommendations made by UN treaty bodies. Section 3.1 which refers to Australia’s most recent review under the Convention of Elimination of All Forms of Racial Discrimination (CERD) should detail the comments made by the CERD committee in a number of areas of Government policy and/or these comments should be addressed in the relevant sub-sections throughout this section, including, for example, the CERD committee recommendation to ensure that public service delivery is culturally appropriate and seeks to reduce Indigenous socio-economic

¹³⁸See NGO Submission to the CERD Committee, *Freedom Respect Equality Dignity: Action* (June 2010)11.

¹³⁹CERD, above n 53 [22].

disadvantage while advancing Indigenous self-empowerment.¹⁴⁰ The Draft should also reference the CERD comments around the need to continue to address the "unacceptably high level of disadvantage and social dislocation" of Aboriginal Australians living in remote areas communities in the Northern Territory.¹⁴¹ Also absent from the draft is reference to the recommendation that Australia take appropriate legislative or administrative measures to regulate Australian corporations' actions which negatively impact on the rights of Indigenous people, including legislation with extra-territorial effect.¹⁴²

109. All relevant UPR recommendations should also be referenced in this section. The Draft does not include reference to the recommendation that Australia include recognition and adequate protection of the culture, values and spiritual and religious practices of Indigenous peoples in Australia's national norms.¹⁴³

Right to self-determination and consultation (Section 3.1.2)

110. The HRLC welcomes the commitment and action demonstrated by Government in the constitutional recognition of Aboriginal and Torres Strait Islander peoples but suggests the Draft would be enhanced by making explicit the link between this project and the Government's commitment to reconciliation and advancing the principles contained within Declaration. As per our recommendations in *Making Rights Real*, the section entitled "things a National Human Rights Action Plan could address" should include the steps to be taken by Government to educate the general population about the importance of recognition in the Constitution as another step towards reconciliation.
111. Section 3.1.2 requires a more detailed discussion of the meaning and importance of genuine consultation with Aboriginal and Torres Strait Islander peoples, drawing on the articles of the Declaration, and acknowledge underlying issues in consultation (e.g. the geographic remoteness of some communities and their entrenched discrimination and disadvantage) with Aboriginal and Torres Strait Islander peoples and therefore the need for greater investment and commitment from Government. The HRLC also suggests that this section should include reference to the importance of consulting and taking advice from a range of Aboriginal and Torres Strait Islander organisations and communities, in addition to the National Congress of Australia's First Peoples. The recommendations in the recent review by the CERD committee which relate to consultation should also be referred to in this section.¹⁴⁴ Consultation with Aboriginal and Torres Strait Islander peoples was also a continuing theme throughout the UPR process.
112. A significant omission in the Draft is the absence of a detailed discussion of reconciliation with Aboriginal and Torres Strait Islander peoples. The Draft should include a discussion of the

¹⁴⁰Ibid [22].

¹⁴¹Ibid[16]

¹⁴²Ibid [13].

¹⁴³See Human Rights Council, UPR, above n 2, recommendation 108.

¹⁴⁴CERD, above n 53 [15], [16].

national apology and identify the need for continued efforts and Government action to promote meaningful reconciliation with Aboriginal and Torres Strait Islander peoples, in line with recent recommendations made by the CERD committee and through the UPR.¹⁴⁵

113. The Draft should also include explicit reference to the issue of a treaty agreement or formal reconciliation agreement. Other recent comments made by the CERD committee should be accounted for, including the recommendation that Australia consider the negotiation of a treaty agreement to build a constructive and sustained relationship with Indigenous peoples. This issue was also raised by Bosnia and Herzegovina in the UPR process.¹⁴⁶ This recommendation was rejected by the Australian Government. The recommendation is referenced in a footnote (n 64) in the Draft, but this issue should be drawn out considering it has been explicitly rejected by Government. This is particularly so given the recommendation reflects the views and wishes of many Aboriginal and Torres Strait Islander peoples for a formal agreement or “treaty” with the Australian Government.
114. Another significant omission in the Draft is any discussion of the issue of Stolen Generations. The Draft should account for the ongoing economic, social, cultural, civil, political and historical consequences of the Stolen Generations for Aboriginal and Torres Strait Islander peoples and the link between this policy and the disadvantage and poverty experienced by many Aboriginal and Torres Strait Islander people today. The payment of compensation to members of the stolen generations has been recommended by the CERD committee and through the UPR process and these recommendations should be referenced, together with the Government response.¹⁴⁷
115. The Draft should also discuss the issue of stolen wages, that is, that many Australian State and Territory governments withheld wages and other payments from Aboriginal and Torres Strait Islander peoples under their care and protection. The Draft should refer to the report of the Senate Legal and Constitutional Affairs Committee report *Unfinished Business: Indigenous Stolen Wages*, which recommended steps to redress the injustice of stolen wages, including a national compensation plan. The Draft should reference to state based initiatives that have been established to repay wages to Aboriginal and Torres Strait Islander peoples that were subject to such treatment and also identify the gaps in other jurisdictions, including the absence of a federal scheme and the Government’s current position on establishing a national scheme as reflected in its response to the UPR recommendations. The Human Rights Committee and CERD Committee have recommended that, in order to nationally address past racially discriminatory practices, adequate compensation must be paid.¹⁴⁸

¹⁴⁵CERD, above n 53 [15]; Human Rights Council, UPR, above n 6, recommendation 103.

¹⁴⁶Ibid, recommendation 110.

¹⁴⁷Ibid, recommendation 97; CERD, above n 53 [26].

¹⁴⁸See *Making Rights Real*, above n 2 [81].

Right to the highest attainable standard of health and adequate housing

116. The discussion of the right to housing should be developed more to include further statistics and data which provide evidence of the barriers to accessing appropriate housing and the over-representation in the homeless population and/or cross reference section 3.6.1(a) which addresses the issue of homelessness and Aboriginal and Torres Strait Islander peoples in more detail. See *Making Rights Real* (paragraph [85]) for further detail of such data, including additional comments by the UN Special Rapporteur on Adequate Housing.
117. This section should also clearly state that many Aboriginal communities lack basic determinants of the right to life, such as adequate housing, safe drinking water, electricity and effective sewerage systems.

Right to Education

118. Section 3.1.3, in particular, would benefit from further development including discussion of key areas of concern in achieving realisation of the right to education for Aboriginal and Torres Strait Islander peoples. The section details Closing the Gap targets and existing initiatives without providing statistics and data on the “gap” in question. If data is insufficient or not available this should be identified in the Draft so as to focus action on improving data collection. See, for example, the statistics and data referenced at paragraph 84 of *Making Rights Real*.
119. This section does not discuss the significant issue of bilingual education. As noted in *Making Rights Real*, students who speak Aboriginal languages at home but attend schools that teach only in English are more to fail or drop out than those taught by bilingual or a trilingual teacher. Despite this, in 2009 the Northern Territory Government implemented a new policy requiring the first four hours of education in all Northern Territory schools to be conducted in English.¹⁴⁹ Reviews under CERD and CESCR have also raised the need to strengthen the preservation of Aboriginal and Torres Strait Islander languages and culture through bilingual education in school. See further the comments in relation to section 3.1.7 below.
120. The Clontarf Foundation Football Academy Program, assisted by funding by both Commonwealth and State Governments, is an example of a successful initiative which is not featured in the Draft. It may be useful to highlight the successful experiences of the Clontarf program in some States and Territories in addressing rates of retention and school completion by Aboriginal boys, for example, by improving retention rates from between 25 to 50% (“pre-Clontarf”) to achieving average retention rates of 90%.¹⁵⁰

¹⁴⁹See paragraph [84] of *Making Rights Real* and sources referred to therein.

¹⁵⁰See Clontarf Foundation Annual Report, at page 3, accessed at:
<http://www.clontarffootball.com/userfiles/files/Foundation/2011/2010_CF_Annual%20Report.pdf>

Right to Work

121. The discussion under section 3.1.4 could be improved by referencing the particularly low income rates for Aboriginal & Torres Strait Islander women and the discrimination and disadvantage experienced by Aboriginal and Torres Strait Islander peoples in job application processes (see for example, paragraph 86 of *Making Rights Real*).

Freedom from Discrimination

122. Section 3.1.5 should include a more detailed discussion of the Northern Territory Intervention Emergency Response (**NTER**) including the human rights abuses that have occurred and continue to occur as a result of the intervention, despite the action taken by the Australian Government to end the suspension of the RDA. This discussion should include reference to all relevant treaty body recommendations. The Draft should also reference the Australian Government's response to these recommendations. We refer to our recent submission entitled *Comments on Australian Government's Response to the Concluding Observations of the CERD Committee* (5 August 2011).
123. Section 3.1.5 should also address all relevant recent comments from the CERD committee's recent review and the Australian Government response. These comments focus on areas such as the Race Discrimination Commissioner and powers and functions of AHRC and racially motivated violence. The Australian Government should adopt the recommendations made in HRLC's recent submission *Comments on Australian Government's Response to the Concluding Observations of the CERD Committee* (5 August 2011). *Making Rights Real* also refers to priority issues and actions for inclusion in the NAP (see [91] to [99] and associated recommendations). Specifically, the Draft and NAP should develop action points which are directed towards ensuring that police forces in all Australian jurisdictions collect data on nationality and ethnicity of victims of crime.

Community Safety and Interaction with the Justice System

124. The Draft should reference all recommendations made about the interaction between Aboriginal and Torres Strait Islander peoples, the police and the criminal justice system made during the UPR, including improving the human rights training of personnel.¹⁵¹
125. Section 3.1.6 includes a discussion the complex legal needs of Aboriginal and Torres Strait Islander peoples but does not detail the factors underlying this complexity or the reasons for the higher levels of representation in the justice system. This is a significant oversight. The analysis of complex legal needs should include, for example, factors such as language barriers and barriers to accessing interpreter services, lower education levels and higher levels of disability and impairment.

¹⁵¹See Human Rights Council, UPR, above n 6, recommendation 96.

126. The factors contributing to high levels of imprisonment for Aboriginal peoples are varied and complex.¹⁵² The Draft should contain a discussion of these factors in greater detail, including institutional discrimination and lack of appropriate non-custodial sentencing options in rural and remote areas, particularly in the Northern Territory, together with the disproportionate impact of certain criminal laws to Aboriginal people.¹⁵³
127. The Draft does not account for the concerning trend that Aboriginal women prisoners are the fastest growing demographic among the prison population. The Draft should include discussion of this issue and the alarming findings in relation to rates of mental illness among this population and issues relating to access to adequate care and services, including treatment for mental health issues.¹⁵⁴ However, we note that discussion of prison conditions at section 3.9 includes references to the over-representation of Aboriginal and Torres Strait Islander peoples in custodial settings and the higher rates of mental illness/cognitive impairment.
128. The discussion of the National Indigenous Law and Justice Framework should include a discussion of the recommendation by the CERD committee in its recent review that Australia implement the measures outlined in the framework.¹⁵⁵
129. The Royal Commission into Aboriginal Deaths in Custody¹⁵⁶ is a key source which is absent from the current Draft. The Draft should reference this report and detail that many of the recommendations remain to be implemented. Twenty years on from this report and the level of over representation of Aboriginal and Torres Strait Islander people is higher than at the time of the Royal Commission.

