

# Universal Periodic Review

## Australian NGO Coalition

### Consultation on UPR Recommendations

#### Australia's UPR Appearance

Australia was reviewed under the Universal Periodic Review (UPR) on 27 January 2011. During the interactive session, 53 countries asked questions and made recommendations. Australia received 145 recommendations in total. These recommendations are set out in the Draft Report prepared by the Universal Periodic Review Working Group of the UN Human Rights Council (**Draft Report**).<sup>1</sup>

#### About this Submission

On 7 March 2011, the Attorney-General's Department announced a public consultation on the UPR recommendations and called for submissions to address:

- which recommendations should be accepted or rejected; and
- which recommendations should be a matter of priority for the Government.

This submission is made on behalf of the Australian NGO Coalition, which in July 2010 prepared a joint NGO submission to the UPR of Australia. The submission was prepared with substantial input and guidance from a high-level NGO Working Group and was endorsed, in whole or part, by 68 organisations.<sup>2</sup>

This submission addresses UPR recommendations made to Australia in the following thematic areas:

1. International Obligations
2. Domestic Implementation of International Human Rights Law
3. Equality
4. Civil and Political Rights
5. Economic, Social and Cultural Rights
6. "New and Emerging" Rights
7. Children's Rights
8. Immigration
9. Aboriginal and Torres Strait Islander Peoples
10. People with Disability
11. Women's Rights

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<sup>1</sup> Available at <http://www.hrlrc.org.au/files/Draft-report-on-UPR-of-Australia.doc>.

<sup>2</sup> The NGO submission, together with further NGO materials relating to the UPR, is available at <http://www.hrlrc.org.au/content/content/universal-periodic-review-of-australia/>.

## **1. Introduction**

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### **1.1 General Observations about the UPR Recommendations**

The NGO Coalition considers that the recommendations contained in the Draft Report represent, in large part, a constructive, detailed and accurate assessment of current human rights issues and challenges in Australia. Accordingly, we are keen to ensure that the Australian Government takes a candid and positive approach when considering and responding to each of the recommendations and, in doing so, demonstrates its commitment to uphold the highest standards in the promotion and protection of human rights.

### **1.2 The Australian Context**

Australia is a democratic, stable and wealthy country and prides itself as being an international human rights leader. Despite being a constitutional democracy that respects the rule of law, Australia continues to fail to comprehensively incorporate its international human rights obligations into domestic law. Indeed, Australia remains the only developed state in the world without comprehensive constitutional or legislative protection at a national level. Australia can — and must — do better to improve the protection and promotion of human rights on the ground.

Australia's appearance before the UN Human Rights Council – the main inter-governmental human rights body of the United Nations – presents a significant opportunity to re-affirm our commitment to the protection and promotion of human rights in Australia and abroad. It is an opportunity to demonstrate international human rights leadership through constructive and principled engagement with the Council and to give concrete substance to our UN Security Council candidacy pledge to be a “principled advocate of human rights for all”.

### **1.3 Prioritisation of Issues**

Australian NGOs have been actively engaged throughout the preparations for Australia's UPR appearance, with the NGO Coalition formed in March 2010. Particularly given the limitations on the size of reports that could be submitted to the UN Human Rights Council by NGOs, the NGO Coalition sought to prioritise the key contemporary human rights issues in Australia to include in its 5-page report. Accordingly, in the NGO Coalition's view, the 17 thematic areas identified in the NGO report to the United Nations and related materials represent the primary human rights issues requiring attention in Australia. We encourage the Australian Government to give appropriate and adequate attention to all of the issues the subject of the UPR recommendations, including particularly those recommendations that are inconsistent with current government policy.

#### 1.4 Principles to Guide Australia's Response to the UPR Recommendations

The NGO Coalition strongly emphasises that the Australian Government's consideration of the UPR recommendations must be guided by the following principles:

1. **Australia's response to each of the UPR recommendations should be based on a commitment to and compliance with Australia's international human rights obligations.** In responding to each of the UPR recommendations, the primary consideration for the Australian Government must be Australia's international human rights legal obligations. Given that the purpose of the UPR is to improve the protection and promotion of human rights on the ground, Australia's international legal obligations must form the primary basis of Australia response to the UPR recommendations. This includes being guided by the principles that human rights are indivisible, interdependent and universal in nature.
2. **Australia's response to the UPR recommendations should be seen as an opportunity to improve Australia's human rights record and not as a burden.** Australia's response to the UPR recommendations presents a significant opportunity for the Australian Government to re-affirm and actively demonstrate its commitment to the protection and promotion of human rights, both in Australia and abroad. In particular, it is an opportunity to strengthen the legal protection and enhance the practical realisation of human rights on the ground in Australia.
3. **The process for considering each of the UPR recommendations must be open, transparent and accountable.** Given the number and breadth of the 145 UPR recommendations, an open and transparent process must be established to ensure that consistent, genuine and principled consideration is given to each of the recommendations.
4. **The Australian Government's consideration of each of the UPR recommendations must be informed by the experience and expertise of NGOs.** It is imperative that the Government's collaborative relationship with NGOs throughout the UPR process to date is continued throughout the process of considering and responding to the UPR recommendations. NGOs bring significant experience and expertise and provide an important perspective on the issues that are the subject of the recommendations. Importantly, NGOs will play a crucial role in working with all Australian governments to ensure the successful implementation of the UPR recommendations.
5. **Clear and effective processes must be established to monitor implementation of the UPR recommendations.** Appropriate processes must be established by the Australian Government to ensure that tangible, measurable assessments can be made on the progress in implementing each of the UPR recommendations. This must include appropriate timelines, milestones, benchmarks and indicators. Effective monitoring of implementation would also include the preparation of periodic interim reports.

6. **The Australian Government should provide appropriate explanations for the reasons for rejection of any UPR recommendations.** In the event that the Australian Government decides to reject any of the UPR recommendations, the Government should provide a sufficient explanation for its decision. This explanation should include how the decision to reject the recommendation is compatible with Australia's international human rights obligations.

## 1.5 Follow Up and Implementation

Where possible, this submission seeks to provide suggestions for how Australia could and should implement many of the UPR recommendations. However, given the limitations of this consultation period, it is not possible to do so in comprehensive detail. The NGO Coalition considers that the National Action Plan will also provide a useful opportunity for further details and guidance to be provided on detailed aspects of implementation of the UPR recommendations.

## 2. International Obligations

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### 2.1 Background

Whilst Australia is a party to most of the key international human rights treaties, there remain a number of important treaties that Australia has not yet ratified. Australia has a real opportunity to demonstrate leadership in the area of human rights by ratifying these instruments, as well as withdrawing reservations it has made to a number of treaties. In particular, we consider it appropriate for Australia to expeditiously ratify:

- the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment* (**OP-CAT**);
- *International Labour Organisation Convention No. 169* (**ILO Convention No. 169**);
- the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (**OP-ICESCR**);
- the *Convention on Enforced Disappearances* (**CED**); and
- the *International Covenant on the Protection of the Rights of all Migrant Workers and Members of their Families* (**ICRMW**).

We also consider it appropriate for Australia to remove the reservations it has made to article 4 of the *Convention on the Elimination of all forms of Racial Discrimination* (**CERD**), articles 10(2), 10(3) and 20 of the *International Covenant on Civil and Political Rights* (**ICCPR**) and article 37(4) of the *Convention on the Rights of the Child* (**CRC**).

### 2.2 UPR Recommendations

Many members of the international community recommended that Australia take the steps referred to in section 2.1 above. In particular, New Zealand, the Republic of Moldova, Azerbaijan, Maldives, Mexico, and Denmark recommended that Australia ratify the OP-CAT as soon as possible.

France, Thailand and Argentina recommended Australia ratify the CED, and Argentina, Algeria, Bolivia, Turkey, Philippines and Bosnia and Herzegovina recommended Australia ratify the ICRMW.

Bolivia and Norway recommended Australia ratify ILO Convention No. 169. Hungary recommended Australia withdraw its reservations to the CRC and the Republic of Korea, South Africa and Denmark recommended Australia withdraw its reservations to the CERD.

The Attorney-General has recognised, in his Ministerial Statement on the UPR to the Commonwealth Parliament on 2 March 2011, the importance of Australia remaining a leader in the area of human rights and demonstrating its commitment to providing an equal and fair society. Further, it is important for Australia to keep its commitments to the UN and its international allies. As recognised by the Attorney-General, respecting fundamental human rights as a nation results in the country being safer, more resilient, productive and stable.

Australia committed, during the UPR, to ratifying the OP-CAT as a matter of priority.<sup>3</sup> It also stated that it was considering ratifying the OP-ICESCR, ILO Convention No. 169 and the CED. In our view, active consideration requires that Australia commit to and make public a timeframe and process for ratification.

We particularly note the recommendations of the Committee on the Elimination of Racial Discrimination's (**CERD Committee**) to Australia in August 2010. The CERD Committee reiterated the importance of ensuring genuine reconciliation with Aboriginal and Torres Strait Islander peoples and to take measures to eliminate the discrimination faced by Indigenous Australians in relation to economic, social and cultural rights.

The CERD Committee recommended that Australia ratify the ILO Convention No. 169 in addition to the ICRMW, due to their impact on the elimination of racial discrimination.

### **2.3 Implementation of recommendations**

We understand that the Government's practice is to ensure that domestic measures have been taken consistent with the relevant international treaty prior to ratification. We have set out below measures necessary to implement the recommendations above regarding each of the international human rights instruments.

#### **(a) ILO Convention No. 169**

As the key principle of the ILO Convention No. 169 is to ensure that Indigenous peoples do not face discrimination in terms of the labour market, few measures should be necessary beyond those necessary to ensure compliance with the CERD and Declaration on the Rights of Indigenous Peoples. The implementation of this Convention will require considerable consultation with Indigenous communities, and this may be best achieved by way of a specific working group with specialist input from Indigenous leaders.

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<sup>3</sup> Human Rights Council, Working Group on the Universal Periodic Review, Tenth Session, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1: Australia, page 6.

**(b) ICRMW**

Ratification of the ICRMW will require Australia to ensure that the *Migration Act 1958*, *Racial Discrimination Act 1975* and *Disability Discrimination Act 1992*, or consolidated discrimination legislation, are amended to comply with the requirements of the ICRMW. This involves ensuring that migrant workers have substantial rights to participate in the labour market without facing discrimination of any kind. These are again obligations which Australia should be upholding currently, and the Government is taking steps to ensure that the Commonwealth anti-discrimination legislation is effective and comprehensive. This review could be utilised to bring the legislation in line with Australia's obligations under the ICRMW.

**(c) CED**

Ratification of the CED will require amendments to the *Crimes Act 1914* to make it a crime to force the disappearance of any person for any reason. The *Anti-Terrorism Act 2005* will also require amendment such that enforced disappearance is not permitted under this Act.

