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Australia's Compliance with the  
International Covenant on Civil and Political Rights  
Submission on List of Issues Prior to Reporting

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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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## 1. Introduction

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1. This submission by the Human Rights Law Centre, a leading Australian human rights advocacy organisation, sets out a number of issues which we consider the Human Rights Committee (the **Committee**) should consider in its development of a List of Issues Prior to Reporting (**List of Issues**) in respect of Australia's compliance with the *International Covenant on Civil and Political Rights* (the **ICCPR**).
2. Each section sets out any previous Concluding Observations relevant to the issue made by the Committee, significant developments in relation to the issue since the Committee's last review in 2009, and proposed questions for the List of Issues.
3. This submission also contains an Appendix which provides an assessment of Australia's implementation of the previous Concluding Observations issued by the Committee in 2009 on the basis of whether each recommendation has been Implemented, Partially Implemented, is In Progress, or Not Implemented.
4. As a preliminary point, we consider that the Committee should explicitly request that Australia's response to the Committee's List of Issues provide a candid, constructive and comprehensive account of human rights issues arising under the Convention. Given that the focus of a periodic review is to enhance implementation of, and compliance with, human rights obligations on the ground, we consider that Australia's response must do more than provide generic information on Australia's legal framework and funding and program initiatives. The response should provide relevant disaggregated data and details as to practical human rights *outcomes*, as against program outputs.

## 2. General Information on the National Human Rights Situation

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5. Since its previous periodic review by the Committee in April 2009, Australia has been reviewed by a number of other United Nations human rights mechanisms, many of which are directly relevant to the Committee's review of Australia's obligations under the ICCPR.
6. Concluding Observations have been issued by the following UN treaty bodies:
  - (a) the Committee on the Rights of the Child in June 2012;<sup>1</sup>
  - (b) the Committee on the Elimination of Racial Discrimination in 2010;<sup>2</sup>
  - (c) the Committee on the Elimination of Discrimination against Women in 2010;<sup>3</sup> and
  - (d) the Committee on Economic, Social and Cultural Rights in 2009.<sup>4</sup>

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<sup>1</sup> Available at [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf).

<sup>2</sup> Available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CERD/C/AUS/CO/15-17&Lang=E>.

<sup>3</sup> Available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/C/AUL/CO/7&Lang=E>.

<sup>4</sup> Available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/C.12/AUS/CO/4&Lang=E>.

7. In January 2011, Australia was reviewed by the UN Human Rights Council under the Universal Periodic Review process. Documentation relating to Australia's review, including the Report of the Working Group, is available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/AUSession10.aspx>.
8. Australia has also been subject to country visits by a number of Special Procedures of the UN Human Rights Council, including:
  - (a) the UN Special Rapporteur on Trafficking in Persons, especially women and children in November 2011;<sup>5</sup>
  - (b) the UN Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations on Human Rights in February 2011;<sup>6</sup>
  - (c) the UN Special Rapporteur on Indigenous Peoples in August 2009;<sup>7</sup> and
  - (d) the UN Special Rapporteur on the Right to Health in November/December 2009.<sup>8</sup>
9. Where relevant, references to the recommendations of these mechanisms will be provided throughout this submission.

### 3. Constitutional and Legal Framework (art. 2)

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#### 3.1 Failure to Incorporate the Covenant into Domestic Law

***Previous Concluding Observations (para 8):***

*The State party should: a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.*

10. Despite the significant opportunity following the National Human Rights Consultation, Australia continues to fail to enact comprehensive legislation to incorporate the Covenant into domestic law. In 2009, at the time of Australia's last review by the Committee, the Federal Government had appointed an independent National Human Rights Consultation Committee to consider the legal recognition and protection of human rights in Australia.

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<sup>5</sup> Available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.18.Add.1\\_En.PDF](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.18.Add.1_En.PDF).

<sup>6</sup> See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/134/31/PDF/G1113431.pdf?OpenElement>.

<sup>7</sup> See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/138/87/PDF/G1013887.pdf?OpenElement>.

<sup>8</sup> See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/139/47/PDF/G1013947.pdf?OpenElement>.

11. After six months of consultation, the committee found that Australia's legal and institutional protection of human rights is inadequate, particularly for individuals and communities that are marginalised or disadvantaged.<sup>9</sup> The committee's key recommendation was that Australia adopt a comprehensive national Human Rights Act.<sup>10</sup> The committee also recommended a range of other measures to protect human rights in Australia, including strengthening the Australian Human Rights Commission, enhancing human rights education, improving parliamentary scrutiny of human rights, improving access to justice and addressing Indigenous disadvantage and exclusion.<sup>11</sup>
12. On 21 April 2010, the Federal Government announced that it had decided not to enact a federal Human Rights Act. Instead, the Federal Government announced a new "Australia's Human Rights Framework", which contains a number of commitments to strengthen the promotion and protection of human rights in Australia.<sup>12</sup>
13. Since the announcement of the Framework, the Australian Government has:
  - (a) enacted legislation in late 2011 to strengthen scrutiny of new legislation by the Federal Parliament for its compatibility with human rights by:
    - (i) requiring that each new Bill introduced into the Federal Parliament is accompanied by a "Statement of Compatibility" with Australia's international human rights obligations, which assesses the proposed legislation's compatibility with the seven core international human rights treaties to which Australia is party; and
    - (ii) establishing a Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations;<sup>13</sup>
  - (b) released a draft National Action Plan on Human Rights to "outline future action for the promotion and protection of human rights" (see further information below);
  - (c) worked towards the consolidation and harmonisation of federal anti-discrimination laws into a single Act (see further information below); and
  - (d) created a 'Human Rights Forum' to enable whole-of-government engagement with non-government organisations on annual basis.

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<sup>9</sup> A copy of the National Human Rights Consultation Committee's report on the protection and promotion of human rights in Australia is available at <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>.

<sup>10</sup> See *Report of the National Human Rights Consultation* (2009), released by the Federal Government on 8 October 2009, page 264 and Recommendation 18.

<sup>11</sup> For further information about the Consultation report, including a summary of the key findings and recommendations, see <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/act-now-a-human-rights-act-for-australia/>.

<sup>12</sup> A copy of the 'Human Rights Framework' is available at [www.ag.gov.au/humanrightsframework](http://www.ag.gov.au/humanrightsframework).

<sup>13</sup> Human Rights (Parliamentary Scrutiny) Act 2011 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Act 2011. For further information see <http://www.hrlc.org.au/content/passage-of-parliamentary-scrutiny-legislation/http://www.hrlc.org.au/content/passage-of-parliamentary-scrutiny-legislation/>.

14. The Federal Government has committed to review the Framework in 2014 to “assess its effectiveness in the promotion and protection of human rights in Australia”.
15. While many aspects of “Australia’s Human Rights Framework” are welcome, it is deficient in many respects. In particular, and contrary to the recommendation of the Committee and other UN human rights mechanisms, it does not incorporate the ICCPR into domestic law, does not impose any legal obligation on public authorities to promote, protect, respect or fulfil human rights, and does not provide victims of human rights violations with access to any effective and enforceable judicial remedies.