Deaths in Custody

130. Section 3.1.6 should also discuss the continuing issue of Aboriginal deaths in custody in greater detail, including reference to the recommendations of the Royal Commission and the status on implementation of the recommendations of the report. This should include analysis of the relative success or otherwise of Aboriginal Justice Agreements in States and Territories. This discussion should also reference the recommendation made in the recent review by the CERD Committee that Australia review the recommendations of the Royal Commission, in consultation with Indigenous communities.¹⁵⁷
131. The Draft should also discuss the issue of deaths and serious injuries caused by transportation of prisoners in Western Australia, including the tragic case of Mr Ward.¹⁵⁸

¹⁵² AHRC, *Social Justice Report 2009*, at [2.3] – [2.4].

¹⁵³ See *Making Rights Real* at [107] and sources referred to therein.

¹⁵⁴ See *Making Rights Real* at [108] and sources referred to therein.

¹⁵⁵ CERD, above n 53 [20]

¹⁵⁶ Commonwealth of Australia, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991) vol 1-5.

¹⁵⁷ CERD, above n 53 [20].

¹⁵⁸ See *Making Rights Real*, [110] to [111].

132. The Draft should also discuss the need to secure safe transport to court for remote communities in Northern Territory, as reported by the Northern Territory Legal Aid Commission and discussed in *Making Rights Real*.¹⁵⁹

Prison Conditions

133. As well as detailing the over representation of Aboriginal and Torres Strait Islander peoples in prisons, section 3.1.6 should also detail the poor prison conditions and poor health experienced by many Aboriginal and Torres Strait Islander people in prisons and/or cross-reference section 3.9.

Mandatory Sentencing

134. The Draft should discuss the issue of mandatory sentencing in Western Australia and the Northern Territory and the disproportionate impact of these laws on Aboriginal and Torres Strait Islander peoples, particularly children. The CAT Committee has recommended that mandatory sentencing be abolished “due to its disproportionate and discriminatory impact on the indigenous population”.¹⁶⁰

Legal Services

135. Section 3.1.6 should also discuss in greater detail the significant issues relating to access to justice for Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander Legal Services (ATSILS) are the preferred and sometimes only legal aid option for many Aboriginal and Torres Strait Islander peoples, many of whom experience language and cultural barriers, low levels of numeracy and literacy and distrust of the justice system. Despite Aboriginal and Torres Strait Islander incarceration rates increasing at an alarming rate over the past decade and the subsequent increase in demand for the ATSILS services, the amount of real funding provided has been declining.¹⁶¹ This section should also reference the recent recommendation by the CERD Committee that Australia increase funding for Aboriginal legal aid.¹⁶²
136. The paragraph which describes Koori Courts in Victoria should also include the description as “culturally appropriate” rather than merely informal.
137. The Draft should identify that Aboriginal and Torres Strait Islander women and children remain chronically disadvantaged in terms of their access to justice, especially in regards to situations of family violence. This is because offenders often access the services of ATSILS which prevents them from acting for the victim, given the opposing interests of the two parties. Family Violence Prevention Legal Services (**FVPLS**) are legal aid providers specialising in

¹⁵⁹See *Making Rights Real*, above n 2 [113].

¹⁶⁰*Ibid* [112], [113].

¹⁶¹*Ibid* [116], [118].

¹⁶²CERD, above n 53 [19].

family violence mainly in regional and remote areas because of a lack of funding to service urban areas where large proportions of Aboriginal and Torres Strait Islander peoples reside. The high incidence of family violence against Aboriginal and Torres Strait Islander women combined means that often the FVPLS are the only culturally appropriate legal assistance option available to Aboriginal and Torres Strait Islander women.

Justice Re-Investment and Diversionary Programs

138. In detailing the positive initiatives demonstrated in certain States and Territories, the Draft should also reference “justice re-investment” strategies and the need to further develop and expand such strategies. Under this approach, a portion of the public funds that would have been spent on covering the costs of imprisonment are diverted to local communities that have a high concentration of offenders. The money is invested in community programs, services and activities that are aimed at addressing the underlying causes of crime in those communities.¹⁶³ The Draft should also reference the comment made by the CERD committee in its recent review that Australia adopt a justice reinvestment strategy, including the use of Indigenous courts and conciliation mechanisms, diversionary and prevention programs and restorative justice strategies.¹⁶⁴

Rights to land, territories and resources

139. There should be an additional sub-section in the Draft which deals with native title and rights to land, territories and resources. This sub-section should provide a more detailed overview of the native title system that the information currently contained in the Draft, including details of the rate of resolution and determination of native title claims and the costs of supporting the native title system and subsequent benefits realised by traditional owners. As detailed in *Making Rights Real*, the *Native Title Act 1993* (Cth) was an innovative and important reform which helped realise many of the rights owed to Aboriginal and Torres Strait Islander peoples. However, the Draft should acknowledge the incompatibility of the strict requirement of the *Native Title Act 1993* (Cth) of continuous connection with the land since colonisation with the rights contained in the Declaration. Reference should also be made to all relevant treaty body concerns and recommendations regarding the operation of the native title system.¹⁶⁵

140. The discussion of the August 2009 meeting of Native Title Ministers should also detail the consensus that the native title system has become bogged down with costly and inflexible

¹⁶³ See eg, *Justice Reinvestment: a new solution to the problem of Indigenous over-representation in the criminal justice system*, a speech delivered by Aboriginal & Torres Strait Islander Social Justice Commissioner, Mick Gooda, at ANTaR NSW Seminar Juvenile Justice Strategy: A Better Way, Sydney Mechanics School of Arts NSW (20 March 2010) accessed at: <http://www.hreoc.gov.au/about/media/speeches/social_justice/2010/20100320_justice_reinvestment.html>.

¹⁶⁴ CERD, above n 53[20].

¹⁶⁵ See *Making Rights Real*, above n 2[101], [102].

legal processes and that flexible and less technical approaches to native title are needed to resolve the backlog of native title claims.¹⁶⁶

Right to Culture

141. The Draft should discuss the cultural rights of Aboriginal and Torres Strait Islander peoples and the issue of preserving Aboriginal and Torres Strait Islander peoples' languages and culture. This need is particularly great given that education in Australia refer to relevant treaty body recommendations, specifically, the need to strengthen the preservation of Aboriginal and Torres Strait Islander languages and culture, including through bilingual education in schools.¹⁶⁷ Bilingual education was also discussed in *Making Rights Real*.¹⁶⁸ The Draft should also reference recommendations made in relation to intellectual property rights for Aboriginal and Torres Strait Islander peoples.¹⁶⁹

Recommendations:

The Baseline study should:

- (a) discuss all relevant recommendations made by UN treaty bodies and other UN mechanisms, including rejected UPR recommendations;
- (b) characterise the unacceptable levels of disadvantage experienced by Aboriginal peoples in the language of rights,
- (c) reference the lack of COAG target areas in relation to justice.
- (d) include further discussion of the UN Declaration on the Rights of Indigenous Peoples and the need for implementation;
- (e) acknowledge the importance of reconciliation and discuss efforts to promote reconciliation and the need for further steps to be taken;
- (f) discuss the meaning and importance of genuine consultation with Aboriginal and Torres Strait Islander peoples and the need to involve a range of Aboriginal and Torres Strait Islander organisations and communities in consultation and discussions relating to self-determination;
- (g) discuss the issues of Stolen Generations and Stolen Wages and relevant UPR recommendations;
- (h) include further statistics, sources and data which evidence the barriers to accessing appropriate housing and over-representation in the homeless population and clearly state that many Aboriginal communities lack basic determinants to the right to life;
- (i) include further discussion of the right to education and identify gaps in data, as well as the positive initiative of the Clontarf Foundation Football Academy Program;

¹⁶⁶Communiqué, Native Title Ministers' Meeting, 28 August 2009.

¹⁶⁷CERD, above n 53[21] and CESCR r [33].

¹⁶⁸*Making Rights Real*, above n 2, [90].

¹⁶⁹CESCR r 33

- (j) discuss the issue of bilingual education and the need to strengthen and preserve Aboriginal and Torres Strait Islander languages and culture, ideally in a separate sub-section;
- (k) reference the low income rates for Aboriginal and Torres Strait Islander peoples and discrimination and disadvantage experienced by Aboriginal and Torres Strait Islander peoples in job application processes;
- (l) discuss in greater detail the Northern Territory Intervention Emergency Response and the human rights issues identified by UN treaty bodies.
- (m) discuss the underlying complexity and reasons for the higher level of representation of Aboriginal and Torres Strait Islander peoples in the justice system;
- (n) discuss the increasing numbers of Aboriginal and Torres Strait Islander women in prison and the rates of mental illness among prisoners and/or cross-reference the discussion at section 3.9;
- (o) discuss implementation of the measures in the National and Indigenous Law and Justice Framework;
- (p) discuss the Royal Commission into Aboriginal Deaths in Custody and progress in relation to the implementation of recommendations;
- (q) discuss the serious human rights incidents relating to transportation of those in police custody and the need to secure safe transport to court for remote communities;
- (r) discuss the poor prison conditions and poor health experienced by many Aboriginal and Torres Strait Islander people in prison and/or cross-reference the discussion in section 3.9;
- (s) discuss mandatory sentencing and its disproportionate impact on Aboriginal and Torres Strait Islander peoples, particularly children;
- (t) discuss in greater detail issues relating to access to justice for Aboriginal and Torres Strait Islander peoples including the particular situation of Aboriginal and Torres Strait Islander women and children in family violence matters, particularly those in remote communities;
- (u) describe the Koori Courts as “culturally appropriate” rather than merely informal;
- (v) discuss the need to develop justice re-investment strategies; and
- (w) include an additional sub-section dealing with native title rights and rights to land, territories and resources

5.2 Women

142. The Human Rights Law Centre is a member of Equality Rights Alliance (ERA) and endorses ERA's submission on the Draft.

Sexual and reproductive health rights

143. The Draft's failure to consider sexual and reproductive health rights represents a significant gap in its discussion of women's rights. Sexual and reproductive health is part of the right to health, as elaborated by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 14 on the right to the highest attainable standard of health. Sexual and reproductive health has also been referenced by the Committee on the Elimination of Discrimination against Women (CEDAW), in General Recommendation 24 on women and health, and the Committee on the Rights of the Child (CRC) in its General Comments 3 (on HIV) and 4 (on Child and Adolescent Health).
144. The Baseline Study should consider legal and practical barriers to the realisation of the right to sexual and reproductive health across the country, recognising that access to sexual and reproductive health information and services varies widely across Australia.

Women and girls in the sex industry

145. The Baseline Study should at the very least acknowledge and explore the situation of women and girls working in the sex industry. If additional data is required, the Baseline Study should recognise this gap and set out commitments to investigate this area more thoroughly.
146. The HRLC urges Australia to consult with sex workers, social workers and service providers in the sex industry to understand the human rights situation of women and girls in sex work.