**(d) OP-ICESCR**

Ratification of the OP-ICESCR will not require significant amendments to domestic legislation beyond that required currently to comply with Australia's obligations under the ICESCR. We note that many of the economic, social and cultural rights that could form the basis of a complaint against Australia to the Committee on Economic, Social and Cultural Rights, are already actionable in relation to people with disability pursuant to Australia's ratification of OP-CRPD and women following Australia's ratification of OP-CEDAW.

**(e) OP-CAT**

The purpose of the OP-CAT is to establish a system whereby independent international and national bodies visit places where people are deprived of their liberty to prevent torture and other cruel, inhuman or degrading treatment. Australia is also required to set up, designate or maintain one or more visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment. Ratification of the OP-CAT requires Australia to establish a national enforcement mechanism and amend domestic legislation to ensure that the international bodies and national enforcement body has the right to visit these facilities for the purposes of OP-CAT.

**(f) Reservations to Article 4 CERD**

Australian legislation should already be in compliance with Article 4 of the CERD. Commonwealth legislation, and State and Territory laws, will need to make it an offence to condemn organisations based on theories of superiority of one race or group over another to promote racial hatred and discrimination.

**(g) Reservations to Articles 10 and 20 ICCPR**

Again, Australian legislation is already largely consistent with the obligations in Articles 10 and 20 of the ICCPR. Withdrawal of Australia's reservations will require ensuring that Commonwealth, State and Territory legislation requires juveniles to be separated from adults and convicted persons segregated from convicted persons.

There should also be a focus on rehabilitation and reformation in the correctional system. Offences also need to be specified for propaganda for war and advocacy of hatred or incitement to discrimination or violence.

**(h) Reservations to Article 37(c) CRC**

In complying with the requirements of the CAT, Australia should be compliant with the requirements of Article 37(c) of the CRC. Commonwealth, State and Territory legislation should ensure that children are not subjected to torture, capital punishment or life imprisonment, deprived of his/her liberty arbitrarily or unlawfully and to be treated with humanity and respect if they are deprived of liberty. Children must also be given the right to legal assistance and to challenge the legality of their deprivation of liberty before a court.

### **3. Domestic Implementation of International Human Rights Law**

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#### **3.1 Implementation of Australia's International Legal Obligations: A Human Rights Act for Australia**

**(a) Background**

There is no overarching and comprehensive protection of human rights in Australian law, such as a bill of rights enshrined in the Australian Constitution or by legislation. In 2009, an independent review commissioned by the Australian Government found that Australia's legal and institutional protection of human rights is inadequate, particularly for marginalised and disadvantaged communities. Despite widespread public support for the introduction of a Human Rights Act, the Australian Government has said it will not consider the issue of comprehensive legal rights protection until at least 2014.

While Australia's domestic law contains a number of pieces of legislation that protect certain human rights, particularly the right to non-discrimination, they provide only patchwork protection. Most rights contained in the ICCPR and ICESCR are not directly justiciable or enforceable in Australian courts or tribunals. While some protection exists in anti-discrimination legislation, these protections are acts of Parliament that can be overridden by subsequent law (such as the *Race Discrimination Act 1975* and the Northern Territory Emergency Response).

Australia is the only developed country that does not have a national charter or bill of human rights. A human rights charter or bill will ensure that Australia has the legal framework for the recognition and protection of the rights of all people, including the most marginalised and disadvantaged. It will also give effect to the community's expectations regarding a framework for protection in Australia: 87% of the 35,000 written submissions to the National Human Rights Consultation that addressed the issue of statutory protection were in favour of a Human Rights Act.

**(b) UPR Recommendations**

Australia received a number of recommendations that it bring its legislation and practice into line with its international human rights obligations, and some which specifically recommended that the Government implement the recommendations contained in the National Human Right Consultation Committee report and enact a Human Rights Act.<sup>4</sup>

**(c) Implementation of Recommendations**

Community consultation on the issue of acceptance for a Human Rights Act was comprehensively completed during the National Human Rights Consultation. The Government should now establish a timetable for the enactment of a comprehensively and judicially enforceable Human Rights Act that implements Australia's international human rights obligations into domestic law.

### **3.2 National Action Plan for Human Rights**

**(a) Background**

In December 2010, the Attorney-General set out the Government's proposed approach to the development of a new National Human Rights Action Plan and invited public submissions on the procedural and substantive issues. The Action Plan represents an important opportunity to support the realisation of human rights in Australia.

Members of the UPR Coalition have provided comprehensive submissions to the Australian Government on the substantive and procedural aspects of the proposed methodology for the National Action Plan for Human Rights. We refer the Attorney-General's Department to those submissions.

**(b) UPR Recommendation**

Azerbaijan (at 86.30) recommended that Australia continue measures for the adoption of the new National Action Plan on Human Rights.

**(c) Implementation of Recommendation**

We recommend that the Australian Government take the following concrete steps in relation to the development of a National Human Rights Action Plan:

- expand the membership of the Government's National Human Rights Action Plan Steering Committee to include Aboriginal and Torres Strait Islander peoples, asylum seekers, people from rural and remote areas, civil society and academics;
- ensure that the Baseline Study establishes indicators for all civil, political, economic, social and cultural rights identified by the various Human Rights Council Special Procedures, UN treaty body reports, Australian Human Rights Commission and NGO reports/shadow reports; and

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<sup>4</sup> See: Sweden (86.17), France (86.18), Jordan (18.19), Timor-Leste (86.21), Canada, Ukraine, Russia, Norway (86.22).

- actions for inclusion in the Action Plan (grouped by theme) should include measures to improve the realisation of all civil, political, economic, social and cultural rights identified in the UPR, at a minimum.

### **3.3 Follow-up to International Human Rights Mechanisms**

#### **(a) Background**

Australia lacks any institutional mechanisms for the systematic domestic consideration and implementation of views and recommendations made by UN human rights mechanisms. Australia has a 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 UN Human Rights Committee on a significant number of occasions.

#### **(b) UPR Recommendation**

The recommendations in relation to Australia's implementation of its international human rights obligations, set out in relation to the Human Rights Act above, are relevant to the adoption and implementation of findings and recommendations from the UN human rights system.

#### **(c) Implementation of Recommendation**

We recommend that the Australian Government extend the mandate of the proposed Joint Parliamentary Committee on Human Rights to include the consideration, follow up and oversight of implementation of recommendations and views of the UN human rights mechanisms.

### **3.4 Australian Human Rights Commission**

#### **(a) Background**

Although Australia does have an independent national human rights institution in accord with the Paris Principles, the authority of the AHRC is limited to inquiry and complaints. The AHRC cannot make enforceable determinations and there is no requirement that the Australian Government implement or even respond to its recommendations. There is also insufficient funding for the AHRC to properly conduct its functions and activities.

#### **(b) UPR Recommendation**

Bolivia (at 86.27) recommended that Australia facilitate the provision of sufficient funding and staffing for the Human Rights Commission and different commissioners, including the recently appointed Commissioner against racial discrimination.

#### **(c) Implementation of Recommendation**

We recommend that the Australian Government ensure that the determinations and recommendations of the AHRC are given greater weight and that the AHRC is sufficiently funded to independently and effectively fulfil its mandate. Practical measures that the Australian Government can take to implement this recommendation are:

- Consult with the AHRC about their minimum funding requirements and increase recurrent core funding to the AHRC and its Commissioners to a level where it has the capacity to protect and promote human rights through its policy development, education, research and inquiry functions.
- That the Australian Government, in consultation with the AHRC and civil society, amend the *Australian Human Rights Commission Act* to expand the function and powers of the AHRC so that it meets the standards for proper performance under the Paris Principles and can effectively:
  - consider (on its own motion) and report on the human rights implications of any existing or proposed legislation;
  - initiate investigations of its own motion and conduct those investigations appropriately, including using powers to compel the production of information and evidence where necessary;
  - on its own motion, seek to enforce conciliation agreements;
  - make binding codes of conduct or guidelines setting out the process for the resolution of complaints; and
  - intervene in all proceedings where significant human rights issues arise.
- Table in Parliament reports of the AHRC, including reports prepared by the Commission after the conduct of inquiries and the annual Social Justice Report and Native Title Report.

## 4. Equality

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The NGO Coalition supports each of the UPR recommendations that relate to strengthening equality and non-discrimination laws in Australia. We reiterate our recommendations made in previous submissions.<sup>5</sup> This section of the submission focuses on two specific areas of the UPR recommendations: a comprehensive equality act; and same-sex marriage.<sup>6</sup>

### 4.1 A Comprehensive Equality Act

#### (a) **Background**

Australia has enacted a number of laws to prevent discrimination, including the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth). Together, however, these laws provide only piecemeal protection of the rights to equality and non-discrimination.

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<sup>5</sup> See Joint Australian NGO Coalition Information Booklet, and Joint NGO Coalition UPR Submission.

<sup>6</sup> See UPR Recommendations 86.43, 86.44, 86.66, 86.67, 86.68, 86.69, 86.70.

Specifically, Australia's anti-discrimination laws are deficient in that they:

- are reactive and complaints-based;
- fail to actively promote equality or address systemic discrimination;
- do not address all grounds of discrimination or intersectional discrimination; and
- are ineffective in areas that have been granted permanent exemptions.

The UN Human Rights Committee noted in their 2009 Concluding Observations on Australia that it “remains concerned that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law” and recommended that Australia “adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination”. The Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination have similarly recommended that Australia strengthen its anti-discrimination laws.

In April 2010, the Australian Government announced a commitment to “harmonise and consolidate Commonwealth antidiscrimination laws”. Australia should use this opportunity to ensure that its equality laws meet the anti-discrimination and equality standards articulated in its international obligations.

**(b) UPR Recommendations**

Federal discrimination law needs to be enhanced to enshrine Australia's international human rights obligations into domestic law and to promote substantive equality. We propose that the Australian Government consolidate current federal discrimination legislation into a comprehensive Equality Act. Discrimination on the basis of race and/or religion has wide ranging impact within our community alongside other types of discrimination such as gender and disability discrimination. An Equality Act should be comprehensive so that it prohibits discrimination on all grounds, including race, age, gender, religion and disability, to protect rights of equality and ensure the full enjoyment of all human rights by every member of society.<sup>7</sup>

An Equality Act should also meet minimum international standards and annex the human rights instruments that Australia is a party to, including CERD, CEDAW, ICCPR and CPRD.<sup>8</sup>

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<sup>7</sup> See UPR Recommendations 86.43 and 86.44.

<sup>8</sup> For further information on a comprehensive equality act, see NACLC Submissions to the Commonwealth Attorney General, *Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation*, dated March 2011, April 2011.