**Proposed Questions for List of Issues:**

- In light of the findings and recommendations contained in the National Human Rights Consultation report, please provide information on the reasons why the Federal Government decided not to incorporate the Covenant into Australia’s domestic law?
- How does Australia’s Human Rights Framework ensure the Covenant’s enforceability and justiciability before domestic courts and tribunals?
- Please update the Human Rights Committee as to the status of the implementation of the recommendations of the Consultative Committees regarding the enactment of human rights legislation in Tasmania and Western Australia.

### 3.2 Constitutional Recognition of Indigenous Peoples

16. The Australian Government has committed to consider the question of recognising of Aboriginal and Torres Strait Islander Peoples in Australia’s Constitution. In 2011, an Expert Panel consisting of Aboriginal and Torres Strait Islander leaders, business leaders, constitutional experts and politicians from all parties was appointed to conduct a community consultation process.<sup>14</sup>
17. On 19 January 2012, the Expert Panel delivered its report, *Recognising Aboriginal and Torres Strait Islander peoples in the Constitution*. The Expert Panel recommended that changes to the Australian Constitution be made to:
  - (a) recognise the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
  - (b) remove racist elements; and
  - (c) prohibit discrimination on the grounds of race, colour or ethnic or national origin.<sup>15</sup>
18. The Australian Government is still considering its response to the Expert Panel’s recommendations.

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<sup>14</sup> Members of the Expert Panel travelled to 84 urban and remote locations to host public events and received 3,600 public submissions.

<sup>15</sup> A copy of the Expert Panel’s report is available at <http://www.youmeunity.org.au/final-report>.

***Proposed Questions for List of Issues:***

- What steps is the Federal Government taking to ensure that Aboriginal and Torres Strait Islander communities can fully participate in the national conversation about recognition in the Australian Constitution?
- What is the proposed timeline for a referendum?
- Please explain how Australia's current Constitutional framework, which permits discrimination on the grounds of race, is compatible with articles 2(1) and 26 of the Covenant?

### 3.3 National Human Rights Action Plan

19. As part of its Human Rights Framework, the Australian Government has committed to develop a new National Human Rights Action Plan which is intended to "outline future action for the promotion and protection of human rights". To date, the National Action Plan process has involved:
  - (a) the development of a Baseline Study, which aimed to provide a comprehensive appraisal of the state of human rights in Australia; and
  - (b) on 9 December 2011, the release of an Exposure Draft of the National Action Plan, which contains 220 'actions' to respond to the human rights issues identified in the Baseline Study.<sup>16</sup>
20. While the development of a National Human Rights Action Plan is a welcome move, there are a number of key concerns, including that:
  - (a) certain critical areas affecting human rights are missing or require further discussion;
  - (b) the Exposure Draft selectively refers to positive examples of human rights initiatives without adequately identifying human rights problems and deficiencies;
  - (c) key sources of prior authoritative research and evidence have been omitted; and
  - (d) the Draft does not reference all relevant recommendations from treaty bodies, reports of Special Procedures of the UN Human Rights Council and the UPR.
21. Following public submissions on the Exposure Draft in March 2012, a final National Human Rights Action Plan has not yet been released.

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<sup>16</sup> A copy of the Exposure Draft is available at <http://www.ag.gov.au/Documents/National+Human+Rights+Action+Plan+++Consultation+version.pdf>

**Proposed Questions for List of Issues:**

- What consultation processes have been involved in the development of the National Human Rights Action Plan? In particular, what steps have been taken to obtain input from Aboriginal and Torres Strait Islander peoples and disadvantaged communities and groups?
- Please explain how the National Human Rights Action Plan is compatible with international best practice, as reflected in the UN Handbook on National Human Rights Action Plans?
- To what extent are Australia's international legal obligations and consideration of previous recommendations of UN human rights bodies incorporated into the National Human Rights Action Plan?
- Please explain what mechanisms and indicators will be incorporated to ensure effective assessment and measurement of the implementation of Australia's human rights obligations over time?

### 3.4 Australia's Reservations to the Covenant

**Previous Concluding Observations (para 9):**

*The State party should consider withdrawing its reservations to article 10, para. (2) (a) and (b) and 3; article 14 para.6; and article 20 of the Covenant.*

22. Australia has committed to review, but not necessarily withdraw, its reservations to international human rights treaties as part of its draft National Human Rights Action Plan.

**Proposed Questions for List of Issues:**

- What mechanisms has the Australian Government implemented to consider whether Australia should maintain existing reservations to the Covenant? Please update the Committee with information on how the Government considers that each of Australia's reservations remains appropriate and required.

#### 4. Equality and Non-Discrimination (arts. 2 and 26)

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***Previous Concluding Observations (para 12):***

*The State party should adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination.*

23. Australia's anti-discrimination laws do not cover all grounds of discrimination required by the Covenant. Further, the laws are reactive and complaints-based and do not adequately promote substantive equality or respond to systemic or intersectional discrimination.
24. Currently, federal anti-discrimination laws in Australia only address discrimination on the basis of race, sex, disability and age. In April 2010, the Australian Government committed to examine gaps in the existing anti-discrimination laws and consolidate them into a single Equality Act.<sup>17</sup> In September 2011, the Federal Attorney-General's Department released a Discussion Paper on the consolidation of federal anti-discrimination laws and invited public comment.<sup>18</sup> It is expected that an Exposure Draft for a proposed Equality Act will be released some time in 2012.
25. It is imperative that the consolidation project will not result in the diminution of any existing protections currently available at the Federal level and be used as an opportunity to strengthen and modernise Australia's Federal anti-discrimination laws by adopting global best-practice standards to promote substantive equality and eliminate discrimination.

***Proposed Questions for List of Issues:***

- What steps is the Australian Government taking to ensure that the consolidation of equality laws will expand the legislative protection of other protected attributes under the Covenant, including on the basis of sexual orientation, gender identity, religion, national or social origin, and other status, such as homelessness.
- What steps is the Australian Government taking to ensure that the consolidation of equality laws will address issues of substantive inequality, intersectional discrimination and systemic discrimination?

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<sup>17</sup> See Joint Media Statement of Attorney-General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, "Reform of Anti-discrimination Legislation", 21 April 2010, available at [http://www.financeminister.gov.au/archive/media/2010/mr\\_292010\\_joint.html](http://www.financeminister.gov.au/archive/media/2010/mr_292010_joint.html).

<sup>18</sup> Consolidation of Commonwealth Anti-Discrimination Laws, Discussion Paper, Attorney-General's Department (September 2011).