Sex Discrimination under the consolidated anti-discrimination legislation

147. The HRLC submission *Making Rights Real* addresses a number of concerns with the existing *Sex Discrimination Act 1984* (Cth) (SDA). The key concerns are:
- (a) the SDA does not contain a general prohibition on sex discrimination;
 - (b) the burden for addressing sex discrimination is on individual complainants;
 - (c) intersectional discrimination is not adequately addressed; and
 - (d) exemptions to the SDA, such as those for religious institutions, perpetuate unfair and unreasonable discrimination against women.
148. The Draft does not outline how the provisions regulating sex discrimination will be changed through the consolidation of anti-discrimination legislation. The Baseline Study should contain an acknowledgement of recommendations that the consolidation and harmonisation of anti-

discrimination laws be based on broad consultation and undertaken in a manner that strengthens anti-discrimination laws, including by:

- (a) addressing all prohibited grounds of discrimination;
- (b) promoting substantive equality;
- (c) providing effective remedies against systemic and intersectional discrimination; and
- (d) implementing the remaining recommendations of the 2008 Senate Committee inquiry.

Recommendation:

The Baseline Study should:

- (a) consider sexual and reproductive rights;
- (b) explore the situation of women and girls working in the sex industry with appropriate consultation; and
- (c) recognise that the consolidation of anti-discrimination legislation be based on broad consultation and strengthen anti-discrimination laws.

5.3 Children and young people

Aboriginal and Torres Strait Islander children

149. In addition to the specific issues discussed below, the Baseline Study should reference the recommendations of the CRC Committee and the UN Special Rapporteur on Indigenous Peoples which specifically relate to Aboriginal and Torres Strait Islander children.¹⁷⁰

150. These recommendations relate to:

- (a) health and wellbeing;
- (b) education;
- (c) abuse and violence; and
- (d) over-representation in the criminal justice system.¹⁷¹

Comprehensive National Plan of Action for Children and Young People

151. *Making Rights Real* sets out the CRC Committee's concern that Australia does not have a comprehensive policy for addressing or monitoring children's rights.¹⁷² The Draft does not include a discussion of the effect of children not being able to access their rights through institutional protections.

¹⁷⁰ *Making Rights Real*, above n 2 [83].

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

Incorporation of the Convention on the Rights of the Child

152. Section 3.3 does not set out any concrete ways in which children's rights under the Convention on the Rights of the Child are needed or will be implemented. A key concern is the lack of necessary reliable data regarding the health and wellbeing of children, and particularly Aboriginal and Torres Strait Islander children. The HRLC believes that the Baseline Study needs to state the need for reliable data to direct resources to children in greatest need, and to ensure that prevention and intervention strategies are implemented in line with children's rights.

Corporal punishment

153. Section 3.3.1 discusses violence against children. However, it does not discuss corporal punishment despite a recommendation that Australia adopt and implement legislation banning corporal punishment at home.¹⁷³ During the UPR process, Australia rejected the recommendation to ensure corporal punishment does not occur within homes.

Supporting children in care of the state

154. Section 3.3.2 discusses the rights of children in care of the state. However, the Draft does not deal adequately with the barriers to children exiting care and becoming independent and self-sufficient young adults.
155. Section 3.3.2 should discuss in further detail the particular circumstances of Aboriginal and Torres Strait Islander children in state care. This discussion should address the particular needs of these children and the factors which contribute to these statistics, including the on-going legacy of past government policies and high levels of incarceration of Aboriginal & Torres Strait Islander adults. The HRLC endorses the submission of the NATSILS and refers the Government to this submission for further discussion on these issues, including lack of compliance with the Indigenous Child Placement Principles and breach of principles contained in the Convention on the Rights of the Child.

The Rights of Children in the Justice System

156. Section 3.3.3 should also include further discussion of the particular situation of Aboriginal and Torres Strait Islander children and young people and the causes of this overrepresentation. The Draft should also discuss the impact of discriminatory laws, over policing, inadequate diversionary options, an absence of crisis accommodation and bail hostels, mandatory sentencing and other punitive laws, poor literacy and other barriers to accessing legal advice and representation and lack of access to custodial options in regional and remote areas. The HRLC endorses the submission of the NATSILS and refers the Government to this submission for further discussion of these issues.

¹⁷³ *Concluding Observations of the Committee Against Torture: Australia*, UN Doc CAT/C/AUS/CO/3, 40th sess (22 May 2008) [31].

Seen and Heard Inquiry

157. Section 3.3.3 does not consider the *Seen and Heard: Priority for Children in the Legal Process* national inquiry conducted by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission. As discussed in HRLC's submission *Making Rights Real*, the inquiry included extensive evidence of a number of problems faced by children in the justice system not discussed in the Draft, such as:

- (a) discrimination against children;
- (b) failure to consult with and listen to children in matters affecting them;
- (c) poorly co-ordinated service delivery;
- (d) the lack of specialist services and programs to children living in rural and remote areas;
- (e) child-friendly court processes; and
- (f) school exclusion processes.

Police powers and children

158. Section 3.3 does not refer to the use of police powers on children, despite the serious human rights concerns posed by deaths by shooting or racial profiling against young African Australians. The HRLC *Making Rights Real* submission sets out in length the impact of that laws permitting preventative apprehension or restricting movement of persons not suspected of any crime which affect children. The Baseline Study should set out the human rights concerns with police powers to impose curfews, remove young people from public space, and to stop and children and young people without a parent or guardian being present.¹⁷⁴ There is growing evidence that these police powers are disproportionately used against young people.¹⁷⁵ This evidence should be referred to in the Draft.

Children in immigration detention

159. Section 3.3 considers children in juvenile justice detention but does not specifically consider the issue of children in immigration detention. Despite research detailing the long term harmful effects on the psychological and emotional well-being of children in detention, there are currently over 800 children being held in immigration detention.¹⁷⁶

160. In *Making Rights Real*, the HRLC cited DIAC statistics showing that, far from being a last resort, children were being detained in Immigration Detention at an alarming rate.¹⁷⁷ Since we

¹⁷⁴ *Making Rights Real*, above n 2.

¹⁷⁵ See M Taylor and T Walsh (eds), *Nowhere to Go: The Impact of Police Move-on Powers on Homeless People in Queensland* (2006) 72 available at http://www.qpilch.org.au/_dbase_upl/Nowhere%20To%20Go.pdf, p 23.

¹⁷⁶ Child Rights Taskforce, *Listen to Children: Child Rights NGO Report Australia* (2011) iii.

¹⁷⁷ *Making Rights Real*, above n 2 [62].

released that report (in February 2011), the Government has released hundreds of children and we commend this effort. Nevertheless, hundreds more remain in detention at the time of writing and the legal deficiencies which led to their detention in the first place have not been addressed. The HRLC takes this opportunity to remind the Government of the third Key Immigration Detention Value, which is:

Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an immigration detention centre (IDC).¹⁷⁸

161. The Committee Against Torture specifically directed Australia to abide by the commitment that children are no longer held in immigration detention “under any circumstances” and ensure that “any kind of detention of children” is always used as a measure of last resort and for the minimum period of time.¹⁷⁹

Bail proceedings involving children

162. Section 3.2.3 refers to Western Australia’s regional youth justice bail service. However, the Draft contains no further reference to bail proceedings involving children. The *Seen and Heard Report* includes a number of recommendations which should be considered in the Baseline Study. A number of these recommendations were listed in the HRLC submission *Making Rights Real*.¹⁸⁰
163. Section 3.2 does not include any recognition of the principle that children should only be detained as a matter of last resort.¹⁸¹ Nor does section 3.2 reference that the Northern Territory authorises the publication of material identifying children appearing in criminal proceedings in violation of Article 14(4) of the *ICCPR*.

The effect of anti-discrimination legislation on children

164. The Draft discusses age discrimination more broadly, but does not discuss the effect of the consolidation of anti-discrimination legislation on children. As it stands, anti-discrimination is largely regulated by the states through various equal opportunity schemes. A key problem with these schemes is that while they often uphold the rights of adults in employment, they rarely protect children against discrimination on the grounds of age and other status. For example, the religious exemptions under the *Equal Opportunity Act 2011* (Vic) religiously aligned state schools to discriminate against children where it accords with the school’s religious practices. A religious state school can lawfully expel or punish a child for engaging in pre-marital sexual activity, expressing a non-normative gender, or for stating a sexual preference for people of the same sex.

¹⁷⁸ <<http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>>.

¹⁷⁹ *Concluding Observations of the Committee Against Torture: Australia*, UN Doc CAT/C/AUS/CO/3, 40th sess (22 May 2008) [25].

¹⁸⁰ *Making Rights Real*, above n 2.

¹⁸¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, Article 37(b) (entered into force 2 September 1999).

Recommendation:

The Baseline Study should:

- (a) include a consideration of whether a comprehensive national policy framework could better protect and promote children's rights;
- (b) comment on the need to incorporate the Convention on the Rights of the Child into domestic legislation;
- (c) discuss the effect of corporal punishment on children and possible safeguards to ensure that children are not subjected to violence within the home;
- (d) review and implement the recommendations by the Australian Law Reform Commission and AHRC in the *Seen and Heard* inquiry;
- (e) discuss the human rights issues concerning children held in immigration detention;
- (f) discuss the human rights concerns surrounding police powers (such as preventative apprehension, move-on and stop and search powers) which are disproportionately used against young people;
- (g) discuss the human rights concerns in bail proceedings involving children;
- (g) reiterate the obligation upon Australia to ensure that children should only be detained in a matter of last resort;
- (h) set out the effect of subjecting children to public opprobrium where they appear in criminal proceedings; and
- (i) discuss the effect of anti-discrimination legislation on children, particularly in schools.

5.4 Older people

165. The HRLC endorses the PILCH submission on the Baseline Study.

166. The human rights of older people are not diminished by virtue of their age.¹⁸² However, section 3.4 adopts a "care" based approach to issues affecting older people, rather than a rights-based approach.¹⁸³ This is disempowering for older people, further undermining – rather than promoting – their human rights. Instead, emphasis throughout the Baseline Study and Government policy in general, should be on empowering older people and maximising their ability to participating in decisions affecting their lives. The Draft should also reference the United Nations Principles for Older Persons which have been developed and are

¹⁸²See eg, Council on the Ageing (COTA), *Policy Compendium* (August 2008), available at <www.cotaaustralia.org.au/e107_files/COTA_documents/public_policy/policycompendium.doc> (30 August 2011).

¹⁸³See, eg, Office of the Public Advocate 25th Anniversary Symposium, Colleen Peace, *Strengths and Tensions in the Current Guardianship System* (July 29 2011) 16.

supported by Governments within Australia. These principles recognise rights to independence, participation, care, self-fulfilment and dignity of older persons.

167. The Baseline Study should address the following human rights which have particular relevance to older people but are inadequately addressed by the Draft:
- (a) the right to be free from abuse, particularly in non-institutional settings;
 - (b) the right to individual self-determination; and
 - (c) the right to education.