The act should also expand protected attributes to include:<sup>9</sup>

- sexual orientation;<sup>10</sup>
- gender identity;
- irrelevant criminal record;
- homelessness;
- victims of domestic violence;
- religious belief and/or activity;
- political belief and/or activity; and
- low socio-economic status.

#### 4.2 Implementation of Recommendations

We note that the following issues and implementation details are dealt with in greater detail in two NACLC Submissions to the Commonwealth Attorney General, *Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation*, dated March 2011 and April 2011.

##### (a) **Definition of Discrimination**

The definition of unlawful discrimination should be a streamlined statement in the comprehensive Equality Act, which abandons the current legislative distinction between direct and indirect discrimination.<sup>11</sup>

##### (b) **Court Process**

The comprehensive Equality Act should facilitate greater access to justice, through implementing streamlined court processes<sup>12</sup> and no costs jurisdictions.<sup>13</sup> Additionally, the Act should provide for conciliation agreements to be legally binding through registration with the court. Applications for court enforcement should be simple and low cost.

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<sup>9</sup> For further detail on these 'protected attributes', see NACLC Submissions to the Commonwealth Attorney General, *Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation*, dated March 2011, April 2011.

<sup>10</sup> See UPR Recommendations 86.66, 86.67 and 86.68.

<sup>11</sup> The distinction between 'direct' and 'indirect' discrimination is conceptually difficult for complainants and decision-makers, and has increased the complexity of complaints. See Discrimination Law Experts' Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, 29 November 2010, 6.

<sup>12</sup> A complainant should be able to make an application directly to the court, rather than initially going through investigation and conciliation by the Australian Human Rights Commission.

<sup>13</sup> The Federal Court and the Federal Magistrates Court should become no costs jurisdictions in discrimination matters, except for vexatious or frivolous proceedings.

**(c) Systemic Discrimination**

The AHRC and the various Discrimination Commissioners should be given the power to investigate and initiate proceedings in relation to conduct that appears to be unlawful under discrimination law, without an individual complaint.<sup>14</sup> This would allow the AHRC and Discrimination Commissioners to address systemic discrimination.

**(d) Exceptions, Exemptions and Special Measures**

An Equality Act should contain a single exception clause with a simple test of “proportionate means of achieving a legitimate end or purpose”. Additionally, this exception test should be applied to exemptions under the act. Exemptions should be time limited and granted on a case-by-case basis in a transparent process. Special measures should be separately and fully defined in the act as ‘lawful activity’ and as being beneficial for a particular group. The Federal Government should also establish a policy of consultation with ATSI people that meets the benchmarks established in the Declaration on the Rights of Indigenous Peoples.<sup>15</sup>

**(e) Positive Duties**

Systemic discrimination can be addressed by imposing positive duties on public and private bodies. A positive duty of equality should be placed on public and private bodies. This positive duty would include measures requiring duty holders to assess, monitor, consult and take remedial action to address discrimination where necessary. The AHRC should also be empowered to facilitate and enforce compliance with the positive obligation without an individual complaint.<sup>16</sup>

### 4.3 Same-Sex Marriage

The NGO Coalition supports all recommendations during under the UPR to strengthen the rights of GLTBI persons, and strongly encourages the federal government to enshrine these recommendations in legislation.

**(a) Background**

Same-sex partners cannot marry in Australia. Same-sex marriages entered into overseas are not recognised as marriages in most Australian jurisdictions. Australian citizens seeking to enter into a same-sex marriage in another country are denied the documentation (such as a Certificate of Non-Impediment to Marriage) required by some foreign governments before they can marry.

The ban on same-sex marriage in Australia effectively legitimises discrimination against same-sex couples and reflects negatively on Australia’s commitment to equality. Freedom of sexuality and gender identity are fundamental human rights, and

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<sup>14</sup> These powers should include monitoring of respondents, commencing complaints, intervening in matters, and reporting to Federal parliament and the public on discrimination matters.

<sup>15</sup> This includes, at a minimum, that consultation is consistent with Aboriginal peoples’ right to self determination, and to ensure that Aboriginal peoples provide free, prior and informed consent to any measures which target them (whether directly or indirectly).

<sup>16</sup> See NACLC Submission to the Commonwealth Attorney General, *Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation*, dated March 2011.

Australia has international human rights obligations to ensure that all its citizens, regardless of sexual orientation, are treated equally before the law.<sup>17</sup>

GLTBI persons in Australia experience high levels of prejudice, stigma, exclusion, discrimination and abuse. Discrimination on the basis of sexual orientation is a significant cause of the higher than average rate of mental illness and suicide in the Australian GLTBI population. Exclusion of same-sex couples from the institution of marriage fosters discriminatory attitudes and sends the message that same-sex partnerships are of less value.

**(b) UPR Recommendations**

Australia needs to ensure that it protects and advances the rights of minorities. Legalising same-sex marriage is an important step towards fulfilling this obligation and protecting one of the most vulnerable groups in society.

Furthermore, same-sex marriage has popular support. 62% of Australians support same-sex marriage.<sup>18</sup> Same-sex marriage is gaining greater support internationally, and has even been legalised in traditional, non-secular countries such as Spain, Portugal and Argentina. The institution of marriage has evolved, and the legalisation of marriage between two consenting adults regardless of sexual orientation will reflect the inclusionary concept of modern marriage.

**(c) Implementation of Recommendations**

The Federal Government should take initiatives to educate the community about the diversity of sexuality. Such initiatives could include anti-discrimination public education campaigns, as well as human rights education with a focus on equality in schools.

The government should also consider legislating for alternative forms of same-sex relationship recognition, such as civil unions. Legalising civil unions would grant same-sex couples an avenue to recognise their relationships, and would be a stepping-stone on the way to full marriage equality.

Finally, an amendment to the Marriage Act that allows same-sex partners to marry and recognizes overseas same-sex marriages will ensure that same-sex couples will achieve equality before the law in compliance with Australia's international obligations.

Australia prides itself on giving everyone a fair go, yet fails to protect the marginalised and minority groups, who are inherently vulnerable. Australia has an obligation to provide protection to these groups through addressing gaps in domestic law and enshrining anti-discrimination and equality measures. The Federal government needs to accelerate the cultural and legal shift towards equality.

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<sup>17</sup> ICCPR, art 26.

<sup>18</sup> Galaxy Research, Same-Sex Marriage Study, October 2010, available at <http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/12/Full-Galaxy-Poll-Results-2010.pdf>.

## 5. Civil and Political Rights

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Australia's UPR produced a number of recommendations that seek to promote the realisation of civil and political rights across a number of areas, and in relation to a number of specific groups. These include, but are not limited to:

- Aboriginal and Torres Strait Islander peoples' rights (see also section 10 below)
- Mandatory detention of refugees and asylum seekers (see also section 9 below)
- Equality rights (see section 4 above for further information)
- Counter-terrorism
- Trafficking
- Policing and prisons

We welcome the Attorney-General's commitment to support the majority of the UPR recommendations in relation to civil and political rights.

### 5.1 Corporal punishment

#### (a) *UPR Recommendation*

The Russian Federation recommended that Australia introduce a full prohibition of corporal punishment within the family in all states and territories (at 85.75).

#### (b) *Background*

The use of 'reasonable' corporal punishment in the home is lawful in all states and territories.<sup>19</sup> While individual state and territory education departments may have policies and procedures that prohibit the use of corporal punishment in both government and non-government schools, corporal punishment is only prohibited by law in the ACT, Tasmania and Victoria.<sup>20</sup> The prohibition in New South Wales is subject to a defence of 'reasonable chastisement'.<sup>21</sup> In South Australia and Western Australia, the prohibition extends to government schools only, and there is no legal prohibition on corporal punishment in the Northern Territory or Queensland.<sup>22</sup>

The UN Committee on the Rights of the Child has expressed its concerns that Australia's inconsistent approach to the prohibition on the use of corporal punishment is contrary to Australia's obligations under article 19 (protection from abuse and neglect) and article 37A (the right not to be subjected to torture and ill-treatment) of the Convention on the Rights of the Child (**CRC**).

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<sup>19</sup> For example, see s50 *Criminal Code Act 1924* (Tas), s11 *Criminal Code Act* (NT), *Crimes Amendment Act 2001* (NSW), s 280 *Criminal Code Act 1899* (Qld), and s257 *Criminal Code Act 1913* (WA).

<sup>20</sup> Corporal punishment is prohibited in both government and non-government schools in Victoria, Tasmania, ACT, NSW. See, *Education and Training Reform Act 2006* (Vic), *Education Amendment Act 1999* (Tas); *Education (Amendment) Act 2004* (ACT); *Education Act 1990* (NSW); *Discipline Act 1995* (NSW).

<sup>21</sup> See, *Crimes Amendment Act 2001* (NSW).

<sup>22</sup> *School Education Act 1999* (WA), *Education (Amendment) Act 1991* (SA), s11 *Criminal Code Act* (NT).

Reviews of Australia by the CRC Committee in 1997 and 2005 resulted in recommendations the Government 'take appropriate measures to prohibit corporal punishment at home and in public and private schools, detention centres and all alternative care settings in all states and territories' and 'strengthen awareness-raising and education campaigns, with the involvement of children, in order to promote positive, non-violent forms of discipline and respect for children's rights, while raising awareness about the negative consequences of corporal punishment'.

Despite the CRC Committee's recommendations, and findings by the Law Reform Institute in Tasmania (2003), Concerned Psychologists in Queensland (2005) and the former Queensland attorney-general and state education minister (2007) that the use of corporal punishment is detrimental to children, the Australian Government and their state and territory counterparts have not taken action to implement a uniform ban.

**(c) *Implementation of Recommendations***

The CRC provides the Australian Government with guidance and practical measures to implement the total legal ban on the use of corporal punishment in the home, education, penal system and alternative care settings. We recommend that the Australian Government take immediate steps to:

- review all existing laws and regulations to ensure that they comply with articles 19 and 37A of CRC and, through COAG, encourage state and territory governments to repeal or pass amendments to any laws that are non-compliant;
- review all policies at Commonwealth, state, territory and local government level to ensure they conform with Articles 19 and 37A of CRC and to review and amend any policies that fail to comply;
- develop systems for reviewing and monitoring new laws and policies to make sure that they do not breach Articles 19 and 37A of CRC; and
- develop, in partnership with a Children's Commissioner, programs to strengthen awareness-raising and education in order to promote positive, non-violent forms of discipline and respect for children's rights, while raising awareness about the negative consequences of corporal punishment.

## **5.2 Police Oversight and Use of Force**

**(a) *UPR Recommendations***

Australia received a number of recommendations about policing, including to:

- improve administration of justice and rule of law by establishing appropriate mechanisms to ensure the adequate and independent investigation of police use of force, misconduct, and police-related deaths (Malaysia, at 86.89);
- improve human rights training for police (United States, at 86.96); and
- ensure a prohibition on the use of excessive force and Tasers against various groups of people (Iran, at 86.88).