## 5. Counter-Terrorism Measures (arts. 2, 7, 9 and 14)

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***Previous Concluding Observations (para 11):***

*The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant. In particular, it should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences. The State party should in particular:*

- a) guarantee the right to be presumed innocent by avoiding reversing the burden of proof;*
- b) ensure that the notion of "exceptional circumstances" does not create an automatic obstacle to release a bail; and c) envisage to abrogate provisions providing Australian Security Intelligence Organization (ASIO) the power to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.*

26. In 2010, the Federal Government established the office of the National Security Legislation Monitor.<sup>19</sup> The Monitor's mandate is to review the operation, effectiveness and implications of counter-terrorism and national security legislation, including its compliance with Australia's international human rights obligations. On 19 March 2012, the Federal Government tabled in Parliament the first annual report of the Independent National Security Legislation Monitor on the operation of Australia's counter-terrorism and national security legislation.
27. The Independent Monitor's first report very usefully outlines the principles for assessing whether Australia's counter-terrorism laws are effective and remain appropriate and contains an important discussion of Australia's international human rights and security obligations. While the Independent Monitor's initial report does not make any specific recommendations, the report raises a number of issues and specific concerns, which will form the focus of his work in 2012. These issues include:
- (a) whether Australia's counter-terrorism laws remain proportionate to any threat of terrorism;
  - (b) whether some laws which confer "extraordinary powers", such as allowing authorities to detain suspects for up to a week without charge, remain necessary at all;
  - (c) given that many of the "emergency" laws were introduced immediately after the September 11 terrorist attacks, the need to ensure that such laws undergo greater scrutiny to determine if they remain appropriate;
  - (d) whether Australia's counter-terrorism laws are being used for matters unrelated to terrorism and national security; and

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<sup>19</sup> *Independent National Security Legislation Monitor Act 2010 (Cth).*

- (e) the disproportionate impact that the operation of counter-terrorism laws may have on particular communities, including concerns in relation to the threat of laws being used rather than their actual use.<sup>20</sup>
28. In addition to the preliminary questions and concerns identified by the National Security Legislation Monitor, the following aspects of Australia's counter-terrorism law, policy and practice also raise issues in respect of Australia's compliance with the Covenant:
- (a) the continued overly broad definitions of "terrorist act", "terrorist organisation" and related offences;
  - (b) the process under the Criminal Code for obtaining control orders, which lacks safeguards of transparency, due process and regular review;
  - (c) the possibility of incommunicado pre-charge detention and prolonged, potentially indefinite detention, under the *Australian Security Intelligence Organisation Act 1979* (Cth);
  - (d) the possibility of incommunicado preventative detention without judicial oversight for up to 48 hours (renewable by judicial officer for a further 48 hours);<sup>21</sup> and
  - (e) the strong presumption against bail and the 'onerous', 'oppressive' and 'austere' conditions of detention of many persons charged and remanded for 'terrorism-related' offences.<sup>22</sup>
29. In August 2009, the former Attorney-General published a National Security Legislation Discussion Paper to review aspects of Australia's counter-terrorism laws.<sup>23</sup> However, the scope and nature of the review did not address some of the most controversial elements of Australia's counter-terror laws, including many of the aspects outlined above.<sup>24</sup> A further Inquiry into National Security Legislation has been released by the current Attorney-General, which proposes a number of possible reforms relating to the interception of telecommunications, monitoring of the internet and social media, data retention and intelligence gathering.<sup>25</sup>

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<sup>20</sup> A copy of the Report is available at <http://www.dpmc.gov.au/inslm/index.cfm>.

<sup>21</sup> See, especially *Criminal Code* Div 105.

<sup>22</sup> See, eg, *R v Benbrika (Ruling No 20)* [2008] VSC 80; *Opinions Adopted by the Working Group on Arbitrary Detention*, UN HRC, 7<sup>th</sup> sess, Item 3, 69 (Opinion No 7/2007 (Australia), 9 May 2007), UN Doc A/HRC/7/4/Add.1 (2008); *Raad v Director of Public Prosecutions* [2007] VSC 330, [6].

<sup>23</sup> Details of the public consultation, including a copy of the Discussion Paper, are available at [www.ag.gov.au/Consultationsreformsandreviews/Nationalsecuritylegislationpublicconsultation/Pages/default.aspx](http://www.ag.gov.au/Consultationsreformsandreviews/Nationalsecuritylegislationpublicconsultation/Pages/default.aspx).

<sup>24</sup> Further information on the National Security Legislation Discussion Paper can be found in the joint submission of the Human Rights Law Centre and Amnesty International Australia, 'Human Rights and Human Security', 1 October 2009, available at <http://www.hrlrc.org.au/content/topics/counter-terrorism/counter-terrorism-and-human-rights-submission-to-national-security-legislation-review-oct-2009/>.

<sup>25</sup> The Terms of Reference and a Discussion Paper for the Inquiry into potential reforms to National Security Legislation are available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=pjcis/nsl2012/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/nsl2012/index.htm)

***Proposed Questions for List of Issues:***

- Please detail the steps being taken to ensure that all counter-terrorism laws and practices are compatible with Australia's human rights obligations, including particularly the absolute prohibition against torture and other forms of cruel treatment?
- What are the review processes used by the Australian Government to ensure that counter-terrorism laws and practices remain relevant, necessary and reasonably adapted?
- How does Australia ensure that counter-terrorism measures are compatible with the right to a fair hearing and the prohibition against arbitrary detention?
- Please provide disaggregated data in relation to the application of counter-terrorism laws and measures, including data in relation to racial and religious minorities?
- Please advise what reparations have been made to people subject to torture, ill-treatment, arbitrary detention or denied the right to a fair hearing in the context of the "War on Terror", including David Hicks and Mamdouh Habib.

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## 6. Aboriginal and Torres Strait Islander Peoples (arts 2, 24, 26 and 27)

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### 6.1 Implementation of the UN Declaration on the Rights of Indigenous Peoples

30. In April 2009, the Australian Government gave its support to the Declaration on the Rights of Indigenous People "in the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust". While the Australian Government regularly claims that it is giving to the 'spirit' of the Declaration, no institutional mechanisms have been established to ensure that the Declaration informs the development and implementation of laws, policies and practices.
31. Aboriginal and Torres Strait Islander peoples remain among the most disadvantaged people in Australia in all social indicators, including health, education, employment, housing, and contact with the criminal justice system. This is compounded by a lack of recognition of and respect for the right of self-determination and for Aboriginal and Torres Strait Islander peoples to participate meaningfully in decisions which affect their communities.
32. The Australian Government's "Close the Gap" initiative is a strategy by all Australian governments to achieve targets relating to life expectancy, infant mortality, early childhood development, education and employment for Aboriginal and Torres Strait Islander peoples.<sup>26</sup>

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<sup>26</sup> Information about the Close the Gap strategy is available at <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap>.

While the commitment is welcome, there has been a lack of involvement of Aboriginal and Torres Strait Islander peoples in the design and implementation of the strategy, with the effect that many of the strategies are ill-conceived, do not have community support and are therefore likely to be ineffective.

**Proposed Questions for List of Issues:**

- What institutional mechanisms do Australian governments use to ensure that laws, policies and practices respect and give effect to the rights, standards and obligation contained in the UN Declaration on the Rights of Indigenous Peoples?
- How has the UN Declaration on the Rights of Indigenous Peoples informed the Federal Government's measures that have been developed to close the gap between Indigenous and other Australians?
- What action has the Australian Government taken to address the disproportionate levels at which Aboriginal and Torres Strait Islander peoples experience disadvantage? How are Aboriginal and Torres Strait Islander communities involved in this process?

## 6.2 Extension and Expansion of the Northern Territory Emergency Response measures

**Previous Concluding Observations (para 14):**

*The State party should redesign NTER measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the Racial Discrimination Act 1995 and the Covenant.*

33. While the Federal Government reinstated the operation of the *Racial Discrimination Act 1975* in late 2010, there remain ongoing concerns about the racially discriminatory operation of the associated measures.
34. In July 2012, the Federal Government passed new legislation, entitled 'Stronger Futures', which extends the operation of many aspects of the measures which were introduced in 2007 as part of the Northern Territory Emergency Response for a further ten years. While the Government's commitment to protect children, ensure community safety and build a better future for Aboriginal and Torres Strait Islander communities is welcome, there are major concerns relating to both the process of development of the Stronger Futures measures, as well as the nature of the measures themselves. In practice, the measures continue to apply disproportionately to Aboriginal and Torres Strait Islander communities.