Elder abuse

168. Section 3.4 explores the problem of elder abuse and acknowledges the increasing issue of financial abuse. The HRLC commends the Draft on recognising the limited availability of data on which to base a complete assessment of the problem,¹⁸⁴ unlike section 2.4 on Human Trafficking which contains no suggestion that further research and analysis is needed.¹⁸⁵
169. A National Action Plan should address the problem of elder abuse in all aspects of life, including financial abuse. Three specific sectors of the population would benefit from targeted education in relation to financial rights and abuse:
- (a) older people themselves;
 - (b) the financial sector; and
 - (c) the general population.¹⁸⁶

Right to Individual Self-Determination

170. In a recent National Action Plan workshop facilitated by the HRLC, participants focused on the rights of older people, identifying these rights as particularly vulnerable under the existing Australian legal and institutional framework. This is especially the case where older people have contact with the aged care sector.
171. The Draft points to the Charter of Resident's Rights and Responsibilities as a basis for the protection and promotion of older people's human rights. However, civil society has identified problems with the aged care sectors approach to legal capacity and the tendency to view capacity as a black and white question.¹⁸⁷ The right to make decisions in relation to all aspects of one's own life is fundamental, but often ignored in the context of older people's decision-making. Despite the fact that the existing legal framework presumes capacity unless

¹⁸⁴See Draft, above n 1, 48.

¹⁸⁵Ibid 18.

¹⁸⁶See also, Senior Rights Victoria, *Submission to the National Human Rights Consultation* (June 2009), [6.96].

¹⁸⁷Participants in the HRLC NAP workshops identified this issue. The submission of K Morris to the National Human Rights Consultation echoes the fear of becoming voiceless as we age. See Human Rights Consultation Committee, *Report - National Human Rights Consultation*, 33 – 34.

proven otherwise,¹⁸⁸ residents are often presumed to lack capacity to make decisions about their own lives (eg living situations, distribution of assets). The Draft should be informed by recent inquiries and research undertaken in this area, including the Parliament of Victoria Law Reform Committee's (VPLRC) Report of its Inquiry into Powers of Attorney.

172. The Baseline Study should recognise that denying older people the right to participate in decision making processes affecting their lives is an element of social exclusion. For example, a determination of lack of capacity has significant rights-abrogating effects. While human rights can be subject to limitations, those limitations should only go so far as is necessary and proportionate.¹⁸⁹ Adopting a rights-based approach to older people - particularly in relation to individual self-determination - requires capacity to be viewed as a spectrum. Further, assessment of capacity should be ongoing as the question of the extent of a person's capacity changes over time.¹⁹⁰

Age discrimination

173. Australia's legal framework for protection against age discrimination has been described as possessing a low level of uniformity, enforceability and enforcement of both State and federal age discrimination legislation.¹⁹¹ The broadness of some of the exceptions and exemptions to the *Age Discrimination Act 2004* (Cth) undermine the effectiveness of the Act and the legislation does not adequately address systemic discrimination or promote substantive equality. The work of the Australian Human Rights Commission focuses primarily on age discrimination in employment and should be expanded to include discrimination in other settings, particularly medical settings including access to treatment and services.

Education about the rights of older people

174. The Draft should identify the issue of lack of awareness and knowledge in relation to older people's rights, both within the general community and amongst older people.¹⁹²
175. In particular, people who work with older people – including institutional care workers – do not receive adequate education and training in older people's:
- (a) legal presumption of capacity;
 - (b) assessment of capacity, including the need for ongoing reassessment; and
 - (c) the implications for the rights of the person which flow from a determination of lack of capacity.

¹⁸⁸See, for example, Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), August 2008, [70.29].

¹⁸⁹See, UN Human Rights Committee (HRC), *General Comment 27: Freedom of Movement (Art 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999), [11] – [18]. See also *Charter of Rights and Responsibilities 2006* (Vic) s 7(2); *Charter of Rights and Freedoms 1982* (Canada) s 1; *European Convention on Human Rights 1950* (EU) ss 8(2), 9(2), 11(2), 17 – 18;

¹⁹⁰House Standing Committee Legal and Constitutional Affairs, *Report: Older People and the Law* (20 September 2007), [3.78].

¹⁹¹COTA National Policy Office, *Over 50's Policy Compendium* (August 2008), 39, accessed at: <http://www.cotavic.org.au/wp-content/uploads/2011/01/policycompendium.pdf>

¹⁹²Including Senior Rights Victoria, above n 56, 7.38, 6.96, 13.1 – 2.

Recommendations:

The Baseline Study should:

- (a) discuss the need for general and targeted education concerning the financial rights of older people and financial abuse;
- (b) discuss the inadequacy of current protections against age discrimination under current Commonwealth law and the need to expand the mandate of the AHRC to focus on age discrimination in a broader range of settings.
- (c) recognise the need to adopt a rights based approach to older people to ensure their right to self-determination is not unjustifiably undermined; and
- (d) recognise the need to increase education and awareness of older people's rights and understanding and awareness of ageism.

5.5 Gay, lesbian, bisexual and sex and/or gender diverse people

Data collection on issues specific to LGBTIQ people

176. Section 3.5 does not refer to any data or research concerning the situation of vilification, bullying and abuse disproportionately affecting people on the basis of their sexual orientation and sex and/or gender identity or expression. *Making Rights Real* sets out that LGBTIQ Australians experience “high levels of prejudice, stigma, exclusion, discrimination, abuse and hate-motivated assault.” As a result, LGBTIQ people experience “higher-than-average levels of a range of mental and physical risk factors including suicide ideation, depression, and drug and alcohol abuse.” There are additional reports and papers which are relevant to LGBTIQ communities and these should be drawn on to supplement the Baseline Study.¹⁹³
177. Section 3.5.3 states that LGBTIQ people “continue to report experiencing high incidents of discrimination, prejudice and violence over a life time”. While it is important that these incidents are reported, the collection of disaggregated data is required to establish the level of discrimination, prejudice and violence. The inclusion of open-ended data categories such as sexual orientation, relationship status, sex status and gender identity is needed to ensure policy makers have access to accurate and up to date health and welfare data. This data is critical to allocating resources effectively and ending the silencing and marginalisation of LGBTIQ ways of life.
178. The Baseline Study should include the need for specific and intersectional data to be collected for issues specific to LGBTIQ, including the experiences of LGBTIQ people:
- (a) transitioning in the workplace;
 - (b) diagnosed with gender dysphoria;
 - (c) subject to medical intervention without consent;

¹⁹³ *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria.*

- (d) subject to bullying, harassment or abuse at school and at home;
- (e) experiencing or at risk or experiencing homelessness;
- (f) working in the sex industry; and
- (g) seeking asylum or refugee status because of a well-founded fear of persecution in their country of origin.

Same sex relationships

179. Section 3.5.1 of the Draft sets out the removal of discrimination against same sex couples concerning legal benefits and entitlements in the 2009 reforms to legislation recognising de facto relationships. The HRLC applauds the Australian Government on making changes to these Commonwealth laws as a step towards ending entrenched discrimination against people on the basis of their sexual orientation. However, announcement by Government in relation to the Consolidation Project have not addressed the issue of vilification or hate speech on the grounds of sexual orientation, sex status and gender identity.
180. Section 3.5.1 also states that the Australian Government does not support marriage equality for same sex couples. The Baseline Study should refer to the current law's inconsistency with the equality provisions of the *United Nations International Covenant on Civil and Political Rights* (both Articles 2 and 26) and the *United Nations International Covenant on Economic, Social and Cultural Rights* as to discrimination against couples in Australia (and their children, referring to *Convention on the Rights of the Child*) in access to the legal status of marriage, and to discrimination against same sex married couples from overseas on basis of race, national origin or other status as well as sex and sexual orientation. In addition, the *Marriage Act 1961* (Cth) potentially violates the right to freedom of religion conscience and belief, in that it requires persons to be bound by the religious beliefs of persons of a particular religion where such beliefs are contrary to the person's beliefs whether derived from a different religion or from no religion.
181. The Baseline Study should discuss the effects of unequal relationship recognition. For example, the Baseline Study should include statistics on the public support for same sex marriage and the fact that many same sex couples' feeling of social inclusion is negatively affected by the denial of marriage equality. The Baseline Study should also refer to the experience of same sex couples whose marriages are validly recognised overseas but are not recognised within Australia.

Same sex families

182. Australia has a diverse range of families, with an increasing number of families with gay, lesbian, bisexual and sex and/or gender diverse (LGBTIQ)¹⁹⁴ people. However, most

¹⁹⁴This submission uses the acronym LGBTIQ (lesbian, gay, bisexual, transgender, intersex and queer) to refer to people whose sexual orientation, sex status and/or gender identity and expression is diverse. The HRLC recognises that terminology is both important and highly contested, and adopts a broad and inclusive

Australian States and Territories do not extend equal rights, responsibilities and recognition to same sex couples currently raising, or planning to start, a family. The Draft does not refer to the human rights of same sex families except in the context of same sex family violence. This means that a number of families where a parent is in a same sex couple is not legally recognised as their child or children's parent. The lack of legal safeguards and recognition places these families at risk in financial or custody disputes (eg involving a sperm donor). In addition, Australian law does not allow for equal recognition of more than two legal parents, which affects co-parent families where three or more parents share significant parenting responsibilities.¹⁹⁵

183. The Baseline Study should discuss the situations currently barring same sex couples from starting a family. Adoption is regulated by State and Territory laws. Same sex couples can jointly adopt children in Western Australia, New South Wales and the Australian Capital Territory, but not the other States and Territories. The refusal of adoption for same sex couples is discriminatory and in violation of the right to found a family, contained in the ICCPR. This is particularly concerning where same sex couples have been caring for in their capacity as foster parents under a permanent care order, but are unable to seek adoption.¹⁹⁶
184. In South Australia, a same sex partner of a woman who has given birth through artificial reproductive technologies cannot be presumed to be a co-parent. In addition, opposite sex couples seeking to use assisted reproductive technologies to start a family have access to Medicare rebates, but same sex couples in the same situation do not. The cost of assisted reproductive technology can be prohibitively expensive, effectively preventing lesbian couples from having children.
185. While some States and Territories allow self-insemination, this is not the case across all of Australia. In addition, the laws regulating surrogacy (eg allowing altruistic surrogacy for same sex couples) differ across Australia. New South Wales, Tasmania, South Australia, Western Australian, the Northern Territory and the Federal Government do not recognise the surrogacy arrangements entered into by same sex couples. The different regimes regulating rainbow families should – as a minimum – be referred to in the Baseline Study.

Freedom from violence

186. Section 3.5.2 discusses freedom from violence in the context of violence between same sex couples. The Draft does not refer to family violence and child abuse which affects LGBTIQ children and young people. The *Writing Themselves In 3* report found that 24% of same sex

interpretation of 'LGBTIQ'. The HRLC encourage the Government to consult with LGBTIQ communities around the use of inclusive language in this section.

¹⁹⁵Rainbow Families Council, *Rainbow Families and the Law: An Information Kit for Same-Sex Couples and single People in Victoria* (October 2010) 2.