**(b) Background**

It is imperative that there be adequate, effective and independent oversight of police, including in relation to police misconduct, police use of force and police-related deaths. The integrity and independence of police complaints procedures in Australia has regularly been questioned. Most states in Australia have civilian oversight bodies that rely on internal police accountability bodies to conduct investigations of police misconduct. This undermines the independence of such investigations and, although there are own motion investigative powers in many jurisdictions, these are sparingly exercised and generally not when the complaints involve only police brutality. Most complaints about police misconduct are therefore either investigated by other members of the same police force, and often by officers from the same police station. In Victoria, for example, only 1.2% of the most serious complaints of assault by police were substantiated as a result of police investigation.<sup>23</sup>

Tasers are used in some circumstances by the Australian Federal Police and police forces in New South Wales, the Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia. Despite being potentially lethal weapons, the use of Tasers is generally subject to the same limitations as other 'non-lethal force' weapons. Generally, police officers are entitled to use the devices in the course of their duties, in self-defence or to prevent escape, provided they do not use excessive force. Despite these safeguards, the excessive use of force by Taser contributed to the death of Mulrinji on Palm Island, the shooting death of a 15 year old boy by the Victorian Police, and the death of a Queensland man who was Tasered up to 28 times.

The Committee against Torture has expressed strong concerns about Tasers, noting that 'the use of these weapons causes severe pain constituting a form of torture, and that in some cases it may even cause death, as recent developments has shown', concluding that their use violates articles 1 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Punishment*.

The relationship between the police and Aboriginal and Torres Strait Islander peoples is a matter of significant concern. It is well documented that Aboriginal peoples are overrepresented in the criminal justice system, partly due to the way in which Aboriginal peoples are policed, which suggests institutional discrimination against Aboriginal peoples by Australia's various police agencies.<sup>24</sup> For example, research in the Northern Territory conducted after the increase in police as a result of the Northern Territory Emergency Response revealed that Aboriginal communities are either over-policed or under-policed<sup>25</sup> and in Victoria, Koori people receive 12 times the rate of

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<sup>23</sup> Tamar Hopkins, cited in the Aboriginal and Torres Strait Islander Legal Services, *Joint Submission to the Human Rights Consultation* (June 2009), page 29.

<sup>24</sup> See, for example, Gallaher Survey in Vic Health, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (December 2009), page 31, available at <http://www.vichealth.vic.gov.au/Resource-Centre/Publications-andResources.aspx>.

<sup>25</sup> North Australian Aboriginal Justice Agency, *Aboriginal Communities and Police's Taskforce Themis: Case Studies in Remote Aboriginal Community Policing in the Northern Territory* (October 2009), page 11.

capsicum spray than non-Aboriginal people, and complain of being harassed and over-policed.<sup>26</sup>

The death of Aboriginal peoples in custody continues to be of serious concern despite recommendations of the Royal Commission into Aboriginal Deaths in Custody almost 20 years ago.<sup>27</sup> The UN Committee on Torture has recommended that the Australian Government improve its mechanisms to prevent and investigate deaths in custody.<sup>28</sup> Moreover, the UN Special Rapporteur on Indigenous Peoples expressed his concerns about the high rate of Aboriginal deaths in custody and encouraged the Government to fulfil its commitment to implementing the recommendations of the Royal Commission.<sup>29</sup>

**(c) Implementation of Recommendations**

Practical steps to improve human rights compliance of Australia's various police forces has been suggested, in some detail, by the Human Rights Council.<sup>30</sup> Accordingly, we recommend that the Australian Government use intergovernmental mechanisms (where appropriate) to take the following actions:

- in collaboration with the Australian Human Right Commission, Aboriginal and Torres Strait Islander peoples and non-government organisations, revise and improve police training on human rights, use of force and principles of proportionality, and in relation to community-oriented solutions to address the root causes of criminal behaviour such as disorderly behaviour and violence. Specific modules should be developed to address police legal duties under anti-discrimination legislation and also provide the police with appropriate cross-cultural and anti-racism training. Police should also be educated on what racial profiling is and the impact that it has on affected communities;
- take legislative measures to ban the use of Tasers in all police operations;
- audit police law and policies against the UN Basic Principles on the Use of Force and Firearms and, where there is non-compliance, take all necessary steps to amend laws and policies to achieve compliance, including by regulating to ensure that any use of force is strictly necessary, reasonable, proportionate and a last resort;

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<sup>26</sup> Ethical Standards Department, Victoria Police and Indigenous Issues Unit, Department of Justice, *Koori Complaints Project – 2006-2008 – Final Report* (2008), pp 7 and 18-19.

<sup>27</sup> Commonwealth of Australia, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991), vols 1-5.

<sup>28</sup> Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/1 (2008).

<sup>29</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* (Advanced unedited version), UN Doc A/HRC/15 (4 March 2010), para [52].

<sup>30</sup> *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Australia*, 95<sup>th</sup> session, 7 May 2009, CCPR/C/AUS/CO/5

- in consultation with Aboriginal and Torres Strait Islander peoples, take immediate steps to review the recommendations of the Royal Commission into Aboriginal Deaths in Custody, identify those which remain relevant and commence a program of implementation; and
- establish properly independent, adequate, accountable systems in each policing jurisdiction to deal with complaints about police misconduct and to investigate police use of force and police-related deaths. Such mechanisms should be fully practically, hierarchically and institutionally independent of police. The mechanisms should comply with Australia's procedural obligations under the right to life and the right to be free from torture and other cruel, inhuman and degrading treatment and at a minimum provide that complaints about police be heard by an independent agency staffed by people who are not themselves police.

### 5.3 Reparations for Torture

#### **(a) UPR Recommendation**

Brazil has recommended that the Australian Government 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 (at 86.136).

#### **(b) Background**

In addition to the UPR, the Committee against Torture and the UN Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism have recommended that Australia take all necessary steps and measures, including legislative measures, to ensure that allegations of torture and other forms of ill-treatment, including by Australian agents abroad or in respect of Australian citizens abroad, be fully investigated and that appropriate reparations be made where such conduct is found to have occurred.<sup>31</sup>

#### **(c) Implementation of Recommendations**

The Australian Government should implement a process for the full and public investigation into allegations of torture, including allegations of knowledge or complicity in torture by Australian officials. The review process should include the power to award reparations to affected individuals if the conduct or knowledge is established and to recommend prosecution of persons involved or implicated in the torture or ill-treatment.

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<sup>31</sup> *Concluding Observations of the Committee against Torture: Australia*, [15] and Recommendation 2.2, UN Doc CAT/C/AUS/CO/1 (2008), Martin Scheinin, Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms While Countering Terrorism, *Australia: Study on Human Rights Compliance While Countering Terrorism*, UN HRC, 4<sup>th</sup> session, Item 2, [62], [72], UN Doc A/HRC/4/26/Add.3 (2006).

Under international law, reparation is well established<sup>32</sup> and refers to a wide range of measures, including: substantive and procedural relief and encompasses:<sup>33</sup>

- restitution: for example, the restoration of legal rights, liberty, citizenship, return to place of residence (temporary or permanent);
- compensation: for example, any economically assessable damage as a result of the deportation and/or torture and ill-treatment, harm to reputation, actual costs of obtaining legal and medical assistance;
- rehabilitation: including psychological as well as physical; and
- satisfaction and guarantees of non-repetition: for example, public acknowledgment of wrong-doing, education and other preventative measures to prevent recurrence of similar acts.

## 6. Economic, Social and Cultural Rights

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### 6.1 Social Inclusion and Poverty Reduction

#### (a) Background

In 2008, 12 per cent of Australians were found to be living in poverty, which is a higher proportion than the OECD average. The risk of poverty for Australian sole parents is extremely high, at 70 percent. Older Australians are also particularly affected by poverty. For single people aged over 65, the income poverty rate is 50 percent – the highest of all the countries in the OECD.<sup>34</sup>

Social security benefits are currently pegged at rates that leave people living in poverty and the needs of many people on extremely low incomes are not being met. Further, Australia is not using a human rights framework to underpin its Social Inclusion Agenda.

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<sup>32</sup> See: Factory at Chorzow, Jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29; Report of the International Law Commission - 53rd session (23 April - 1 June and 2nd July - 10 August 2001), UN Doc. (A/56/10); Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other Cruel Inhuman and Degrading Treatment (art. 14) and the Rome Statute for an International Criminal Court (art. 75), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 19 92; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women.

<sup>33</sup> Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, E/CN.4/2000/62.

<sup>34</sup> OECD, 'Country Note: Australia', *Growing Unequal?: Income Distribution and Poverty in OECD Countries* (2008), 1, available at <http://www.oecd.org/dataoecd/44/47/41525263.pdf>. This means that 12 per cent of the population lives on less than half of the median disposable income of all Australian households.

In 2009, the UN Committee on Economic, Social and Cultural Rights recommended that Australia take all necessary measures to combat poverty and social exclusion and develop a comprehensive poverty reduction and social inclusion strategy.<sup>35</sup>

**(b) UPR recommendations and the importance of acceptance**

In its opening address to the Human Rights Council, the Australian delegation emphasised its commitment to “a fairer and more inclusive Australia”.<sup>36</sup> It later acknowledged the importance of economic, social and cultural rights “to the inherent dignity of all persons” and reiterated the Australian Government’s commitment to “taking steps with a view to their realization”.<sup>37</sup>

A significant number of countries made recommendations regarding poverty, social inclusion and reducing socio-economic disadvantage in Australia. Ghana and Pakistan expressly recommended that Australia develop a comprehensive poverty reduction and social inclusion strategy, which should integrate economic, social and cultural rights.<sup>38</sup> Lao People’s Democratic Republic and Viet Nam made recommendations about closing the gap in living standards and social disparities for vulnerable groups, particularly in relation to economic, social and cultural rights.<sup>39</sup>

The Australian delegation identified the Australian Government’s priorities for its social inclusion agenda as: supporting children at greatest risk of long term disadvantage; helping jobless families with children; focusing on locations of greatest disadvantage; assisting in the employment of people with a disability or mental illness; addressing the incidence of homelessness; and closing the gap for Indigenous Australians.<sup>40</sup>

We reiterate that, as well as providing a foundation for a stronger, fairer Australia, reducing poverty and social exclusion is consistent with Australia’s obligations under international law. In particular, the obligation under article 2(1) of the ICESCR to take steps, to the maximum of available resources, to progressively achieve the full realisation of all ICESCR rights, including the right social security under article 9 and to an adequate standard of living under article 11 (which includes adequate housing, food, clothing, water and the continuous improvement of living conditions).