35. There has been widespread criticism and disapproval of the Government's Stronger Futures by Aboriginal and Torres Strait Islander leaders, communities and organisations, as well as by human rights and community organisations.<sup>27</sup> Concerns about the process of development and implementation of the extension of the measures include:
- (a) the lack of meaningful engagement with and participation of Aboriginal and Torres Strait Islander communities and individuals who are affected by the current Northern Territory Emergency Response measures and who will be subject to the proposed Stronger Futures measures; and
  - (b) failures of the proposed Stronger Futures measures to comply with human rights obligations and principles, particularly given the lack of clear and cogent evidence to support the continuation of many of the measures.
36. While the Federal Government's discourse has changed from an 'Emergency Intervention' to 'Stronger Futures, many of the Intervention measures continue to operate under the Stronger Futures legislation, including:
- (a) a prohibition on courts being able to consider Aboriginal customary law and cultural practice in bail and sentencing;
  - (b) coercive 'Star Chamber' powers held by the Australian Crime Commission to investigate allegations of violence and child abuse in Aboriginal communities, which include removing the right to silence;<sup>28</sup>
  - (c) the compulsory quarantining of social security payments for those individuals assessed to be 'vulnerable';
  - (d) the School Enrolment and Attendance Measure (SEAM), which quarantines welfare payments from parents whose children miss school more than five times over two terms;
  - (e) increased penalties for possession of alcohol on Aboriginal land;
  - (f) blanket bans on sexually explicit and violent material on Aboriginal land;
  - (g) suspension of the operation of the permit system in Aboriginal townships; and
  - (h) the licensing of community stores.

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<sup>27</sup> See, eg, submissions by community organisations to the Senate Legal and Constitutional Committee. Despite the vast majority of submissions criticising the proposed legislation, the Committee recommended that the legislation be passed. See [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=clac\\_ctte/strong\\_future\\_nt\\_11/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/strong_future_nt_11/submissions.htm).

<sup>28</sup> This is despite not one person being prosecuted for child sex abuse since the Intervention's introduction five years ago amid allegations of 'paedophile rings' operating throughout Aboriginal communities.

37. These measures, when first introduced in 2007, raised many concerns regarding Australia's international human rights obligations. A number of highly respected, independent UN human rights bodies and experts, including the Human Rights Committee, have consistently identified the need for Australia to take urgent action to ensure that the Intervention measures comply with Australia's international human rights obligations.<sup>29</sup>
38. Despite some steps being taken by the Federal Government, including the reinstatement of the operation of the *Racial Discrimination Act 1975* (Cth) and an enhanced effort to engage with affected Aboriginal and Torres Strait Islander communities, the process of development of the Stronger Futures measures, as well as the nature of the measures themselves, continue to raise serious concerns with Australia's international human rights obligations.

**Proposed Questions for List of Issues:**

- What evidence exists to demonstrably justify the need to continue and expand many of the measures implemented under the Emergency Response and now continued under the Stronger Futures legislation?
- To what extent were affected Aboriginal and Torres Strait Islander communities involved in the design, implementation and evaluation of the Emergency Response measures?
- Please explain why the Stronger Futures Bills were not subject to a Statement of Compatibility under the Human Rights (Parliamentary Scrutiny) Act 2011 and why they were not referred to or examined by the Joint Parliamentary Committee on Human Rights, despite requests by the National Congress of Australia's First Peoples?

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<sup>29</sup> These bodies and experts include the Committee on the Elimination of Racial Discrimination (both in response to a Request for Urgent Action in 2009 from residents in the Northern Territory and also in its 2010 review of Australia's compliance with the *Convention on the Elimination of All Forms of Racial Discrimination*), the Human Rights Committee during its review in 2009 of Australia's compliance with the *International Covenant on Civil and Political Rights*, the Committee on Economic, Social and Cultural Rights during its review in 2009 of Australia's compliance with the *International Covenant on Economic, Social and Cultural Rights*, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people following his country visit to Australia in 2009; the Special Rapporteur on the Right to Health following his country visit to Australia in 2010 and, most recently, the Committee on the Rights of the Child during its review of Australia's compliance with the *Convention on the Rights of the Child* in June, 2012.

## 7. Violence against Women (arts. 2, 3, 7 and 26)

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***Previous Concluding Observations (para 17):***

*The State party should strengthen its efforts towards the elimination of violence against women, especially perpetrated against indigenous women. The State party is encouraged to promptly implement its National Plan of Action to Reduce Violence against Women and their Children, as well as the recommendations of the 2008 Family Violence and Homeless report.*

39. Violence against women remains a major issue in Australia. One in three Australian women has experienced physical violence since the age of 15 and Aboriginal women and women with disabilities and women in rural and remote areas are particularly severely impacted.<sup>30</sup> In addition to the Committee's previous recommendation, violence against women was a major concern of the Committee on the Elimination of Discrimination against Women, which requested the Australian Government to report within 12 months on steps it was taking to implement that Committee's recommendations.<sup>31</sup>
40. The Australian Government is to be commended for a number of positive initiatives designed to address violence against women, including the creation of the National Plan to Reduce Violence against Women and Children. However, while the National Plan has been in place for over three years, concerns remain about adequate funding and monitoring mechanisms and the Plan's failure to focus on long-term, sustained primary prevention to address the root causes of violence against women and girls.
41. Further areas requiring attention are the lack of adequate access to sexual assault services for rural and remote women and the lack of access to crisis accommodation services, particularly for Aboriginal women and women with disabilities.<sup>32</sup>

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<sup>30</sup> Aboriginal and Torres Strait Islander women are 35.1 times more likely than non-Indigenous women to be hospitalised for family violence: see [www.aph.gov.au/library/intguide/sp/ViolenceAgainstWomen.htm](http://www.aph.gov.au/library/intguide/sp/ViolenceAgainstWomen.htm). See also: Commonwealth of Australia (2009) *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021, 9.

<sup>31</sup> See paragraphs 28 and 29 of CEDAW's Concluding Observations in July 2012, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/C/AUL/CO/7&Lang=E>.

<sup>32</sup> See: Women With Disabilities Australia (WWDA), Submission to the National Human Rights Consultation (2009) at [www.wwda.org.au/subs2006.htm](http://www.wwda.org.au/subs2006.htm). See also Commonwealth of Australia (2009) *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021, 9.

**Proposed Questions for List of Issues:**

- What steps have been taken to ensure that women and children who are victims of domestic violence are able to remain in the family home and do not become homeless?
- What steps have been taken to implement the 2006 recommendation of the Committee on the Elimination of Discrimination against Women that Australia formulate a comprehensive strategy to combat the trafficking of women and exploitation resulting from prostitution?
- How will the Australian Government ensure proper monitoring and reporting on the implementation of the National Plan to Reduce Violence Against Women and Children?