¹⁹⁶Ibid 3.

attracted and gender questioning youth (SSAGQ) who were abused suffered abuse at home.¹⁹⁷ This is an increase from previous figures from 1998 (16%) and 2004 (18%).¹⁹⁸

SSAGQ young people

187. The Draft only briefly refers to the human rights situation of same sex attracted and gender questioning (SSAGQ) young people. The Baseline Study should recognise the status and need for data and research about the effect of bullying, homophobia, transphobia and other related discriminatory conduct which disproportionately affects SSAGQ young people. In particular, vulnerable sub-sections of the young SSAGQ community should be considered, including:
- (a) people living in rural and regional Australia;
 - (b) Aboriginal and Torres Strait Islander people;
 - (c) refugees, asylum seekers and migrants;
 - (d) homeless people; and
 - (e) people with unsupportive families.
188. The recent *Writing Themselves In3* report conducted a wide-ranging survey of SSAGQ youth.¹⁹⁹ The report found that LGBTIQ young people are “less likely to use a condom, twice as likely to become pregnant and more likely to contract a sexually transmitted infection (STI) compared to their heterosexual peers.”²⁰⁰ The Baseline Study should recognise that the lack of inclusive sexuality education programs throughout Australia potentially violates the right to health of SSAGQ youth.
189. *Writing Themselves In 3* also reports that in 2010 “61% of young people reported verbal abuse because of homophobia, 18% physical abuse and 26% ‘other’ forms of homophobia” with 80% of that abuse taking place at school.²⁰¹ These statistics of homophobic violence in schools have increased from studies conducted in 1998 (69%) and 2004 (74%).²⁰² In addition, 35% of SSAGQ young people reported verbal and physical abuse in the street.²⁰³ In addition, both the report and *Beyond Blue* have found strong links between homophobic abuse and feeling unsafe, worse engagement in their schooling, excessive drug use, worse mental health outcomes (particularly depression and anxiety disorders), homelessness, self harm, suicide attempts.²⁰⁴

¹⁹⁷Lynne Hillier et al, *Writing Themselves In 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People* (Australian Research Centre in Sex, Health & Society, La Trobe University: 2010) 46.

¹⁹⁸Ibid.

¹⁹⁹Ibid 3.

²⁰⁰Ibid xi.

²⁰¹Ibid.

²⁰²Ibid.

²⁰³Ibid 46.

²⁰⁴Ibid; Julianne Corboz et al, *Feeling Queer and blue: A Review of the Literature on Depression and Related Issues Among Gay, Lesbian, Bisexual and Other Homosexually Active People* (Australian Research Centre in Sex, Health & Society, La Trobe University: 2008).

190. The HRLC is particularly concerned about the lack of consistency regarding homophobia in schools and the role of religious exemptions to anti-discrimination in improving the situation of SSAGQ children. As referred to above, the existing equal opportunity scheme in Victoria does not prevent private schools or religiously instituted state schools from suspending, expelling or punishing a child on the basis of their sexual orientation or sex and/or gender identity or expression. In fact, a number of educational institutions actively punish students whose gender expression does not accord with the uniform code of the school. The inability of many children to choose their own schools is another strong reason for national uniformity.

LGBTIQ older people

191. Participants in NAP workshop hosted by the HRLC listed a number of concerns facing LGBTIQ communities. The participants criticised the Draft for failing to acknowledge the immense harm suffered by older members of LGBTIQ communities who have been persecuted, criminalised, medicalised and discriminated against for decades. In addition, the Baseline Study should also identify the issues facing LGBTIQ people in aged care.

Freedom from discrimination

192. The HRLC commends the Australian Government on committing to introducing legislation to prohibit discrimination on the basis of a person's sexual orientation or gender identity in section 3.5.3. In terms of substantive grounds for protection, the Baseline Study should also refer to any protection on the grounds of sex status for intersex people in Australia. In relation to types of conduct, the Baseline Study should also refer to the problems of failing to legislate:

- (a) to prohibit discriminatory harassment (by words or conduct); and
- (b) to safeguard against inciting hatred or violence.

193. The Draft does not refer to the Yogyakarta Principles as the key international human rights instrument guiding domestic legislation concerning sexual orientation and sex and/or gender identity and expression. The Baseline Study should confirm that the consolidation of anti-discrimination legislation will be conducted in accordance with Australia's international human rights obligations, including the Yogyakarta Principles.

194. Section 3.5.3 does not refer to any institutional support for LGBTIQ organisations or bodies (eg funding for a peak advocacy body or NGOs). Currently, there is no specific government agency, commissioner or minister to deal with issues specific to LGBTIQ communities, unlike all other groups listed in the Draft (with the exception of carers). Nor does section 3.5.3 refer to any effective civil and criminal sanctions to deter vilification and harassment. The Baseline Study should include recognition that while anti-discrimination legislation is a good first step, the need for ongoing education, support and advocacy is central to ending the unequal treatment of LGBTIQ Australians.

195. In addition, section 3.5.3 does not set out the range of areas in which discrimination is currently experienced by LGBTIQ people, for example:
- (a) employment discrimination against people transitioning;
 - (b) health, community and other services failing to accommodate the needs of the LGBTIQ community;
 - (c) consider developing specific policies for ensuring sex and/or gender diverse people travelling internationally are treated with dignity and respect; and
 - (d) in dealings with law enforcement officials, including the use of strip searches.

Defence of provocation

196. The Baseline Study should also recognise that in Queensland the criminal defence of provocation – often referred to as the “homosexual panic defence” – continues to be available to defend serious criminal offences. Sections 268 and 269 of the *Criminal Code 1899* (Qld) allow a complete defence of provocation to an assault, and section 304 reduces murder to manslaughter under the partial defence of provocation.²⁰⁵ The implication that severe physical harm or death is justified where provoked because of a person’s sexual orientation is in clear contravention of the rights to life and equality under law.

Sex and/or gender diverse people

197. Section 3.5.4 includes four issues discussed in the Australian Human Rights Commission’s Sex and Gender Diversity Project. The HRLC reiterates that the Baseline Study must be a frank and comprehensive account of the status of human rights in Australia. The concerns affecting sex and/or gender diverse people require greater analysis in the Baseline Study.
198. It is not enough that the Baseline Study briefly refer to these key issues without recognising the practical effect on the rights of transgender, intersex and other sex and/or gender diverse people. The fact that a transgender person cannot have their birth certificate or passport amended to affirm their gender unless they undergo gender re-assignment surgery can have a profoundly negative effect on their mental and physical health. Gender re-assignment surgery carries significant costs and health risks that should not act as a precondition for gender affirmation. The HRLC disagrees with the Australian Government’s existing policy on gender re-assignment. In line with the Yogyakarta Principles, the HRLC affirms that the only criteria for gender identity and expression should be a person’s self-concept, self-definition or commitment. By establishing additional criteria to gender affirmation – such as relationship status, nationality, surgical status or financial capacity – the Australian Government is complicit in the negative health outcomes of transgender Australians.

²⁰⁵ See Queensland Law Reform Commission, *A Review of the Defence of Provocation* (August 2008) for a discussion of abolishing the defence of provocation in relation to homosexual “advances”, 36, 88, 139 <<http://www.qirc.qld.gov.au/AccidentProvocation/docs/WP63.pdf>>.

199. The fact that gender identification in records is binary (male/female options only) can also have a severe effect on the mental health of sex and/or gender diverse people who do not identify as either male or female. The ubiquitousness of gender based identification (on driver's licences, passports, medical forms, surveys, etc) reinforces gender as a level of difference and social exclusion.
200. The treatment of transgender people must adopt a rights based approach and focus on the inherent dignity of the person.

Sex assignment surgery and medical consent

201. Currently, there are no laws prohibiting sex assignment surgery on intersex children prior to them having the capacity to give consent. As a result, intersex children can be subject to invasive medical intervention without their knowledge or consent with significant effects on their health for their entire lives.

Effective and inclusive public education

202. Section 3.5 does not include any reference to the lack of public education about LGBTIQ communities. The UN Special Rapporteur on the Right to Education has stated that comprehensive sexuality education is central to ending discrimination against LGBTIQ people.²⁰⁶ The need for education about the LGBTIQ community is particularly serious in areas where discrimination is prevalent, including:
- (a) in schools;
 - (b) among service providers; and
 - (c) among medical professionals.

²⁰⁶United Nations Special Rapporteur on the Right to Education, *Interim Report on the Right to Education*, UN GA, A/65/162, 65th sess (23 July 2010) 7.

Recommendation:

The Baseline Study should:

- (a) include a discussion of the situation of LGBTIQ youth and older people, and particularly the effect of discrimination as a serious barrier to social inclusion;
- (b) discuss inequalities for same sex couples in relationship recognition and family situations;
- (c) include data and information about family violence which affects SSAGD children as a result of homophobia and discrimination;
- (d) recognise that data and on issues specific to LGBTIQ people is needed;
- (e) refer to the human rights concerns surround sex assignment surgery for intersex children before they have reached the age to provide informed consent; and
- (f) refer to the need for education, including public education and sexuality education.

5.6 People at risk of or experiencing homelessness

Right to social welfare

203. The Human Rights Law Centre endorses the submission by PILCH on the baseline study.
204. While section 3.6.2(b) notes the conditional nature of Australia's social security system, it does not address some of the key deficiencies of this system, including:
- (a) the inadequate amounts paid under the most common payments to people who are homeless;
 - (a) the inadequate amount provided as rent assistance; and
 - (b) the targeted quarantining of social security payments for people who are homeless.²⁰⁷
205. Any meaningful analysis of homeless Australians' rights must address the inadequacy of social security payments. While Centrelink should be commended on initiatives to identify and assist clients who are homeless, recent measures to restrict the access of social security payments (putting at risk people's housing, health and quality of life) will likely undermine these advances.
206. The Baseline Study should include a coordinated, consultative approach to address the inadequacy of social security payments to support disadvantaged members of the Australian community. As the Special Rapporteur on Adequate Housing noted with concern, in Australia:

²⁰⁷See *ibid* [48].

- (a) the number of people renting caravans on a medium to long term basis, particularly in rural and remote locations;²⁰⁸
- (b) the trend for transitional accommodation to become permanent structures and subsequently “de factor inadequate housing structures”,²⁰⁹
- (c) the shortage of shelters, refuges and safe houses, particularly for families, couples and single parents with adolescent children;²¹⁰ and
- (d) the disproportionate effect of criminal offences on people who are homeless or experiencing homelessness.²¹¹

Health

207. Section 3.6 is silent on the issue of homeless Australians’ right to an adequate standard of health. The evidence consistently shows that people experiencing homelessness experience poor health outcomes, disproportionately high experiences of mental ill-health, high morbidity, low mortality and other health issues. In addition, section 3.6.3 is silent on the links between drug misuse and homelessness.

Young people

208. Section 3.6.3 needs greater detail on the situation of young people who are experiencing or at risk of experiencing homelessness. The Baseline Study should:

- (a) identify the relationship between child protection services and later experiences of homelessness;
- (b) respond to the release of young people from institutional care into homelessness; and
- (c) recognise young people’s right to education, and to school-based and other responses to homelessness to assist them to realise this right.