Although article 9 does not specify the type or level of social security required, the Committee on Economic, Social and Cultural Rights (**CESCR**) has commented that it must be sufficient to allow the realisation of the right to an adequate standard of living.<sup>41</sup> Australia’s obligation under article 9 must also consider the redistributive aim

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<sup>35</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia*, E/C.12/AUS/CO/4 (2009) [24].

<sup>36</sup> United Nations Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review – Australia* (A/HRC/WG.6/10/L.8) (31 January 2011) at [7].

<sup>37</sup> *Ibid* at [68].

<sup>38</sup> *Ibid*, Recommendations [86.32] and [86.33] respectively.

<sup>39</sup> *Ibid*, Recommendations [86.142] and [86.50] respectively.

<sup>40</sup> *Ibid* at [69].

<sup>41</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, UN Doc. E/C.12/GC/19 (2008) at [22].

of social security, and its role in “poverty reduction and alleviation, preventing social exclusion and promoting social inclusion”.<sup>42</sup>

As a developed country and an influential member of the Asia-Pacific community, Australia has the potential to provide leadership in relation to human rights promotion. This leadership potential is limited by policies and laws which fail to protect economic, social and cultural rights and leave 12 percent of Australians living in poverty.

**(c) Further information regarding social inclusion and poverty reduction**

The Attorney-General’s Department has indicated that it would like more definition regarding poverty reduction and social inclusion.

The Australian Council of Social Service (**ACOSS**) explains the experience of poverty and social exclusion: “Australians living in poverty not only have low levels of income; they also miss out on opportunities and resources that most take for granted, such as adequate health and dental care, housing, education, employment opportunities, food and recreation.”<sup>43</sup> To use the Australian Government’s own words: “Social inclusion is about ensuring that everyone is able to participate fully in Australian society. It is about people having the necessary opportunities, capabilities and resources to enable them both to contribute to and share in the benefits of Australia’s success as a nation.”<sup>44</sup>

Currently in Australia, in addition to the 12 percent of Australians who live in poverty, 5 percent of people aged between 18 and 64 years experience three or more of: low income and assets; unemployment; poor health; limited education; lack of safe housing; and social isolation.<sup>45</sup> The experience of “multiple disadvantages” limits a person’s ability to participate in economic, social and community activities.

The acute shortage of affordable housing is a major cause of poverty and social exclusion in Australia: 105,000 Australians are homeless;<sup>46</sup> over 1.1 million Australian families experience housing stress (i.e. they pay more than 30% of their income on recurrent housing costs);<sup>47</sup> and 248,419 applicants are waiting for social housing.<sup>48</sup> The cost of housing is the greatest financial pressure on low and middle income Australians.

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<sup>42</sup> Ibid at [3].

<sup>43</sup> Australian Council of Social Service, *Poverty Report: Poverty and its Causes* (October 2010), 1, available at: [http://acoss.org.au/images/uploads/ACOSS\\_poverty\\_report\\_October\\_2010.pdf](http://acoss.org.au/images/uploads/ACOSS_poverty_report_October_2010.pdf) (**ACOSS Report**).

<sup>44</sup> Australian Social Inclusion Board, *Social Inclusion in Australia: How Australia is faring* (2010), 1, available at: [http://www.socialinclusion.gov.au/Resources/Documents/SI\\_HowAusIsFaring.pdf](http://www.socialinclusion.gov.au/Resources/Documents/SI_HowAusIsFaring.pdf) (**ASIB Report**).

<sup>45</sup> Australian Bureau of Statistics, General Social Survey (2006) cited in ASIB Report, above n 44, 5.

<sup>46</sup> Chris Chamberlain and David MacKenzie, Australian Bureau of Statistics, *Australian Census Analytic Program: Counting the Homeless* (2006) available at: [www.abs.gov.au](http://www.abs.gov.au).

<sup>47</sup> Ryanti Miranti and Binod Nepal, ‘Housing stress in Australia 2007’, National Centre for Social and Economic Modelling, University of Canberra (2008).

<sup>48</sup> See Australian Institute of Health and Welfare, Housing assistance data development series reports for public rental housing, community housing, and state owned and managed Indigenous housing.

Escalation in the cost of living has the most significant impact on people and families who are reliant on social security. Using the OECD definition of poverty (less than 50% of median income), in 2006, a single Newstart recipient's weekly payment placed them \$79 below the poverty line; and a sole parent with two children receiving a Parenting Payment was \$26 below the poverty line.<sup>49</sup> Moreover, the CESCR has expressly identified that certain members of Australian society continue to be excluded from the social security system (including asylum seekers and new immigrants) and that conditions such as mutual obligations and welfare quarantining "have a punitive effect on disadvantaged and marginalized families, women and children".<sup>50</sup>

Increasing costs of education and health care and rising numbers of long-term unemployed and underemployed<sup>51</sup> are also contributing to increased inequality and disadvantage. This disadvantage is disproportionately affecting vulnerable groups, including asylum seekers, migrants, people with disabilities and Aboriginal and Torres Strait Islander peoples (who experience a 17-year gap in life expectancy, low rates of employment and high rates of poverty and homelessness).

**(d) Recommendations for Implementation**

To reduce poverty and improve social inclusion, the following measures are needed:

- **Poverty reduction plan and transparent evaluation** – A comprehensive poverty reduction strategy needs to be implemented across all levels of government. An integrated approach across health, welfare, education and housing sectors is also required. Clear targets and transparent measurements need to be adopted and used by all levels of government so that the causes of poverty can be addressed and reductions in poverty can be accurately and consistently measured.
- **Increased social security payment levels** – Levels of social security payments (including Newstart, Youth Allowance and sole parenting payments) need to be increased with a view to reducing the number of Australians – including children – living in poverty. The single rate of Newstart Allowance should be increased by \$45 per week as proposed by the Henry Tax Review.
- **Increased affordable housing** – A commitment to provide 220,000 new affordable dwellings by 2020, which includes public housing, housing managed by not-for-profit organisations and housing provided under the National Rental Affordability Scheme. National homelessness legislation which explicitly recognises the right to adequate housing should be introduced (as recommended by the Special Rapporteur on Adequate Housing in 2007, in the Australian Government's White Paper on Homelessness and again by the Standing Committee on Family, Community, Housing and Youth in its report, *Housing the Homeless: Report on the Inquiry into Homelessness Legislation*).

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<sup>49</sup> ACOSS Report, above n 43, 6.

<sup>50</sup> CESCR Concluding Observations, above n 35, [20].

<sup>51</sup> See ACOSS Report, above n 43.

- **Improved operation of the social security system** – As recommended by the CESCR,<sup>52</sup> legislative and policy reforms are required to broaden the coverage of social security and to make sure it is administered in a way that does not disempower or further marginalise members of the community (for example, through compulsory income management).
- **Unemployment programs and assistance** – More effective programs for assisting unemployed Australians are required. These should include training that meets the needs of particular groups (including people experiencing long-term unemployment) and paid work experience programs.
- **Improved affordability and accessibility of health and education** – Funding needs to be allocated to improve access to health services (including mental health) and education to ensure that the rights to adequate health and education are realised for all Australians – not just those who can afford to pay. This need is particularly acute in rural and Aboriginal and Torres Strait Islander communities.

## 6.2 The Right to Strike

### (a) Background

The right to strike is an integral part of the principle of freedom of association. The UN Committee on Economic, Social and Cultural Rights and the International Labour Organisation have recommended that Australia limit its prohibitions on the right to strike in accordance with its international obligations under ICESCR and the *Freedom of Association and Protection of the right to Organise Convention (ILO Convention No 87)*.<sup>53</sup> ILO Convention No 87 provides the content of the right to strike, which is broadly summarised in three obligations: protection of the right to strike in support of economic interests, non-hindrance of strike in practice, and restricting responses to illegitimate strike action to legal measures that are both measured and appropriate.

Although the Australian Government's shift from Work Choices to the Fair Work Act resulted in some improvements to Australia's compliance with its international obligations under freedom of association provisions, many of the provisions in previous legislation in relation to the right to strike that had been subject to criticism by the CESCR and ILO were maintained.

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<sup>52</sup> CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia, E/C.12/AUS/CO/4 (2009), [20].

<sup>53</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [29] and International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention: Australia* (2007).

Relevant restrictions on the right to strike which challenge Australia's compliance with its international obligations include:

- Industrial action other than in support of negotiations for a single-enterprise agreement outside the scope of the protected industrial action provisions of the Fair Work Act, the right to strike is effectively denied. This is in contrast to the ILO Standards which recognise the right to strike in relation to a broader concept of 'collectivism' or 'pattern bargaining', which would permit strike action in relation to common wages or conditions.<sup>54</sup>
- Hindrance to strike in practice through the requirement of secret ballots before lawful strikes.<sup>55</sup>
- The Fair Work Act requires suspension or termination of protected industrial action beyond an essential services exemption.

**(b) UPR Recommendation**

Israel (at 86.100) recommended that the Australian Government remove, in law and practice, restrictions on the right of workers to strike, in accordance with the recommendations previously made to the Australian Government by CESCR.

**(c) Implementation of Recommendation**

In its 2009 Concluding Observations, CESCR recommended that Australia:

... continue its efforts to improve the realisation of workers rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87. In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action and consider amending the Fair Work Act 2009. The State party should lift the restrictions on "pattern bargaining", the pursuit of multi-employer agreements and matters that are not "permitted", and to remove the secret ballot requirements for workers who wish to take industrial action.

The Australian Government should take immediate steps to review the *Fair Work Act 2009* (Cth) to ensure that it complies (in principle and in practice) with the right to freedom of association and the right to strike. The Australian Government should also review the above recommendation made by CESCR and implement the recommendations that remain outstanding. This includes the recommendation that Australia lift the restriction on 'pattern bargaining', and to remove the secret ballot requirements for workers who wish to take industrial actions, as well as amendments to the Building and Construction Industry Improvement Act 2005.

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<sup>54</sup> Section 45D *Fair Work Act 2009* (Cth) and *Freedom of Association and Protection of the right to Organise Convention (ILO Convention No 87)*, CFA, *Complaint Against the Government of Australia Presented by the Australian Council of Trade Unions*, Document Vol LXXXVIII, 2005, Series B, No 3, Report No 338, Case No 2326, at [445].

<sup>55</sup> Section 409(2) *Fair Work Act 2009* (Cth).

## 7. “New and Emerging” Rights

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### 7.1 Background

During Australia’s UPR appearance, a number of recommendations were made that relate to what the Australian Government refers to as “new and emerging” rights. These rights include issues such as climate change, Australia’s foreign aid program and Australia’s role in the region. We note our view that these are not “new and emerging” rights, but instead rights that are anchored in instruments such as the ICCPR and the ICESCR.