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8. Refugees and Asylum Seekers (arts 7, 9, 10, 14 and 24)

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**Previous Concluding Observations (para 19):**

*The State party should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.*

**Previous Concluding Observations (para 23):**

*The State party should: a) consider abolishing the remaining elements of its mandatory immigration detention policy; b) implement the recommendations of the Human Rights Commission made in its Immigration Detention Report of 2008; c) consider closing down the Christmas Island detention centre; and d) enact in legislation a comprehensive immigration framework in compliance with the Covenant.*

**Previous Concluding Observations (para 24):**

*The Committee express concern at the notable gaps in the protection of children and juveniles in the criminal justice system, and that children and juvenile can be detained in adult facilities or held in immigration detention facilities, where they are sometimes subject to abuse.*

42. The following aspects of Australia's current immigration law, policy and practice raise issues in respect of Australia's compliance with the ICCPR:
- (a) the continued policy of mandatory, indefinite immigration detention of asylum-seekers, including children and women, which is enshrined in legislation by the operation of the *Migration Act 1958* (Cth);<sup>33</sup>
  - (b) the extended periods for which many people are held in immigration detention;<sup>34</sup>
  - (c) the deleterious impacts on mental health of immigration detention and the high prevalence of mental illness among immigration detainees, particularly long-term detainees;<sup>35</sup>
  - (d) the continued detention of asylum seekers in "prison-like" detention facilities, including on the remote Christmas Island facility;
  - (e) conditions of detention in immigration detention centres, particularly those in excised offshore places, and the lack of adequate mental health care facilities and services, particularly in light of the prevalence of mental distress, trauma and illness among immigration detainees;<sup>36</sup>
  - (f) the potentially indefinite detention in immigration facilities of persons who are stateless<sup>37</sup> or who have been the subject of adverse security assessments by the Australian Security Intelligence Organisation (ASIO);<sup>38</sup>
  - (g) the high numbers of children who remain in immigration detention facilities;<sup>39</sup>
  - (h) pre-charge detention of individuals suspected of people smuggling offences for prolonged and indefinite periods of time. The average time spent in detention prior to charge for alleged crew of people smuggling ventures is 161 days, with restricted access to judicial review and no guarantees of legal assistance or representation for

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<sup>33</sup> *Migration Act 1958* (Cth) s 190. See the *Final Report of the Joint Select Committee on Australia's Immigration Detention Network* (2012), available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=immigration\\_detention\\_ctte/immigration\\_detention/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=immigration_detention_ctte/immigration_detention/report/index.htm).

<sup>34</sup> Of the 7,252 people in immigration detention as at 30 June 2012, 1,197 people have been detained for over a year and 473 have been detained for over 2 years: see [http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20120630.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20120630.pdf).

<sup>35</sup> Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health*, Anand Grover: *Mission to Australia*, UN Doc A/HRC/14/20/Add.4 (3 June 2010), [92]-[93].

<sup>36</sup> Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health*, Anand Grover: *Mission to Australia*, UN Doc A/HRC/14/20/Add.4 (3 June 2010), [95]-[99].

<sup>37</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>38</sup> See, eg, Yuko Narushima, "Security Risk" Refugees Left in Limbo', *The Age* (Melbourne), 22 April 2010.

<sup>39</sup> As of 30 June 2012, 591 children were being held in immigration detention. See: [http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20120630.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20120630.pdf).

- the purposes of challenging the lawfulness of their detention.<sup>40</sup> There are also particular concerns about the impact of these laws on suspects who are children;<sup>41</sup>
- (i) the offence of aggravated people smuggling currently attracts a mandatory minimum sentence of 5 years with 3 years non-parole.<sup>42</sup> These mandatory minimum sentences are arbitrary because they do not allow for differentiation between serious and minor offending or for consideration of the particular circumstances of the individual. In practice, these provisions have prevented courts from distinguishing between those who orchestrate people-smuggling operations and the crew on the boats who are generally young, uneducated fishermen from small villages in Indonesia.<sup>43</sup> As of 15 March 2011, only 6 of 353 people charged with people smuggling offences were organisers of people smuggling operations;<sup>44</sup> and
  - (j) despite the welcome passage of the *Migration Act Amendment (Complementary Protection) Act 2011*, which legislates obligations relating to non-refoulement, the legislation sets out a list of grounds upon which Australia will grant protection obligations which is narrower than the grounds for protection under international law and also excludes protection for certain classes of people, despite the absolute and non-derogable nature of Australia's protection obligations.<sup>45</sup>
43. There also remain concerns about current policy discussions that focus on punishment and deterrence, which would continue to raise serious human rights issues. Current policy options being seriously debated by both major parties include a proposed 'People Swap Arrangement' with Malaysia, a return to the 'Pacific Solution', and the re-introduction of temporary protection visas.<sup>46</sup>

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<sup>40</sup> Further information on the operation and impact of the pre-charge detention laws is available at <http://www.hrlc.org.au/content/topics/refugees-and-asylum-seekers/childrens-rights-submission-to-inquiry-into-detention-of-indonesian-minors-in-australia-28-may-2012/>.

<sup>41</sup> See recent report of the Australian Human Rights Commission, *An Age of Uncertainty*, available at [http://humanrights.gov.au/about/media/news/2012/71\\_12.html](http://humanrights.gov.au/about/media/news/2012/71_12.html).

<sup>42</sup> Migration Act, s 236B.

<sup>43</sup> See P Mailey and P Taylor, "Asylum Spike Bucks World Trend", *The Australian* (24 March 2010).

<sup>44</sup> Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, 18 October 2011, 68.

<sup>45</sup> Further information on the content of legislation is available at <http://www.hrlc.org.au/content/topics/refugees-and-asylum-seekers/complementary-protection-bill-strengthens-protection-from-torture-and-other-serious-human-rights-violations-25-feb-2011/>.

<sup>46</sup> For further information see <http://www.hrlc.org.au/content/major-joint-submission-to-expert-panel-on-asylum-seekers-20-july-2012/>.

**Proposed Questions for List of Issues:**

- Please provide information as to whether and how asylum seekers who have been detained are provided with adequate physical and mental health care, including routine assessments.
- What steps does the Australian Government take to monitor the safety of individuals once they are returned to their country of origin?
- Please provide information as to the legislative steps being taken to abolish mandatory immigration detention and to enable substantive judicial review of the lawfulness of detention.
- Please advise the Human Rights Committee as to the steps, including legislative steps, being taken by Australia to address the decision of the High Court in *Al-Kateb* which permits the indefinite detention of a stateless person, potentially for life.
- What steps is the Australian Government taking to implement the Joint Select Committee on Australia's Immigration Detention Network's recommendations that:
  - all reasonable steps be taken to limit detention to 90 days, and that where people are held any longer, the reasons for their prolonged detention be made public; and
  - the Minister for Immigration be replaced as guardian of unaccompanied minors in detention, and that a uniform child protection code be implemented across the immigration system for children seeking asylum?

## 9. Prisoners' Rights and Conditions of Detention (arts 7, 9 and 10)

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44. There are serious and well-documented human rights issues in relation to Australian prisons and in regards to some prisoner population groups. The following aspects of Australia's law, policy and practice in respect of prisoners and conditions of detention raise issues in respect of Australia's compliance with the Covenant:
- (a) the significant over-representation of persons with mental illness in prison and the inadequacy of mental health care facilities and services in prison, an issue that was also highlighted by the UN Special Rapporteur on the Right to Health;<sup>47</sup>
  - (b) the incarceration of persons with mental illness, including beyond their term of sentence or without being sentenced at all, due to inadequate mental health care facilities and services in the community;<sup>48</sup>

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<sup>47</sup> Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, Anand Grover: Mission to Australia*, UN Doc A/HRC/14/20/Add.4 (3 June 2010), [69]-[72].