²⁰⁸Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari: Mission to Australia*, UN Doc A/HRC/4/18/Add.2, 4th sess (11 May 2007) [38].

²⁰⁹Ibid [44].

²¹⁰Ibid [45].

²¹¹Ibid [47].

Recommendation:

The Baseline Study should:

- (a) discuss the inadequacy of social security for preventing homelessness;
- (b) address the right to health, particularly of people who are experiencing or at risk of experiencing homelessness;
- (c) address in greater detail the situation of young people experiencing or at risk of experiencing homelessness;
- (d) recognise the rights of people with health issues related to drug misuse;
- (e) contextualise the issue as a public health issue (which links to the right to an adequate standard of health); and
- (f) discuss meaningful actions to provide assistance to (and not criminalise) people in this category.

5.7 People with disability

209. The HRLC commends the Government on its recent announcement of the National Disability Insurance Scheme and the endorsement of the National Disability Strategy through COAG.

Legal Capacity

210. The Baseline Study should acknowledge the importance of transitioning away from a substituted decision making framework to a fully supported decision making framework, in accordance with Australia's obligations under the *Convention on the Rights of Persons with Disabilities (CRPD)*, especially article 12 in relation to equal protection before the law.²¹² This is especially necessary given the difficulties faced when challenging a government decision – including time, money and emotional costs.²¹³

211. The Baseline Study should aim to increase personal capacity of those at risk of being deemed to lack legal capacity by increasing tools available to them to demonstrate their capacity. Treating professionals and those close to a person with such a disability should be provided the education and training necessary to recognise capacity.²¹⁴ This should include the development and implementation of a proportionality test to assess the level of support required for a decision to be made which preserves to the greatest possible extent the autonomy and self-determination of the person affected.²¹⁵

²¹² See People with Disability Australia, *Everyone, Everywhere: Recognition of Persons with Disability as Persons Before the Law* (2009). This point was also raised by participants in a NAP Disability Workshop hosted by HRLC on 12 July 2011.

²¹³ See Draft, above n 1, 68 (Submission of ACT Disability Aged and Carer Advocacy Service).

²¹⁴ People with Disability, above n 212, 56.

²¹⁵ *Ibid*, 53. See also *CRPD* art 12(4).

Mental Health

212. The Draft only discusses mental health briefly through its intersection with other areas. This results in the artificial distinctions within categories which is unbeneficial in determining practical solutions to the problems.²¹⁶ The 2007 National Survey of Mental Health and Wellbeing conducted by the Australian Bureau of Statistics found that 45% (or 7.3 million) of the 16 million Australians aged between 16 and 85 years had a mental health disorder at some point in their life, with one in five Australians reporting a mental health disorder for 12 months.²¹⁷

Access to services and treatment in care

213. Recently, the mistreatment of people with mental health conditions and disorders in state-run psychiatric facilities is reported to have led to “shocking” death rates.²¹⁸ The Office of the Public Advocate has repeatedly called on the need to protect women in mental health units.²¹⁹ In addition, the Special Rapporteur on the Right to Health noted in 2010 that Australia has failed to:

- (a) provide sufficient replacement community-based treatment options for mental health care services, resulting in “prisons becoming de facto mental institutions”,²²⁰
- (b) adequately resource mental health diagnosis and treatment within prisons, particularly for chronic illness,²²¹ and
- (c) treat and improve depressive, anxiety and post-traumatic stress disorders affecting refugees and asylum seekers in detention.²²²

214. The Baseline Study should recognise the issues that persist from years of chronic under-funding; for example, significant issues of access to services – especially for the most vulnerable and disadvantaged communities – despite recent initiatives.²²³

²¹⁶ As noted by participants of the HRLC Victoria Disability Workshop. The overlaps become especially significant for already disadvantaged sectors of the community, including Aboriginal and Torres Straight Islanders, people in prison and refugees and asylum seekers. For further information, see Anand Grover, *Recommendations of the UN Special Rapporteur on the Highest Attainable Right to Health*, UN Doc A/HRC/14/20/Add.4 (3 June 2010).

²¹⁷ Australian Bureau of Statistics, National Survey of Mental Health and Wellbeing, *Summary of Results, 2007* (23 October 2008).

²¹⁸ The Age, Nick McKenzie and Richard Baker, *State Urged to Act on ‘Shocking’ Death Rates in Mental Care* (September 5 2011).

²¹⁹ Office of the Public Advocate, Media Release, *More Care to Protect Women in Mental Health Units* (October 15 2009)

<<http://www.publicadvocate.vic.gov.au/file/file/News/MediaRelease/More%20care%20to%20protect%20women%20in%20mental%20health%20units09.pdf>>.

²²⁰ Human Rights Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Anand Grover: *Mission to Australia*, UN Doc A/HRC/14/20/Add.4, 14th sess (3 June 2010) [71].

²²¹ *Ibid* [73].

²²² *Ibid* [92]-[94].

²²³ See Mental Health Council of Australia, ‘Better Access for whom? Mental health evaluation shows too many Australians missing out on care’ (Media Release, 15 March 2011) <<http://www.mhca.org.au/MediaReleases/2011/Evaluation%20into%20Better%20Access.pdf>> at 31 August 2011; Mental Health Council of Australia, ‘COAG briefed on mental health reform agenda’ (Media Release, 19 August 2011)

215. In *Making Rights Real*, the under-resourcing of mental health services was identified as an issue, together with widespread problems with access to care, quality of care and adequate accommodation for people.²²⁴ Insufficient support for persons with mental health problems, and access to services, for those in detention, was also raised as an issue. These issues and the sources referred to in *Making Rights Real* should be discussed in the Baseline Study.
216. *Making Rights Real* also identifies the issue of involuntary detention of people with mental illness. The Draft should contain a discussion of differing legal frameworks and detail the concern over the relative ease in which involuntary detention is currently imposed on individuals. The Draft should also discuss the proposal for Advance Directives and the need for state and territory governments to consider introducing Advance Directives as a matter of priority.²²⁵ The Draft should also discuss the issue of timely reviews of involuntary detention, as raised in *Making Rights Real*.²²⁶

Right to Vote

217. The Baseline Study should acknowledge the need to undertake a thorough, critical review of the legislative and administrative arrangements governing electoral matters be conducted to ensure that people with disability can fully and equally participate in electoral processes, including obtaining the right to cast a vote, in accordance with international obligations, especially the *CRPD* and the right to equality before the law secret ballot freely and independently.²²⁷

Disability and Migration

218. As discussed in *Making Rights Real*, provisions of the *Migration Act 1958* (Cth) which limit the application of the *Disability Discrimination Act 1992* (Cth) should be repealed, including in regard to the treatment of people living with HIV/AIDS and people with disabilities. This is necessary to ensure that migrants' right to equality before the law is respected. Reversing these exemptions reiterates the value of people with disability to the wider community. The Baseline Study should discuss this issue and include reference to the recommendation by CESCR to amend the Migration Act and DDA to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice.²²⁸

<<http://www.mhca.org.au/MediaReleases/2011/COAG%20briefed%20on%20mental%20health%20reform%20agenda.pdf>> at 31 August 2011.

²²⁴ *Making Rights Real*, above n 2, [173]-[175].

²²⁵ *Ibid* [176] -[180].

²²⁶ *Ibid* [178]-[180].

²²⁷ *Ibid* 242.

²²⁸ *Ibid* [243] -[244].

Social inclusion

219. The HRLC endorses the submission of Australian Communications Consumer Action Network (ACCAN), the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services.
220. While the Draft does acknowledge that social inclusion is a high priority, barriers to social inclusion should be discussed. These barriers include income/income support and access to aids and equipment for people with disabilities.
221. The Baseline Study should also deal with the issue of social inclusion from poverty and other perspectives.

Recommendations:

The Baseline Study should:

- (a) refer to the need to ensure that Australia's mental health and guardianship and administration laws comply fully with the Convention on the Rights of Persons with Disabilities, particularly article 12 thereof;
- (b) identify the issues surrounding decision making and levels of support concerning people with disability;
- (c) identify barriers to the right to vote affecting people with disability;
- (d) refer to discrimination on the grounds of disability and impairment against migrants under the *Migration Act 1958* (Cth).
- (e) address issues of funding and access to support services for people with disabilities;
- (f) include a separate section addressing mental health and discuss the full range of concerns relevant to those experiencing mental illness;
- (g) recognise the need to investigate the overlap of mental illness with other areas of disadvantage;
- (h) discuss the issues of access to services and care, quality of care and adequate accommodation for those requiring mental health services.
- (i) discuss the issue of involuntary detention of people with mental illness and the issues raised in *Making Rights Real* including Advance Directives, the failure of external review processes and need for greater compliance with the *United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*.
- (j) acknowledge that in some cases involuntary treatment of mental illness may constitute torture or other cruel, inhuman or degrading treatment; and
- (k) address barriers to social inclusion, including income/income support and access to aids and equipment.

5.8 People in prisons

222. The HRLC welcomes the Baseline's Study's engagement with challenges facing Australian prisoners – particularly health issues. We also welcome the Australian Government's commitment to the oversight regime of the Optional Protocol to the Convention against Torture (OPCAT).
223. However, the National Action Plan must address several issues which are not included on page 82 of the Study. The Australian Government response to UPR Recommendation 46 – to “[s]trengthen legislative protections of the rights of people in detention” – was that it was “already reflected” in existing law and/or policy.²²⁹ In the HRLC's view, there is actually very little statutory protection for the rights of those deprived of their liberty in Australia, and this should be identified as a weakness in the Baseline Study.
224. First, schemes to divert people from the prison system are referenced on pages 27 (in the context of Aboriginal peoples), 44 (in the context of young people) and 78 (in the context of those suffering from mental illness), but there is no proposal to include in the National Action Plan a cohesive national diversionary strategy, providing alternatives to detention in appropriate cases. The HRLC recommends the National Action Plan include such a strategy.
225. Second, the Draft refers to conditions of detention, including overcrowding, in the Christmas Island Immigration Detention Centre, but fails to address adequately conditions in prisons and other places of detention. The Study acknowledges recommendations relating to ‘super-maximum’ prisons in the most recent Concluding Observations on Australia of the Committee against Torture, but the Committee also expressed concerns about overcrowding (particularly in Western Australian prisons) and excessive use of solitary confinement leading to adverse outcomes such as exacerbation of mental illness, suicide attempts and even deaths in custody.²³⁰
226. Access to healthcare in prisons was highlighted in a recent Investigation Report by the Victorian Ombudsman,²³¹ which follows up on his 2006 report entitled *Conditions for Persons in Custody*. The report reveals that Corrections Victoria has no comprehensive communicable disease policy, that Hepatitis C treatment is only available in three out of 14 Victorian prisons despite the high prevalence of the disease and that drug rehabilitation programs are simply not keeping up with need. In response to the report, the Victorian Government has promised to supply condoms in prisons,²³² belatedly bringing it into line with other jurisdictions, but the other problems remain and are faced by Corrections authorities throughout Australia.²³³ A

²²⁹See Human Rights Council, UPR, above n 6.