### 7.2 Climate Change

#### (a) Background

Climate change is likely to have significant human rights implications for Australia, the Asia Pacific region and the world. The consequences of climate change have been described by the United Nations Deputy High Commissioner as “calamitous”<sup>56</sup> and by the Australian Human Rights Commission as a “human rights tragedy in the making”.<sup>57</sup> The United Nations Development Programme has stated that climate change, if allowed to manifest, would constitute “a systemic violation of the human rights of the poor and of future generations”.<sup>58</sup>

Thus, climate change necessitates putting in place appropriate programs to protect human rights. Within Australia, fundamental rights such as the right to an adequate standard of living and to health may be diminished in a number of ways, including by “climate change induced disasters” such as flooding, cyclones or droughts that diminish the availability of safe drinking water; or changed climatic conditions that promote the spread of disease.<sup>59</sup> Indeed, one manifestation of climate change is predicted to be an increase in the number of heatwaves and hot days which could lead to approximately 4,000 more deaths in Queensland annually.<sup>60</sup>

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<sup>56</sup> Andreas Sandre von Warburg, ‘Human Rights Council Addresses Climate Change as a Global Threat’, *The Gstaad Project*, 1 April 2008, available at <http://gstaadblog.wordpress.com>, citing the UN Deputy High Commissioner for Human Rights.

<sup>57</sup> Human Rights and Equal Opportunity Commission, *Background Paper — Human Rights and Climate Change*, above n 59, 24.

<sup>58</sup> *Ibid*, citing the United Nations Development Programme, *Human Development Report 2007/2008 — Fighting Climate Change: Human Solidarity in a Divided World* (2007) 4.

<sup>59</sup> Human Rights and Equal Opportunity Commission, *Background Paper — Human Rights and Climate Change* (2008) 4, referring to comments of the UN Deputy High Commissioner of Human Rights.

<sup>60</sup> Ross Garnaut, *Garnaut Climate Change Review: Final Report*, Cambridge University Press (September 2008).

The current Australian Government has recognised that climate change is a global problem requiring a global solution.<sup>61</sup> As a result of this it has pledged to take action to reduce Australia's greenhouse gas emissions, adapt to climate change which cannot be avoided and help shape a global solution to climate change "that both protects the planet and advances Australia's long-term interests".<sup>62</sup>

**(b) UPR Recommendation**

The Maldives recommends that Australia "adopt a rights-based approach to climate change policy at home and abroad, including by reducing greenhouse gas emissions to safe levels that are consistent with the full enjoyment of human rights" (Recommendation 86.31).

**(c) Implementation of Recommendation**

Australia's policy and practice in relation to climate change should respond to the human rights issues and obligations associated with climate change, including particularly with respect to access to water, food and the spread of disease.

In its Concluding Observations in 2009, the CESCR Committee expressed concern at the negative impact of climate change on the right to an adequate standard of living, including on the right to food and the right to water, affecting in particular Indigenous peoples, in spite of Australia's recognition of the challenges imposed by climate change. The Committee recommended that Australia:

take all the necessary and adequate measures to ensure the enjoyment of the right to food and of the right to affordable drinking water and sanitation in particular by indigenous peoples, using a human-rights based approach, in line with the Committee's general comments No. 15 on the right to water (2002), No.14 on the right to health (2000) and No. 12 on the right to food (1999). It also recommends that the State party intensify its efforts to address issues of climate change, including through carbon reduction schemes. The State party is encouraged to reduce its greenhouse gas emissions and to take all the necessary and adequate measures to mitigate the adverse consequences of climate change, impacting the right to food and the right to water for indigenous peoples, and put in place effective mechanisms to guarantee consultation of affected Aboriginal and Torres Strait-Islander peoples, so to enable them to exercise their rights to an informed decision as well as to harness the potential of their traditional knowledge and culture (in land management and conservation).

The NGO Coalition considers that the recommendation by CESCR provides useful guidance on how Australia look to implement the recommendation made by the Maldives.

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<sup>61</sup> Ibid. See also *Resolution on Human Rights and Climate Change*, UN HRC Res 7/23, 7<sup>th</sup> sess, 41<sup>st</sup> mtg, UN Doc A/HRC/RES/7/23 (2008).

<sup>62</sup> Department of Climate Change, Australian Government, *Carbon Pollution Reduction Scheme: Green Paper* (2008) 8.

### 7.3 Australia's foreign aid program and role in the region

#### (a) **Background**

Notwithstanding the United Nations target of 0.7% of Gross National Income for aid and development assistance for developed countries, Australia contributed only 0.29% of its Gross National Income towards official development assistance in 2009/2010.<sup>63</sup> Australia recently committed to increasing its assistance to 0.5% of GNI by 2015-2016.<sup>64</sup> However, this remains well short of the Millennium Development Goal target of 0.7% target.

In terms of Australia's role in the region, the Australian Government's new Human Rights Framework commits Australia to "promote and protect human rights within our region",<sup>65</sup> while "comprehensive engagement with the Asia-Pacific" is one of the three key pillars of Australian foreign policy.<sup>66</sup> Despite these commitments, Australia has not developed a comprehensive policy on human rights in the Asia-Pacific.

#### (b) **UPR Recommendations**

During Australia's UPR appearance, a number of countries made recommendations relating to Australia's role in the region and overseas development assistance:

- Recommendation 86.135 — Protect Official Development Assistance from budgetary cuts in the context of the international crisis and making every effort to bring it to the internationally agreed target of 0.7 per cent of GDP (Algeria);
- Recommendation 86.141 — Continue to share its experiences for the promotion of human rights in the region and the world (Lao People's Democratic Republic);
- Recommendation 86.144 — Continue to promote and protect human rights internationally through bilateral and multilateral dialogue to enhance human right capacity regionally across the Asia-Pacific and globally through the AusAID programme (Cambodia);
- Recommendation 86.145 — Continue its efforts for the promotion and protection of human rights in the world and in their country (Chad).

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<sup>63</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: UN Doc E/C.12.AUS/CO/4.

<sup>64</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>65</sup> Australian Government, *Australia' Human Rights Framework* (April 2010) 7.

<sup>66</sup> See, eg, The Hon Stephen Smith MP, Minister for Foreign Affairs, 'Australia and the Asia-Pacific Century', Paper to the South Australian Branch of the Australian Institute of International Affairs, 12 April 2010.

**(c) Implementation of Recommendations**

While recognising that the nature of these recommendations is reasonably broad, the NGO Coalition considers that Australia should develop a comprehensive policy on human rights in the Asia-Pacific and explicitly commit to the promotion and protection of human rights as the primary goal and instrument of Australia's engagement with the region.

The recent report of the Joint Committee on Foreign Affairs, Defence and Trade (JCFADT) on human rights in the Asia-Pacific identified a "clear need to enhance mechanisms to protect human rights and to redress human rights violations" in the region.<sup>67</sup> On Australia's role, JCFADT found that Australia is "well placed to foster discussion and progress on a cooperative approach to human rights challenges facing the Asia-Pacific".<sup>68</sup> It concluded that Australia has a "significant" role to play in the region.<sup>69</sup>

The NGO Coalition recommends that Australia develop a comprehensive policy on human rights in the region that encompasses action in the following areas:

- human rights as a key instrument and aim of Australian engagement in the region;
- adopting a human rights-based approach to aid and development assistance;
- adopting a human rights-based approach to military and security cooperation;
- empowering communities and supporting civil society actors;
- promoting human rights treaty ratification and implementation;
- strengthening human rights institutions;
- enhancing parliamentary engagement with human rights; and
- human rights envoys and ambassadors.

Concrete recommendations in relation to each of these areas can be found in the Human Rights Law Resource Centre's policy brief on *Human Rights in the Asia-Pacific: Australia's Role and Responsibilities*.<sup>70</sup>

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<sup>67</sup> JCFADT Report, vii.

<sup>68</sup> JCFADT Report, 149.

<sup>69</sup> JCFADT Report, 147.

<sup>70</sup> The policy brief is available at <http://www.hrlrc.org.au/files/Policy-Paper-Asia-Pacific-and-Human-Rights.pdf>

## 8. Children's Rights

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### 8.1 Background

Despite Australia's ratification of the UN Convention of the Rights of the Child (**CRC**) in 1990, Australia does not have a comprehensive national policy framework for children. There has been a lack of integration of children's rights into Australian law and no appropriate and effective mechanism exists to ensure the "coherence and compliance of all jurisdictions"<sup>71</sup> in Australia for the protection of children's rights.

In 2005, the UN Committee on the Rights of the Child noted that "there is no comprehensive policy at national level for children specifically addressing human rights issues that may impact on them,"<sup>72</sup> and also noted the need for more effective monitoring.<sup>73</sup> Without a human rights framework for children, Australia fails to effectively set benchmarks or measure progress – particularly to improve the circumstances of Aboriginal and Torres Strait Islander children – and disadvantage and abuse is not consistently monitored or addressed.

### 8.2 UPR Recommendations

During Australia's UPR appearance, a number of recommendations were made to Australia that related to children's rights. These recommendations related generally to the following main areas:

- the establishment of a national policy framework for children;
- the establishment of an independent national Children's Commissioner;
- Aboriginal and Torres Strait Islander children;
- the non-therapeutic sterilisation of children with disability;
- children in immigration detention; and
- corporal punishment.

### 8.3 Implementation of the UPR Recommendations

#### (a) *National Policy Framework for Children*

As identified above, the UN Committee on the Rights of the Child has expressed concern that there is no comprehensive policy framework for children at the national level. Israel has recommended that Australia establish a comprehensive child care policy, as recommended by CEDAW (UPR Recommendation 86.99).

The NGO Coalition considers that the UN Committee on the Rights of the Child's Concluding Observations from 2005, together with CEDAW's recommendation, provide useful guidance on how Australia could implement this recommendation.

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<sup>71</sup> Committee On Economic, Social And Cultural Rights, Forty-Second Session, Geneva, 22 May 2009, Concluding Observations, Australia E/C.12/Aus/Co/4.

<sup>72</sup> CRC/C/15/Add.268, Concluding Observations, Australia, 40th Session, Paragraph 11.

<sup>73</sup> CRC/C/15/Add.268, Concluding Observations, Australia, 40th Session, Paragraph 16.

In particular, paragraph 12 of the CRC Concluding Observations indicates that Australia should:

- take into account the Committee's general comment No. 7 (2005) on implementing child rights in early childhood;
- provide the necessary budget for the full implementation of a national plan of action for children;
- take into account the Declaration and the Plan of Action contained in the document "A world fit for children" adopted by the UN General Assembly at its special session on children in May 2002;
- identify specific goals, strategies and guaranteed resources, which would allow for an appropriate implementation of the Convention in all states and territories.

**(b) A National Children's Commissioner**

A number of states made specific recommendations that Australia establish an independent commissioner relating to children's rights, including New Zealand (Recommendation 86.28) and Poland (Recommendation 86.29). Poland expressed concern that no independent institution was devoted specifically to the promotion and protection of children rights. New Zealand stated that an independent mechanism to monitor compliance with the CRC would assist in improving the welfare of vulnerable children.