- (c) the gross over-representation of Aboriginal and Torres Strait Islander peoples in detention,<sup>49</sup> and the continued deaths of Indigenous persons in custody.<sup>50</sup> This is despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody close to 20 years ago, many of which have still not been implemented;<sup>51</sup>
- (d) prison conditions, youth detention facilities, and police cells have variously been documented as being "intolerable and inhumane",<sup>52</sup> and "appalling", "disgraceful" and incompatible with basic human rights;<sup>53</sup>
- (e) high rates of blood borne virus transmission and sexually transmitted diseases, together with an absence of adequate harm minimisation strategies, including condoms or needle and syringe exchange programmes;<sup>54</sup> and
- (f) the lack of independent, effective mechanisms for monitoring, oversight, investigation and inspection of places of detention in most states and territories, despite Australia having signed (but not yet ratified) the *Optional Protocol to the Convention Against Torture*.<sup>55</sup>

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<sup>48</sup> See 'Mentally ill in jail "tantamount to torture"', *ABC News Online*, 26 June 2012, available at <http://www.abc.net.au/news/2012-06-25/mentally-ill-in-jail-tantamount-to-torture/4092084>. See also *R v White* [2007] VSC 142; 'Judge "Forced" to Keep Mentally Ill Man in Jail', *ABC News Online*, 22 December 2008; Natasha Robinson, 'Hopeless Days of Man, Adrian Faulton, Lost in the Legal System', *The Australian* (Sydney), 20 December 2008.

<sup>49</sup> Aboriginal and Torres Strait Islander prisoners represented 27% of the total full-time prisoner population in the March quarter 2012. The total Aboriginal and Torres Strait Islander population aged 18 years and over at 30 June 2011 was 2% of the Australian population. See Australian Bureau of Statistics, Corrective Services, Australia, March 2012, available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0/>.

<sup>50</sup> James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum – The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15 (4 March 2010) [52].

<sup>51</sup> Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) volumes 1-5, available at [www.austlii.edu.au/au/other/IndigLRes/rciadic/](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/).

<sup>52</sup> Office of the Inspector of Custodial Services (WA), *Report of an Unannounced Inspection of Roebourne Regional Prison* (February 2011), v.

<sup>53</sup> See, eg, Ombudsman Victoria, *Investigation into the Use of Excessive Force at the Melbourne Custody Centre* (November 2011); Ombudsman Victoria, *Conditions for Persons in Custody* (July 2006); Office of Police Integrity, *Update on Conditions in Police Cells* (June 2010); Ombudsman Victoria, *Investigation into Conditions at the Melbourne Youth Justice Precinct* (October 2010).

<sup>54</sup> See *Julia Medew*, 'Prisons a disease "hotbed"', *The Age*, 21 July 2012, available at <http://www.theage.com.au/victoria/prisons-a-disease-hotbed-20120720-22fux.html> and J Ryan et al, 'Prisons, Needles and OHS' (2010) 26(1) *Journal of Health, Safety and Environment* 63.

<sup>55</sup> For further information on the status of Australia's consideration of ratifying the *Optional Protocol*, see <http://www.hrlc.org.au/content/joint-parliamentary-committee-urges-government-to-take-urgent-action-to-prevent-ill-treatment-in-detention/>.

**Proposed Questions for List of Issues:**

- Please provide an update on the timeline for Australia's ratification of the *Optional Protocol to the Convention against Torture* and details as to the proposed National Preventative Mechanism.
- Please advise what programs are in place to ensure that prisoners have access to adequate healthcare, including mental healthcare, and enjoy an equivalence of access to the broader community.
- What steps have been taken to review, update and implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and substantially reduce the incarceration of Aboriginal and Torres Strait Islander peoples and the incidence of deaths in prison?
- What harm minimisation strategies are used in states and territories to reduce the risk of blood borne virus transmission in prisons? In particular, please provide information regarding drug harm prevention and minimisation programs in prisons, including condom and needle and syringe exchange programs.

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10. Policing, Police Use of Force and Police-Related Deaths (arts 2, 6 and 7)

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**Previous Concluding Observations (para 21):**

*The State party should take firm measures to eradicate all forms of excessive use of force by law enforcement officials. It should in particular: a) establish a mechanism to carry out independent investigations of complaints concerning excessive use of force by law enforcement officials; b) initiate proceedings against alleged perpetrators; c) increase its efforts to provide training to law enforcement officers with regard to excessive use of force, as well as on the principle of proportionality when using force; d) ensure that restraint devices, including TASERS, are only used in situations where greater or lethal force would otherwise have been justified; e) bring its legislative provisions and policies for the use of force into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and e) provide adequate reparation to the victims.*

45. The following aspects of Australia's law, policy and practice in respect of police and policing raise issues in respect of Australia's compliance with the Covenant:

- (a) a number of recent deaths in or immediately following police custody;<sup>56</sup>

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<sup>56</sup> See, eg, 'Amnesty backs independent death in custody inquiry', *ABC News Online*, 11 January 2012, available at <http://www.abc.net.au/news/2012-01-11/20120111-amnesty-on-death-in-custody-terrance-briscoe/3767430>;

- (b) in many Australian jurisdictions, there is inadequate regulation regarding police use of force, including lethal force, in particular the requirement that any such force be a last resort, reasonable, strictly necessary and proportionate;
- (c) lethal police shootings of persons with mental illness and children as young as 15;<sup>57</sup>
- (d) the increased use of Taser weapons, without adequate training, regulation or justification, including against children and people with mental illness;<sup>58</sup>
- (e) inadequate mechanisms for independent investigation and oversight of police, and a lack of access to effective remedies for police misconduct;
- (f) the absence or inadequacy of mechanisms to independently and effectively investigate police-related deaths, meaning deaths caused by or implicating police are themselves investigated by police;<sup>59</sup> and
- (g) evidence of police targeting, harassment and excessive use of force against Aboriginal peoples<sup>60</sup> and newly arrived migrants, particularly Africans.<sup>61</sup>

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'Shocking prison failures blamed for murder of Carl Williams as his family demands \$1m', *Herald Sun*, 19 April 2012, available at <http://www.heraldsun.com.au/news/true-crime-scene/shocking-prison-failures-blamed-for-murder-of-carl-williams-and-his-family-demands-1m/story-fnat7jnn-1226332108301>; 'Man hangs himself at Echuca police station in the second death in police custody this week", *Herald Sun*, 23 December 2009, available at <http://www.heraldsun.com.au/news/man-hangs-himself-at-echuca-police-station-in-the-second-death-in-police-custody-this-week/story-e6frf7jo-1225813029378>.

<sup>57</sup> See, eg, Coroner's Court of Victoria, *Inquest into the Death of Tyler Cassidy* (2010); Mex Cooper, 'Tyler Cassidy's Family Vent Fury Over Police Probe', *The Age* (Melbourne), 21 December 2009.

<sup>58</sup> See 'A history of Tasers in Australia', *ABC News Online*, 29 March 2012, available at <http://www.abc.net.au/news/2012-03-23/tasers-in-australia/3905914>.