²³⁰*Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Concluding Observations of the Committee Against Torture, Australia*, 40th session, 15 May 2008, CAT/C/AUS/CO/1 [23].

²³¹<http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_prisoner_access_to_health_care.pdf>.

²³²See: <<http://www.premier.vic.gov.au/media-centre/media-releases/1815-victorian-prisoners-to-get-access-to-condoms.html>>.

²³³See *The Health of Australia's Prisoners 2009*, Australian Institute of Health and Welfare, available at: <<http://www.aihw.gov.au/publications/phe/123/11012.pdf>>.

2009 study by the Australian Institute of Health and Welfare (**AIHW**) showed that more than a third of all prison entrants in 2009 tested positive for Hepatitis C, a sixth have chronic health conditions and nearly three quarters had used illicit drugs in the year leading up to their incarceration.²³⁴ This is a snapshot of a cohort with far more serious health issues than the population at large, and demonstrates a need for a comprehensive review of prisoner health policies at the national level. The AIHW study presents itself as providing “a baseline for monitoring these indicators of the health of Australia’s prisoners, to inform policy making and service delivery.”²³⁵ The HRLC recommends it, along with more specific reports such as the Victorian Ombudsman’s, be used for just this purpose.

227. Third, the Baseline Study refers to mandatory sentencing laws in section 3.3.3 in the context of young offenders, and recognises criticism that they can have arbitrary effects and impact disproportionately on Aboriginal peoples.
228. While acknowledging the division of responsibility for relevant policy development between the different levels of government, the Federal Government is under an obligation under international human rights instruments to which it is party – including the ICCPR and the CERD – to seek to change laws and policies which have discriminatory or unjust effects. Mandatory sentencing should therefore be addressed in the National Action Plan.
229. In its List of Issues prior to the submission of Australia’s fifth periodic report, the Committee also raised the issues of compliance with the bail system and prisoner transport.²³⁶
230. Presumptions against bail for certain offences can have disproportionate effects on certain populations, including unreasonably long periods on remand.²³⁷ Even though these presumptions are generally contained in State and Territory laws, they should be identified as a human rights issue in the Baseline Study.
231. As the HRLC noted in its *Making Rights Real* submission, transportation of prisoners has resulted in injury or even death in a number of cases – particularly in Western Australia where such transportation is generally across significant distances in unsuitable vehicles.²³⁸ The Committee against Torture raised this in its List of Issues prior to Australia’s fifth periodic report in the context of the egregious case of the death of Mr Ward, and requested information on “measures taken to ensure that transportation of prisoners and detainees in all jurisdictions of the State party comply with international human rights standards relating to the treatment and custody of persons deprived of their liberty.” The HRLC notes that the vehicles used for transportation of detainees will be subject to the monitoring regime under the OPCAT once this comes into effect.

²³⁴Ibid x.

²³⁵Ibid, xi.

²³⁶CAT/C/AUS/4 [29] & [34].

²³⁷See eg North Australian Aboriginal Justice Agency, *Submission FV 194 to ALRC Report 114 ‘Family Violence – A National Legal Response.’*

²³⁸See *Making Rights Real*, above n 2 [110]-[111].

232. All of the issues referred to above affect Aboriginal peoples disproportionately and must be addressed in the National Action Plan as part of Australia's effort to reduce Aboriginal incarceration rates and morbidity in detention.

Recommendations:

The Baseline Study should:

- (a) discuss whether it will implement a national diversionary strategy for persons at risk;
- (b) acknowledge and discuss in further detail the extent of the health issues facing prisoners in Australia;
- (c) refer to criticism of conditions of detention by the CAT in all detention facilities, not just in 'super-maximum' prisons;
- (d) include discussion of mandatory sentencing provisions; and
- (e) discuss presumptions against bail.

5.9 Refugees, asylum seekers and migrants

233. As a preliminary point, the HRLC believes that the human rights issues facing asylum seekers and refugees in Australia are of sufficient significance to warrant a section of their own in the Baseline Study. As such, we recommend that the integration and support issues facing other migrants (as well as refugees once they are granted visas) be placed in a separate section.

Mandatory detention

234. The Baseline Study states that '[t]he Australian Human Rights Commission and a number of submissions to the National Consultation have indicated that there may be room for further improvement in the protection of human rights for refugees, asylum seekers and migrants.' This understates the calls from all members of Australia's human rights community for better protection of the rights of refugees and asylum seekers. The HRLC reiterates its call in *Making Rights Real* for asylum seekers arriving by boat to be treated the same as those arriving by air, despite the political difficulties this now poses.
235. Criticisms of the Australian Government policy of mandatory detention of asylum seekers are well-known,²³⁹ but they are particularly pertinent in late 2011 as Department of Immigration and Citizenship (**DIAC**) testimony²⁴⁰ before the Joint Select Committee on Australia's Immigration Detention Network²⁴¹ reveals a health crisis in the detention centres, prompting the Australian Medical Association to call for an end to the policy.²⁴² The Baseline Study

²³⁹ Many are set out in *Making Rights Real*, above n 2 [60]-[64].

²⁴⁰ See: <<http://www.abc.net.au/7.30/content/2011/s3296024.htm>> and <<http://www.brisbanetimes.com.au/opinion/editorial/politics-of-detention-defy-all-reason-20110817-1iy5a.html>>.

²⁴¹ <http://www.apf.gov.au/Senate/committee/immigration_detention_ctte/immigration_detention/index.htm>.

²⁴² See, eg: <<http://www.canberratimes.com.au/news/national/national/general/ama-calls-for-end-to-mandatory-detention/2262420.aspx>>.

acknowledges issues with detention conditions on Christmas Island, but DIAC's own statistics as well as numerous expert opinions²⁴³ and reports²⁴⁴ have clearly shown that issues with overcrowding and poor conditions extend nationwide. The figures also cast doubt on the claim in the Baseline Study that "[t]he Australian Government provides appropriate facilities and support to asylum seekers in immigration detention facilities." Reports from the AHRC, Ombudsman and others²⁴⁵ have contended that neither the facilities nor the support (particularly healthcare) is appropriate or adequate.

236. In addition, the UN human rights treaty bodies²⁴⁶ and the Human Rights Council in the context of the UPR²⁴⁷ have called for an end to mandatory detention in Australia. The baseline study acknowledges the latter but not the former. The Study does recognise that "detention that is indefinite or otherwise arbitrary is not acceptable," but in our submission (and according to the Human Rights Committee), a policy of mandatory detention provides insufficient protection against arbitrariness.²⁴⁸ In a recent (August 2011) report, the Centre for Policy Development stated that 30 days should generally suffice for the "health, identity and security checks" which are cited to justify the current indefinite regime.²⁴⁹ Given that two of the authors of this report have served as members of the Senior Executive Service in DIAC, their view should not be discounted lightly. Whether it is 30 days or 6 months (as recommended in the UPR²⁵⁰), immigration detention should be for a limited period, after which independent, judicial authorisation should be required to extend it.

Offshore processing

237. Another practice – that of offshore refugee processing – also presents significant human rights challenges. The legality of the artificial 'excision from the Migration Zone' of parts of Australian territory has been widely canvassed, but the main problems with offshore processing relate to the conditions for the asylum seekers intercepted at sea and detained on remote islands. The Baseline Study acknowledges that the conditions on Christmas Island could be improved, but the problem begins earlier – on the naval and Customs vessels chartered to transport the

²⁴³See, eg, The Australian, *McGorry attacks "reprehensible" detention* (10 January 2011) <<http://www.theaustralian.com.au/news/mcgorry-attacks-reprehensible-detention/story-e6frg6n6-1225984685389>>.

²⁴⁴See eg the Commonwealth Ombudsman's numerous Immigration detention review reports from 2005 on: <<http://www.ombudsman.gov.au/reports/immigration-detention-review>>, the Australian Human Rights Commission's Immigration detention reports dating back to 1998: <http://www.hreoc.gov.au/human_rights/publications.html>, See also ComCare, *Investigation report into the work health and safety of federal workers, contractors and detainees at seven Immigration Centres*, August 2011: <http://www.comcare.gov.au/news_and_media/news_listing/diac_investigation_report>.

²⁴⁵*Ibid.*

²⁴⁶See eg, *Concluding Observations of the Human Rights Committee: Australia*, 95th sess, UN Doc CPPR/C/AUS/CO/5 (7 May 2010) [22]; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [25]; CERD, above n 53 [24].

²⁴⁷See Human Rights Council, UPR, above n 6, recommendations 126, 127 and 131.

²⁴⁸See eg *A v Australia* (CCPR Communication CCPR/C/59/D/560/1993) or *C v Australia* (CCPR Communication CCPR/C/76/D/900/1999).

²⁴⁹See *A New Approach: Breaking the Stalemate on Refugees & Asylum Seekers*, CPD 2011 (<http://cpd.org.au/wp-content/uploads/2011/08/CPD-Refugee_Report_Web.pdf>) at 35.

²⁵⁰See Human Rights Council, UPR, above n 6, recommendation 132.

asylum seekers to the island. At the time of writing, reports suggest that Navy transport vessels HMAS Manoora, Kanimbla and Tobruk – which were being used for this purpose – are all out of action due to issues with their condition, and that an Antarctic Support vessel, along with two Customs patrol boats, are presently being diverted to transport duty.²⁵¹ The policy of offshore processing should be abandoned, but if it is not, vessels suitable for passenger transport should be procured and conditions in the detention centre on Christmas Island (for both the detainees and the staff) should be addressed urgently.

238. The Baseline Study, and the Action Plan once it is drafted, should not avoid referring to such an important gap in protection for some of the most vulnerable people in Australia simply because mandatory detention is long-standing Government policy.

The “character test” for citizenship

239. Another troubling aspect of Australia’s asylum processing scheme is the character test under s 501 of the *Migration Act 1958* (Cth) which is used to exclude certain people from refugee protection. According to DIAC’s latest Fact Sheet on this subject,²⁵² a person will fail the character test if he/she “ha[s], or ha[s] had, an association with an individual, group or organisation suspected of having been, or being, involved in criminal conduct.” Furthermore, if, “having regard to the person’s past and present general conduct, the person is found to be not of good character” they will also fail the test. Even when the character test only applied to actual criminality, it was interpreted inflexibly in cases such as Stefan Nystrom’s²⁵³ and Robert Jovicic’s.²⁵⁴ A discretion to exclude someone from refugee protection or cancel someone’s visa simply because his/her ‘general conduct’ is not to the Minister’s liking is overly broad.
240. When former Minister for Immigration Chris Evans came to office he explained why such Ministerial discretions are problematic:

One of the first things that struck me when I took on this role was what extraordinary powers I had as minister; the range of powers from determining the character of a person – such as Dr Haneef – to the deportation of long term residents with criminal convictions – to whether or not a new born baby can be allowed to live with its mother in community detention.

Yet ministerial intervention offers no guarantee of fairness.

While tribunal members and judicial officers make their decisions and judgments in accordance with appropriate guidelines – decisions and judgments that are, in turn, open to review – there are no strict guidelines for the exercise of ministerial discretion.