During its UPR appearance, the delegation noted that the Australian Government is currently exploring the potential role for a National Children's Commissioner. The NGO Coalition acknowledges that the Senate Legal and Constitutional Affairs Legislation Committee is currently considering the Commonwealth Commissioner for Children and Young People Bill 2010 and is due to report in May 2011.

The NGO Coalition strongly supports the establishment of a Children's Commissioner as established in the Commonwealth Commissioner for Children and Young People Bill 2010, however recommends that:

- the Children's Commissioner should sit within the Australian Human Rights Commission, rather than being established as a wholly independent and "stand alone" statutory office;
- the Children's Commissioner should not be responsible for preparation of Australia's reports on its compliance with the CRC, but should instead contribute to the Australian Human Rights Commission's reports under the CRC, together with to relevant UN human rights bodies and mechanisms; and
- the role of the Children's Commissioner should be enhanced by:
  - providing more explicit functions relating to monitoring Australia's compliance with its international obligations;
  - expanding and clarifying the Children's Commissioner's powers to receive and determine complaints and to make inquiries and publish reports; and

- providing for the demarcation of the roles of the Children's Commissioner *vis-à-vis* the commissioner's in the states and territories and outline how they are to interact.

**(c) *Aboriginal and Torres Strait Islander Children***

Issues relating to Aboriginal and Torres Strait Islander children are discussed generally in section 10 below.

**(d) *Non-therapeutic Sterilisation of Children with Disability***

The issue of the non-therapeutic sterilisation of children with disability is discussed in further detail below under heading 11.2.

**(e) *Children in Immigration Detention***

The issue of children in immigration detention is discussed in further detail below under heading 9.2.

**(f) *Corporal Punishment***

The issue of corporal punishment is discussed in further detail above under heading 5.1.

## **9. Immigration**

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The NGO Coalition supports each of the UPR recommendations that relate to immigration detention, and more generally in relation to safeguarding the rights of all migrants, refugees and asylum seekers in Australia. This section of the submission addresses:

- mandatory immigration detention;
- children in detention;
- alternatives to detention;
- non-refoulement; and
- Australia's multicultural policy.

Recommendations made by the Committee on these topics include, but are not limited to:

- 86.123. Ensure the processing of asylum seekers' claims in accordance with the UN Refugee Convention and that they are detained only when strictly necessary (Norway);
- 86.126. Repeal the provisions of the *Migration Act 1958* relating to mandatory detention (Pakistan)
- 86.129. Ensure that no children are held in detention on the basis of their migratory status and that special protection and assistance is provided to unaccompanied children (Brazil);

- 86.131. Consider alternatives to the detention of irregular migrants and asylum seekers, limit the length of detentions, ensure access to legal and health assistance and uphold its obligations under the Vienna Convention on Consular Relations (Brazil)
- 86.132. Do not detain migrants other than in exceptional cases and limit this detention to six months and bring detention conditions into line with international standards in the field of human rights (Switzerland);

## 9.1 Mandatory Immigration Detention

The *Migration Act 1958* requires all unlawful non-citizens remain subject to mandatory detention, regardless of circumstances, until their status is resolved. Australian law also fails to protect unlawful non-citizens against indefinite detention, as time limitations for immigration detention are not codified in Australian law.<sup>74</sup>

### (a) Recommendations for Implementation

It is acknowledged that many of the principles articulated in the UPR recommendations relating to mandatory detention are already addressed in the Australian Government's "seven key immigration values". However, it is of great concern that these principles, including those relating to length of detention, are neither enshrined in legislation nor implemented in practice.

We recommend that the Australian Government take immediate steps to:

1. Repeal the provisions of the *Migration Act 1958* relating to mandatory detention;
2. Review Australia's immigration policies to ensure that asylum seekers and migrants are only detained as a last resort in exceptional cases;
3. Detention should be for the shortest time possible and in no circumstances extend beyond 6 months – asylum seekers should be assessed expeditiously, and with the upmost respect paid to their human rights;
4. Any detention should be subject to regular substantive and judicial review; and
5. Conditions in detention should be reviewed as a matter of priority - this includes reviews of rights in relation to asylum seeker access to legal counsel and health and support services.

## 9.2 Children in Immigration Detention

During its UPR appearance, the Australian delegation stated that children, and where possible their families, will not be detained in an immigration detention centre.

While the *Migration Act 1958* has been amended to affirm the *principle* that asylum seeker children should only be detained as a measure of last resort, and children are no longer detained in immigration detention centres, they nonetheless continue to be held in detention-like conditions in other immigration detention facilities.

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<sup>74</sup> *Migration Act 1958* (Cth), ss189(1), 189(2) and 196(1).

This issue was highlighted by Ghana during Australia's appearance, who referred to concerns expressed by treaty bodies about Australia's asylum-seeker and refugee policy, including the keeping of children in detention-like conditions in remote areas and, at times, separated from their parents.

Human rights issues relating to the detention of humanitarian minors have been examined in the *Australian Human Rights Commission report, A Last Resort? National Inquiry into Children in Immigration Detention*, however the Australian Government has not fully implemented the recommendations outlined in this report.<sup>75</sup>

**(a) Recommendations for Implementation**

The Australian Government should:

1. Take all necessary legislative steps to ensure no children are held in detention, or detention-like facilities; this would involve implementing administrative, procedural and legal safeguards – it is insufficient to rely on the current discretionary model around community detention.
2. Implement the outstanding recommendations from the *Australian Human Rights Commission's National Inquiry into Children in Immigration Detention*.

**9.3 Alternatives to Immigration Detention:**

Mandatory, indefinite immigration detention, which is the current practice of the Australian Government, is incompatible with international human rights standards. Further, conditions in immigration detention facilities have serious implications for the human rights of asylum seekers. Detention, particularly when indefinite or prolonged, has shown to have a detrimental impact on the mental health of persons who have suffered torture and trauma. There have been at least five suicides in immigration detention over the last seven months.

Alternatives to detention are therefore highly preferable. Alternatives to detention may be defined as "any legislation, policy or practice that allows asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country" (International Detention Coalition).

**(a) Recommendations for Implementation**

The Australian Government should implement community-based alternatives to detention whenever possible, particularly for families, children and other vulnerable groups. Community based alternatives may include:<sup>76</sup>

- Open accommodation centres for asylum seekers
- Release on own recognizance or with registration and documentation
- Release to nominated address

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<sup>75</sup> Australian Human Rights Commission (2004), *A last resort? National Inquiry into Children in Immigration Detention*, at [http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/index.html](http://www.humanrights.gov.au/human_rights/children_detention_report/index.html) (accessed 21 October 2010).

- Release to case worker support (case management)
- Release to community group / religious group / family
- Release to a return preparation program
- Release with reporting requirements
- Release with bail, bond, surety or guarantee

#### **9.4 Non-refoulement**

##### **(a) UPR Recommendations**

During its UPR appearance, Australia received the following recommendations specific to the issue of non-refoulement:

- Recommendation 86.124 — Cease the practice of refoulement of refugees and asylum-seekers, which puts at risk their lives and their families' lives (Slovenia); and
- Recommendation 86.125 — Ensure in its domestic law that the principle of non-refoulement is respected when proceeding with the return of asylum-seekers to countries (Ghana).

##### **(b) Background**

The fundamental principle of non-return to face torture or death has not yet been enacted in Australian domestic law. This is of particular concern given that the Australian Government has repeatedly disclaimed any responsibility for the subsequent torture or cruel treatment of persons who are removed. There is substantial evidence that asylum seekers who have been returned by Australia to their country of origin have been tortured or even killed.<sup>77</sup> Australia regularly deports asylum seekers to countries that are not signatories to the Convention relating to the Status of Refugees (such as Malaysia and Thailand) and to so called “safe third countries” (such as China) in which the use of torture and other ill-treatment remains widespread.

##### **(c) Implementation of Recommendations**

While the NGO Coalition welcomes the Migration Amendment (Complementary Protection) Bill 2010 [need to check where this is at] as a move to enact complementary protection legislation, we also consider that the Bill must be stronger in order to accurately reflect Australia's obligations under international human rights law.

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<sup>76</sup> *Alternatives to Immigration detention*, International Detention Coalition, 'International Examples' page 3 ( June 2010)

<sup>77</sup> See, for example, Australian Refugee Rights Alliance, 'Deportations to China: Australia RSD Process that Return People to Persecution (Draft Discussion Paper, 2007).

In particular, we consider that Australia's complementary protection legislation should be enhanced by:

- expanding the list of grounds upon which Australia recognises protection obligations to cover all those grounds for protection recognised under international law;
- omitting the requirement that risks be "necessary and foreseeable" and constitute "irreparable harm";
- omitting the requirement of intent in the definition of cruel, inhuman or degrading treatment; and
- ensuring that complementary protection is available to all those within Australia's jurisdiction.

## **9.5 Australian National Multicultural Policy**

### **(a) Background**

In February 2011, the Federal Government introduced Australia's first multicultural policy since 2006 – *The People of Australia*. This policy considers matters of access and equity to government services, a national anti-racism strategy and the development of a new Australian Multicultural Council.

### **(b) UPR Recommendations**

Recommendations made by the UPR Committee around a national multicultural agenda, including an anti-racism and discrimination strategy, include, but are not limited to:

- Recommendation 86.59. Strengthen further the measures to combat discrimination against minority communities, including Muslim communities in Australia (Algeria)
- Recommendation 86.60. Take measures towards ensuring the equal and the full enjoyment of the basic rights of all its citizens including persons belonging to indigenous communities, and to effectively prevent and, if necessary, combat racial discrimination (Sweden)
- Recommendation 86.61. Continue its efforts to promote multicultural and racial tolerance through initiatives such as the Australian Multicultural Advisory Council and the Diversity and Social Cohesion Programme (Singapore)
- Recommendation 86.62. Take more effective measures to address discrimination and other problems related to racial and ethnic relations including by developing and implementing appropriate policy and programmes with a view to improving and strengthening relations between races and cultures (Malaysia)

**(c) Implementation of Recommendations**

To fully address recommendations including those listed above, the government should ensure that there is ongoing and adequate consultation with NGOs, in particular those that work with culturally and linguistically diverse communities, to ensure that their views are reflected in the development and implementation of the new Australian Multicultural Policy – including the new anti-racism strategy, access and equity framework and Australian Multicultural Council.

The government should continue to support peak ethnic organisations such as the Federation of Ethnic Communities' Councils of Australia (FECCA) to conduct access and equity consultations to capture grassroots feedback to convey to the Council and to government. Peak ethnic organisations such as FECCA should be supported to provide crucial advocacy on behalf of migrant communities and to contribute expert and specialist input to all levels of government to create relevant policy interventions.