<sup>59</sup> See, eg, Human Rights Law Resource Centre, *Submission to Office of Police Integrity Inquiry into the Investigation of Deaths Associated with Police Contact* (June 2010) at [www.hrlrc.org.au/content/topics/victorian-charter-of-human-rights/right-to-life-submission-on-investigation-of-police-related-deaths-18-june-2010/](http://www.hrlrc.org.au/content/topics/victorian-charter-of-human-rights/right-to-life-submission-on-investigation-of-police-related-deaths-18-june-2010/).

<sup>60</sup> See, e.g. Vic Health, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (December 2009) 31 at [www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources.aspx](http://www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources.aspx); Ethical Standards Department, Victoria Police and Indigenous Issues Unit, Department of Justice, *Koorie Complaints Project – 2006-2008 – Final Report* (2008), 7, 18 and 19.

<sup>61</sup> Victorian Equal Opportunity & Human Rights Commission, *Rights of Passage: The Experiences of Australia-Sudanese Young People* (2008) 30-8 at [www.humanrightscommission.vic.gov.au/pdf/rights\\_of\\_passage.pdf](http://www.humanrightscommission.vic.gov.au/pdf/rights_of_passage.pdf). Bec Smith and Shane Reside, Fitzroy Legal Service, *Boys, You Wanna Give Me Some Action?: Interventions into Policing of Racialised Communities in Melbourne: Report of the 2009/10 Racism Project* (2010).

***Proposed Questions for List of Issues:***

- What legislative and policy measures exist to regulate the use of weapons, including guns and 'Tasers', by police and correctional authorities to ensure that such weapons are used only where strictly necessary and as a measure of last resort?
- What mechanisms are used to ensure independent and impartial investigation and oversight of deaths in police custody and deaths associated with police contact?
- Please provide details as to the training given to police and other law enforcement officials to de-escalate conflict, avoid or minimise the use of force, and engage effectively with vulnerable people, including young people and people with mental illness or disability.
- Please provide disaggregated data in relation to the police use of force against Aboriginal and Torres Strait Islander peoples and racial and religious minority groups.

## 11. Foreign Policy and Extra-Territorial Obligations (art 2)

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46. The following aspects of Australia's foreign policy and extra-territorial obligations raise issues regarding compliance with the Covenant:
- (a) Australia's Official Development Assistance currently represents only 0.35% of its Gross National Income. While Australia had recently committed to increasing its assistance to 0.5% of GNI by 2015-2016,<sup>62</sup> the most recent budget delivered in May 2012 will put this on hold for a further 12 months. Both current and proposed spending, however, remain well short of the internationally agreed target of 0.7% of GNI.
  - (b) On 6 July 2011, the Federal Government announced a comprehensive new strategy for Australia's aid and development program. The strategy was developed in response to the report of a major independent review of the effectiveness and efficiency of Australia's program.<sup>63</sup> Under the strategy, the Government developed "five strategic goals for the overall aid program" and defined "ten specific development objectives that seek to give effect to these strategic goals". However, contrary to the recommendations of many NGOs and the independent review, the new strategy does not adopt a human rights-based approach to aid and development.

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<sup>62</sup> Australian 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](http://www.budget.gov.au/2010-11/content/ministerial_statements/ausaid/html/ms_ausaid-03.htm), as at 20 October 2010.

<sup>63</sup> A copy of report of the Independent Review of Aid Effectiveness is available at <http://www.aidreview.gov.au/report/index.html>.

- (c) Neither Australia's aid and development agency, AusAID, nor Australia's export credit agency, the Australian Export Finance and Insurance Corporation, have a policy or process by which they conduct comprehensive human rights impact assessments.<sup>64</sup>
- (d) Australia's close cooperation with countries such as Sri Lanka is impacting on the human rights situation in that country. For example, Australia provides financial assistance and security and intelligence cooperation in relation to the prevention of people smuggling and the interception of asylum seeker boats that has the effect of preventing people from fleeing the country and seeking protection under the Refugee Convention.<sup>65</sup>
- (e) The activities of Australian companies have the potential to impact on the human rights of individuals across the world.<sup>66</sup> However, there remains no comprehensive legal or regulatory framework which imposes human rights obligations on Australian corporations when operating overseas, particularly in countries where there is relaxed or no regulation, or which provides access to remedies for victims of corporate human rights violations.

***Proposed Questions for List of Issues:***

- What timeline does Australia propose in order to meet the internationally agreed target of contributing 0.7% of Gross National Income to overseas development assistance?
- How does Australia ensure that its regional cooperation to address international immigration is compliant with its human rights obligations?
- Please advise as to what legislative, policy, educative and other steps Australia has taken to give effect to the UN Human Rights Council's Framework and Guiding Principles on Business and Human Rights.
- Please advise as to the legislative and policy measures in place to ensure that Australia's aid and development agency and export credit agency promote, protect, respect and fulfil Covenant rights?

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<sup>64</sup> Human rights impact assessments could have identified the risks of AusAID's investment in a Cambodia railway project that has resulted in human rights violations associated with the involuntary resettlement of locals: see <http://www.equitablecambodia.org/reports/docs/derailed.pdf>. Similarly, it could have identified and better managed the risks associated with EFIC's \$350 million loan to an LNG project in the Southern Highlands of Papua New Guinea, including tribal conflict and landowner unrest resulting in local villager deaths and security issues for worker: see <https://www.oxfam.org.au/media/2012/05/report-on-lng-project-in-png-warns-of-major-challenges/>.

<sup>65</sup> See <http://www.hrlc.org.au/content/opinion-australia-should-act-to-promote-and-protect-human-rights-in-sri-lanka-31-july-2012/>.

<sup>66</sup> 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](http://www.hreoc.gov.au/pdf/human_rights/corporate_social_responsibility/factsheet3.pdf).

## 12. Response to Individual Views (art 2)

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***Previous Concluding Observations (para 10):***

*The State party should review its position in relation to Views adopted by the Committee under the First Optional Protocol and establish appropriate procedures to implement them, in order to comply with article 2, paragraph 3 of the Covenant which guarantees a right to an effective remedy and reparation when there has been a violation of the Covenant.*

47. Australia lacks any comprehensive institutional mechanism for the systematic domestic consideration and implementation of views and recommendations made by UN human rights mechanisms. Australia has a very poor record of taking action in response to treaty body recommendations, which it does not recognise as legally authoritative, and has rejected the adverse findings and recommendations of the Human Rights Committee on a significant number of occasions.<sup>67</sup> Australia routinely “respectfully disagrees” with the Committee on the interpretation and application of the Covenant, despite the Committee being the authoritative interpreter of the ICCPR. Further, contrary to the principle of constructive dialogue, Australia has advised the Committee in a number of cases that “further consideration of this matter would not be fruitful or constructive”. Since Australia ratified the Optional Protocol to the ICCPR, the Human Rights Committee has issued 32 views identifying violations of the Covenant. Of those, only two, arguably three, have received a satisfactory response from the Australian Government.
48. In the draft National Human Rights Action Plan released in 2011 (see section 3.3 above), the Australian Government incorporated a commitment to “review whether any Treaty Body recommendations can be accepted as consistent with the Government’s immigration detention policies”. The notion that a Government would only implement those views that are consistent with existing Government policy, whether or not that policy violates international human rights, undermines the purpose and integrity of ratifying the Covenant.
49. In addition, despite the establishment of the Joint Parliamentary Committee on Human Rights (see section 3.1 above), the Committee is not mandated to monitor the implementation of Concluding Observations and Views of the United Nations treaty bodies.