²⁵¹ See: <<http://www.theaustralian.com.au/national-affairs/commentary/secure-seas-need-dedicated-body/story-e6frgd0x-1226064368506>>.

²⁵² <<http://www.immi.gov.au/media/fact-sheets/79character.htm>>.

²⁵³ <<http://www.hrlrc.org.au/content/topics/international-human-rights-mechanisms/nystrom-v-australia-individual-communication-un-human-rights-committee/>>.

²⁵⁴ <<http://www.minister.immi.gov.au/media/media-releases/2008/ce08018.htm>>.

There is no way of really knowing what factors influence the minister's decision in individual cases. And there is no avenue of appeal from a bad decision, and no way to prevent an abuse of power.

There is no consistency in the decision making because different ministers have different personalities and different ways of thinking.²⁵⁵

241. These insightful observations on the Ministerial Intervention power, which includes the power to make decisions on the character test, remain true today. As such, reliance on this power for tests such as the character test should be identified as a serious institutional gap in fairness and protection for migrants in Australia.

Multiculturalism

242. Australia's efforts to promote multiculturalism, such as Australian Multicultural Council, National Anti-Racism Partnership and Strategy and mentoring grants referred to in the Baseline Study, are laudable. However, it should be acknowledged that multiculturalism has been a controversial term – so much so that it was removed from the name of the Department of Immigration in 2007 and senior figures from both the Liberal²⁵⁶ and Labor²⁵⁷ parties have criticised it openly. Most recently, the word was removed from the title of the Parliamentary Secretary assisting the Minister for Immigration and Citizenship.²⁵⁸ Australia's latest Multicultural Policy document²⁵⁹ states that “[t]he Australian Government is unwavering in its commitment to a multicultural Australia.” The Government should ensure the NAP and subsequent Government policy and conduct in general demonstrate unqualified commitment to the spirit and practice of multiculturalism in Australia.

Selective collection of biometric data from visa applicants

243. In its August 2010 Concluding and Observations on Australia, CERD expressed concern about Australia's collection of biometric data for visa applicants only in certain countries, which, in the Committee's view, “may constitute racial profiling and may contribute to increased stigmatization of certain groups.” The National Action Plan should, in the context of legislation and policy affecting non-citizens, provide for regular review to ensure there is no unlawful discrimination.

Statelessness

244. The Draft should identify and discuss the issue of Statelessness. As discussed in *Making Rights Real*, under section 196 of the *Migration Act 1958* (Cth) a person can be indefinitely detained until they have either been removed or deported from Australia or granted a visa.

²⁵⁵ <<http://www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm>>.

²⁵⁶ <<http://www.couriermail.com.au/news/national/national-identity-in-spotlight/story-e6freooo-111112595621>>.

²⁵⁷ <<http://www.smh.com.au/articles/2004/04/20/1082395857017.html>>.

²⁵⁸ <<http://www.theaustralian.com.au/national-affairs/multiculturalism-departs-stage-left-from-jobs-title/story-fn59niix-1225922953663>>.

²⁵⁹ <http://www.immi.gov.au/media/publications/multicultural/pdf_doc/people-of-australia-multicultural-policy-booklet.pdf>.

However, if a visa has been refused but the person cannot be removed or deported because no other country will allow their entry, under the law as it currently stands that person can be legitimately kept in detention for the rest of their life. This absurd and inhumane situation has been subject to criticism from the international community, including the CAT Committee.²⁶⁰

Discriminatory suspension of processing from selected countries

245. In April 2010 the Government announced a suspension of the processing of new asylum applications from Sri Lanka and Afghanistan.²⁶¹ ‘Evolving circumstances’ in these countries, which were cited as justification for this policy, should be taken into account when each visa applicant is processed – they cannot absolve Australia of its obligation to process anyone seeking asylum under the Convention on the Status of Refugees. The HRLC welcomes the subsequent lifting of these suspensions and urges the inclusion in the National Action Plan of a commitment to step up efforts to gather up-to-date Country of Origin Information and maintain a comprehensive database accessible to all DIAC decision-makers.
246. Only two of the issues covered in this section are included in the ‘issues that a National Action Plan could address’ box. Given the seriousness and scope of the human rights challenges generated by immigration detention, the NAP must place a high priority on this issue. “Further develop mechanisms to support people while in immigration detention” should be supplemented by the following recommendations. For further recommendations please refer to Part 7 of *Making Rights Real*.

²⁶⁰ See *Making Rights Real*, above n2, [71] – [72].

²⁶¹ See: <<http://www.foreignminister.gov.au/releases/2010/fa-s100409.html>>.

Recommendations:

The Baseline Study should:

- (a) discuss whether and how it intends to review immigration detention policies (including offshore processing);
- (b) refer to the Key Immigration Detention Values promulgated by the Government in July 2008 (particularly the human rights-based protections in values 3-7);²⁶²
- (c) include a consideration of the best interests of the child in line with Australia's international obligations under the Convention on the Rights of the Child and the Minister's statutory duties as guardian of unaccompanied minor migrants;²⁶³
- (d) provide information about conditions on Government vessels and in the detention centre;²⁶⁴
- (e) set out its process for regular review of policies (such as the collection of biometric data from visa applicants to ensure they do not entail any discrimination);
- (f) refer to maintaining a comprehensive database of Country of Origin Information to enable accurate refugee processing at any time.; and
- (g) discuss the issue of statelessness.

5.10 Additional groups to be included in the Baseline Study

Workers' rights

247. The Draft does not discuss the protection of workers' rights. Australia has received recommendations from the CESCR Committee and during the UPR process to repeal penalties for and remove restrictions on industrial action, including the right to strike.²⁶⁵ In addition, there are a number of concerns surrounding the informal employment sector, minimum shifts, Individual Flexibility Arrangements and non-discrimination within the employment sector which have an impact on human rights and should be included.

248. The CESCR Committee also recommended that Australia implement special programs and measures promote the right to work for Aboriginal and Torres Strait Islander peoples, asylum-

²⁶² <<http://www.immi.gov.au/managing-australias-borders/detention/about/key-values.htm>>.

²⁶³ See <<http://www.immi.gov.au/media/fact-sheets/69unaccompanied.htm>>.

²⁶⁴ We note that, once Australia becomes party to the OPCAT, all forms of immigration detention and transport will be subject to regular inspections by the National Preventive Mechanism.

²⁶⁵ See Human Rights Council, UPR, above n 6, recommendation 100; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) recommendation 19.

seekers, migrants and people with disabilities, and to protect them from discrimination and exploitation.²⁶⁶

Arab and Muslim communities

249. The Draft does not discuss the human rights concerns around the racial discrimination facing Australia's Arab and Muslim populations, despite a number of UPR and other treaty body recommendations specifically recognising the specific difficulties facing these communities.²⁶⁷ Australia's Race Discrimination Commissioner, Dr Helen Szoke, recently commented that:

After September 11, 2001, the racist focus on Muslim communities has been exacerbated and has been quite acute.²⁶⁸

There has been considerable research into the racial discrimination experienced by Arab and Muslim Australians.²⁶⁹ This research should be referenced in the Baseline Study.

International students (particularly from India)

250. During the UPR process, India expressed its concern over the safety and well-being of Indian students in the country, and expressed the hope that the Australian Government would ensure the safety of all in the country.²⁷⁰ In addition, Australia accepted a recommendation to implement additional measures to combat discrimination against "foreign students (essentially coming from India)".²⁷¹ The rise in violent attacks against Indian students since 2009, including the death of 21 year old Indian student Nitin Garg,²⁷² has sparked protests to demand additional protection against racism.²⁷³ The Australian Human Rights Commission released a policy paper introducing the experience of racism by international students in Australia,²⁷⁴ stating:

We do not know enough about who are the victims, who are the perpetrators and the contexts of each. There are no official data about racially motivated crime, and no data on victims' perception of whether the crime was racially motivated.²⁷⁵

²⁶⁶ *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN Doc E/C.12/AUS/CO/4, 42nd sess (12 June 2009) [18].

²⁶⁷ See Human Rights Council, UPR, above n 6, recommendations 59, 65; CERD, above n 53 [14].

²⁶⁸ Race Discrimination Commissioner Dr Helen Szoke, quoted in *The Age*, Farah Farouque, *Detention Not Humane, Says Commissioner* (September 5 2011).

²⁶⁹ See, eg, Scott Poynting, Report to the Human Rights and Equal Opportunity Commission, *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence since 11 September 2001* (19 April 2004) <http://www.hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf>; Islamic Women's Welfare Council of Victoria Inc, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria (The Ongoing Impact of September 11 2001)* (11 December 2008) <http://www.islamicwomenswelfare.org.au/files/iwwcv_race_faith_report.pdf>.

²⁷⁰ See Human Rights Council, UPR, above n 6 [44].

²⁷¹ *Ibid*, recommendation 65.

²⁷² See, eg, *Herald Sun*, *Funeral for Nitin Garg* (January 10 2010).

²⁷³ See, eg, ABC Local Radio, *The World Today*, Rachael Brown, *Indian Students Protest over Race Attacks* (1 June 2009); *The Times of India*, *Thousands Rally Against Racism in Melbourne* (1 June 2009); *Time Magazine*, Sharon Verghis, *Australia: Attacks on Indian Students Raise Racism Cries* (10 September 2009).

²⁷⁴ Adam Graycar, *Racism and the Tertiary Student Experience in Australia* (May 2010)

<http://www.hreoc.gov.au/racial_discrimination/publications/tertiary_students/Graycar_racism_tertiary2010.pdf>.

²⁷⁵ *Ibid* 8-9.

In addition, there have been a series of news reports detailing the misleading behaviour of colleges, education agents and providers²⁷⁶ and exploitative conduct of employers in relation to international students.²⁷⁷ The CERD Committee noted with concern increasing reports of ongoing discrimination and equity experienced by people of Asian background.²⁷⁸

Recommendations:

The Baseline Study should:

- (a) add a section on workers' rights, including protections on the right to industrial action in line with commitments under CESCER and during the UPR process;
- (b) make specific references to the discrimination facing Australia's Arab and Muslim communities, particularly in the context of newly arrived migrants; and
- (c) specifically refer to discrimination facing international students, particularly from India, and recognise the need for data on racially motivated violence.

²⁷⁶See, eg, Brisbane Times, Kate Dennehy, *Overseas Students Ripped Off with 'False Promises'* (June 29 2009); The Age, Nick McKenzie, *Push for Probe on Foreign Student 'Rip-Off'* (February 23 2007); All International Student Association (AISA), Kelvin Thomson, *'Residence' Lure Rorts Students* (November 7 2009); ABC News, *Xenophon Urges Compo for Cheated Foreign Students* (July 28 2009).

²⁷⁷See, eg, Fair Work Ombudsman, Media Release, *Convenience Store Operators Fined \$150,000 for Underpaying International Students* (27 April 2011) <<http://www.fairwork.gov.au/media-centre/media-releases/2011/04/Pages/20110427-Bosen.aspx>>.

²⁷⁸CERD, above n 53, [14].