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<sup>67</sup> The views of the Human Rights Committee and the Australian Government’s response can be found at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Human\\_rights\\_and\\_anti-discriminationCommunications](http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationCommunications).

***Proposed Questions for List of Issues:***

- What measures and mechanisms, including legislative, administrative and parliamentary measures, are in place to ensure domestic implementation of, and compliance with, the Views of the Human Rights Committee?
- What mandate does Joint Parliamentary Committee on Human Rights have to consider and oversee the implementation of recommendations and views of UN human rights mechanisms?
- Please explain how Australia's consistent rejection of the Committee's Views, together with its consistent refusal or failure to implement those Views, is compatible with Australia's legal obligations under the Covenant or the First Optional Protocol.

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## Appendix: Assessment of the Implementation of the Previous Concluding Observations

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The following table provides an assessment of Australia's implementation of the previous Concluding Observations issued by the Committee in 2009:

Recommendation	Assessment	Comments
<b>General Implementation</b>		
Enact comprehensive legislation giving effect to the Covenant (para 8)	Not Implemented	See section 3.1 of this submission for more detailed information.
Establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant (para 8)	Implemented	Establishment of the Joint Parliamentary Committee on Human Rights: see section 3.1 for more detailed information.
Provide effective judicial remedies for the protection of rights under the Covenant (para 8)	Not Implemented	
Withdraw reservations to following: (para 9)		See section 3.4 of this submission for more detailed information.
<i>Separation of accused from convicted prisoners</i>	Not Implemented	
<i>Separation of children and adult prisoners</i>	Not Implemented	
<i>Imprisonment aimed at social rehabilitation and reformation</i>	Not Implemented	
<i>Compensation for wrongful convictions</i>	Not Implemented	
<i>Propaganda in war made illegal</i>	Not Implemented	

Recommendation	Assessment	Comments
<i>Advocacy for national/religious/racist hatred to incite discrimination or hostility or violence made illegal</i>	Not Implemented	
Implementation of Views adopted by the Committee (para 10)	Not Implemented	See section 3.1 of this submission for more detailed information.
<b>Counter-Terrorism Measures (para 11)</b>		
Redefine "terrorist act" in <i>Criminal Code Act 1995</i> (Cth)	Not Implemented	
Enshrine a presumption of bail	Not Implemented	
Abrogate ASIO's power to detain people without access to a lawyer and under secrecy for up to 7 day renewable periods	Not Implemented	
<b>Equality and Non-Discrimination (para 12)</b>		
Adopt federal legislation covering all grounds and areas of discrimination (para 12)	In Progress	See section 4 of this submission for more detailed information.
<b>Indigenous Peoples</b>		
Increase consultation efforts with indigenous people in decisions affecting their rights, establish an adequately resourced representative body (para 13)	Partially Implemented	National Congress of Australia's First People established in April 2010
Redesign NTER measures in consultation with indigenous people concerned to create consistency with the ICCPR and <i>Racial Discrimination Act 1975</i> (Cth) (para 14)	Partially Implemented	See section 6.2 of this submission for more detailed information.

Recommendation	Assessment	Comments
Adequate reparation to be provided to the Stolen Generation victims (para 15)	Not Implemented	Reparation schemes exist in some states but remain inadequate
Simplify the Native Title System to improve access in consultation with Aboriginal and Torres Strait Islander people (para 16)	Partially Implemented	<p><i>Native Title Amendment Act 2009</i> (Cth) was introduced to streamline procedures in relation to Aboriginal and Torres Strait Islander bodies.</p> <p><i>Native Title Amendment Act (No 1) 2010</i> (Cth) provides for consultation with Native Title holders in relation to proposed future acts on native title land.</p>
<b>Violence against Women</b>		
Eliminate violence against women, especially indigenous women, implement National Action Plan and recommendations from 2008 Report (para 17)	In Progress	See section 7 of this submission for more detailed information.
<b>Homelessness</b>		
Increase effort to prevent deprivation of rights in ICCPR experienced by homeless people (para 18)	In Progress	<p><i>The Road Home White Paper</i> (Rudd) December 2008 aiming to reduce homelessness through providing affordable housing (National Affordable Housing Agreement from 1 Jan 2009 replaces CSHA).</p> <p><i>National Partnership Agreement on Homelessness</i> (COAG) commenced 1 July 2009 pledging \$1.1 billion of funding over 5 years to provide affordable housing and social inclusion.</p>
<b>Non-Refoulement and Extradition</b>		
Stop return of people to countries where there is substantial evidence to believe this person will be at risk of being arbitrarily deprived of their life, tortured, subjected to cruel or degrading treatment or punishment (para 19)	Partially Implemented	See section 8 of this submission for more detailed information.

<b>Recommendation</b>	<b>Assessment</b>	<b>Comments</b>
Stop extradition of people to states where they may face the death penalty (para 20)	Not Implemented	Still not a mandatory ground of refusal under the Extradition Act.
<b>Law Enforcement Officials (para 21)</b>		
Independent investigations into use of excessive force by law enforcement	Not Implemented	
Initiate proceedings against alleged perpetrators	Not Implemented	
Improve training on use of excessive force and proportionality principle	Not Implemented	
Use restraint devices only where greater or lethal force would otherwise be justified	Not Implemented	
Bring policy in line with Use of Force and Firearms by Law Enforcement Officials	Not Implemented	
Provide adequate reparation to victims of use of excessive force	Not Implemented	
<b>Human Trafficking (para 22)</b>		
Comprehensive strategy and equal assistance to victims of human trafficking regardless of assistance in criminal proceedings	Partially Implemented	Formal ongoing support only available to those agreeing to participate in proceedings. See recommendations of the UN Special Rapporteur on trafficking in persons.
<b>Immigration</b>		
Abolish the remaining elements of the mandatory detention policy (para 23)	Not Implemented	

<b>Recommendation</b>	<b>Assessment</b>	<b>Comments</b>
Implement the recommendations of the Human Rights Commission made in its Immigration Detention Report of 2008 (para 23)	Not Implemented	
Consider closing Christmas Island detention centre (para 23)	Not Implemented	
Enact in legislation a comprehensive immigration framework in compliance with the ICCPR (para 23)	Not Implemented	
Implement the recommendations of the Human Rights and Equal Opportunity Commission in regard to the ICCPR and UN rules for the Protection of Juveniles Deprived of their Liberty (para 24)	Not Implemented	
<b>Access to Justice</b>		
Provide adequate services to marginalized and disadvantaged people, including aliens and indigenous people to ensure equality of access to justice (para 25)	Partially Implemented	Development of Strategic Action Plan for Access to Justice in the Federal Civil Jurisdiction in September 2009, however further reform still needed.
<b>Discrimination on the Basis of Religious</b>		
Implement the Freedom of Religion and Belief in the 21st Century project (para 26)	In Progress	Report released in 21 March 2011.
<b>Human Rights Education</b>		
Adopt a plan for human rights education including training for public officials, teachers, judges, lawyers and police officers on the ICCPR (para 27)	Partially Implemented	Funding under National Human Rights Framework 2010-14 for national school human rights curriculum, resources for teachers, education of public sector official but not specifically for police officers/lawyers.