## **10. Aboriginal and Torres Strait Islander Peoples**

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### **10.1 The full implementation of the UN Declaration on the Rights of Indigenous Peoples<sup>78</sup>**

The Australian Government's current "support" for the UN Declaration on the Rights of Indigenous Peoples (**Declaration**) and general indication that its policies are 'in the spirit' of the Declaration are not enough. Without any treaty body monitoring implementation of the Declaration, it is up to the Australian Government to give practical meaning its support for the Declaration by taking immediate steps to fulfil its obligations to protect, respect and promote the rights of Aboriginal and Torres Strait Islander peoples in accordance with the Declaration.

We acknowledge the Government has indicated the Closing the Gap Campaign, support for the New National Congress of Australia's First Peoples and the appointment of an Expert Panel to report on the issue of Constitutional recognition of Aboriginal and Torres Strait Islanders as some important steps in the right direction. These three policies arguably and only to a limited extent concern articles: 14 (Education), 23 (Economic and Social development), 24 (health), 4 (Autonomy), 5 (Distinct Institutions). The NATSILS maintain concerns about the significant limitations of each policy (which requires further assessment beyond the scope of this submission) and large number of other human rights under the Declaration that continue to be disregarded by the Australian Government.

The Government can take the following steps to achieve full implementation of the Declaration:

1. Government Consultation with Aboriginal and Torres Strait Islander peoples to develop an Action Plan for the full implementation of the rights in the Declaration by:
  - (a) With assistance from the ATSILS, the National Congress of Australia's First Peoples and other peak Aboriginal and Torres Strait Islander bodies,

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<sup>78</sup> UPR recommendations 86.24. (Norway), 86.106. (Bolivia, Ghana, Hungary and Denmark) and 86.107. (Guatemala).

- convening a special forum or series of forums with Aboriginal and Torres Strait Islander peoples and organisations dedicated to consultation on the implementation of the rights contained in the Declaration. The Government should provide financial and educational resources to assist organisations attend and meaningfully participate at the forum/s.
- (b) The forum/s could include a preparatory meeting for Aboriginal and Torres Strait Islander peoples and organisations to better understand the international and domestic framework for the protection of human rights, and formulate common positions on issues and areas of interest in regards to the implementation of the Declaration;
  - (c) Prior to the forum/s the Government could provide a written explanation or Discussion Paper cataloguing the current implementation and realisation of each right individually and the rights under the Declaration collectively, including by identifying any gaps, challenges and proposed areas for positive change;
  - (d) Affording Aboriginal and Torres Strait Islander peoples and organisations the opportunity to respond to the Government's explanation at the forum/s, with the option of being able to also provide submissions at a later date after having time to reflect and discuss with each other collectively;
  - (e) Committing to developing an Action Plan for the Declaration, based on the input of Aboriginal and Torres Strait Islander peoples and organisations at the forum/s within 6 months of the conclusion of the forum/s.
2. Incorporate the Declaration as the 8th Core Human Rights Instrument in the Human Rights Framework, which contains the following elements:
- (a) Reaffirmed commitment: the Government would reaffirm its commitment to the Declaration by incorporating it as a core human rights instrument into the Framework, including in the Human Rights (Parliamentary Scrutiny) Bill 2010;
  - (b) Education: the Government could empower Aboriginal peoples to develop and deliver training and education to the public service and broader community about the Declaration;
  - (c) Engage: the Government could support a regular forum for Aboriginal and Torres Strait Islander peoples to discuss and advise the Government about their rights and how they can be better protected in Australia and overseas;
  - (d) Protect: Government departments could refer to the rights in the Declaration in the development of any statements of compatibility for all new bills through Parliament and the Joint Parliamentary Committee for Human Rights could also give consideration to the rights in the Declaration in the course of its activities, in consultation with Aboriginal and Torres Strait organisations and peoples; and
  - (e) Respect: the Government could review all policies and laws for their compatibility with the Declaration, and consider how the Declaration can be incorporated into the harmonisation of anti-discrimination laws.

## **10.2 Establishing a Formal Reconciliation Process that leads to an agreement with Aboriginal and Torres Strait Islander peoples<sup>79</sup>**

As part of the forum/s outlined above, work with Aboriginal and Torres Strait Islander peoples and organisations to develop a strategy for self-determination that is in line with the Declaration as well as other instruments such as ICERD, ICCPR, ICESCR, CROC, and CEDAW, and was recommended in the National Human Rights Consultation.

## **10.3 National compensation scheme for victims of the Stolen Generations<sup>80</sup>**

A national compensation scheme for victims of the Stolen Generations has been repeatedly recommended by UN Treaty Bodies for Australia to fulfil its obligations under ICERD and ICCPR.<sup>81</sup> Various state-based schemes have not adequately addressed this issue. The Government should establish a national compensation scheme in which the relevant consideration for compensation is proof of harm rather than the legality of removal under the laws at the time.

## **10.4 Access to justice<sup>82</sup>**

The Government can take the following steps to achieve the implementation of measures to address the factors leading to the overrepresentation of Aboriginal and Torres Strait Islander peoples in prisons and combat the high level of deaths of Aboriginal and Torres Strait Islander peoples in places of detention:

- incorporate targets, including benchmarks and timeframes, to reduce the high involvement of Aboriginal and Torres Strait Islander peoples in contact with the criminal justice system into the Closing the Gap agenda;
- fund a research project into the development of justice reinvestment pilot programs in each State and Territory. Justice Reinvestment pilot programs should include strategies such as therapeutic jurisprudence approaches, the expansion of specialised courts and community courts, and the increased use of restorative justice processes that promote community empowerment and the role of Aboriginal and Torres Strait Islander Elders in the criminal justice system;
- through COAG, work with State and Territory governments to increase the use of non-custodial sentencing options (such as community based orders, community work orders, diversionary programs, cautioning and home detention);

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<sup>79</sup> UPR recommendation 86.103. (Slovenia).

<sup>80</sup> UPR recommendation 86.97. (Slovenia).

<sup>81</sup> *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, 999 UNTS 171, arts 2, 24, 26, 27 (entered into force 23 March 1976); *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD), opened for signature 21 December 1965, 1249 UNTS 13, art 6 (entered into force 4 January 1969), and see James Anaya, Special Rapporteur on the rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia*, 15<sup>th</sup> sess, [83], UN Doc A/HRC/15 (2010); Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations – Australia*, 77<sup>th</sup> sess, [26], UN Doc CERD/C/AUS/CO/15-17 (2010); and Human Rights Committee (HRC), *Concluding Observations - Australia*, 95<sup>th</sup> sess, [15], UN Doc CCPR/C/AUS/CO/5 (2009).

<sup>82</sup> UPR recommendations 86.93. (Austria), 86.90. (Russian Federation) and Recommendation 86.92. (Bolivia).

- introduce legislation prohibiting mandatory sentencing policies;
- establish an advisory panel to develop a model for independent bodies that could be established in each State and Territory to independently investigate and determine police complaints; and
- through COAG, work with State and Territory governments to develop an action plan for the immediate implementation of outstanding recommendations from the Royal Commission into Aboriginal Deaths in Custody.

The NGO Coalition notes that these actions, either in entirety or in part, have already been recommended to the Government by numerous UN human rights institutions.<sup>83</sup>

The Government can also take the following steps to achieve an increase in the provision of legal advice to Aboriginal and Torres Strait Islander peoples along with the provision of due translation services:

- ensure the funding of the ATSILS and FVPLS is proportionally increased to equal that of mainstream legal aid services and departments of public prosecutions;
- provide the ATSILS and the FVPLS with longer term funding agreements, rather than the current three year agreements;
- provide additional specific funding to the ATSILS and FVPLS so that they can increasingly conduct human rights law, research and advocacy work at the local, national and international levels; and
- Implement the recommendations made in the recent joint ATSILS submission entitled 'The Right to a Fair Trial: A Submission to the Commonwealth Attorney-General Regarding the Expansion of Aboriginal and Torres Strait Islander Interpreter Services'.

The NGO Coalition notes that these actions also, either in entirety or in part, have on numerous occasions already been recommended to the Government by numerous UN human rights instruments.<sup>84</sup>

#### **10.5 Aboriginal and Torres Strait Islander peoples' rights to participate in decision-making<sup>85</sup>**

The Government can take the following steps to achieve the provision and protection of Aboriginal and Torres Strait Islander peoples' right to participate in decisions that affect their communities:

- (a) Introduce legislation requiring the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in the development of policy that directly affects their communities, and to genuine collaboration by developing and implementing a framework for self-determination, outlining consultation protocols, roles and responsibilities and strategies for increasing Aboriginal

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<sup>83</sup> Anaya, above n 5 [102-103]; CERD and HRC, above n5; and Committee on the Rights of the Child (CRC), *Concluding Observations – Australia*, 40<sup>th</sup> sess, [74], UN Doc CRC/C/15/Add.268 (2005).

<sup>84</sup> Anaya, above n5 [104]; CERD and HRC above n5.

<sup>85</sup> UPR recommendations 86.109. (Bolivia), 86.110. (Bosnia and Herzegovina), and 86.111. (Mexico).

and Torres Strait Islander participation in all institutions of democratic governance.

- (b) Conduct a review of recommendations made by Aboriginal and Torres Strait Islander peoples and organisations in submissions to the Government over the last three years and provide reasons for the rejection or dismissal of these recommendations.

The ATSILS note that these actions, either in entirety or in part, have already been recommended to the Government by the Special Rapporteur on the rights and fundamental freedoms on indigenous people.<sup>86</sup>

## 10.6 Closing the Gap<sup>87</sup>

The Government can take the following steps to achieve the increased participation of Aboriginal and Torres Strait Islander communities in Closing the Gap initiatives, and a comprehensive assessment, in consultation with the communities concerned, of the effectiveness of actions and strategies aimed at improving the socioeconomic conditions of Aboriginal and Torres Strait Islander peoples:

- (a) commit to the actions outlined above at 5;
- (b) commit to amending Closing the Gap and Northern Territory Emergency Response initiatives where amendment is determined as necessary by the communities concerned;
- (c) provide for increased Aboriginal and Torres Strait Islander ownership of initiatives, programs and services during both the development and operational phase of initiatives. This will require flexibility within Government to allow for initiatives, programs and services to be derived locally and in response to local particularities rather than the continuation of homogenous one-size-fits-all approaches; and
- (d) encourage and facilitate community empowerment and development both through financial and structural support.

The NGO Coalition notes that these actions, either in entirety or in part, have already been recommended to the Government by the UN Human Rights Committee.<sup>88</sup> The NGO Coalition would further like to note the special importance of these recommendations given that the Northern Territory Emergency Response legislation is due to expire mid-2012 and hence, the Government now has the opportunity to work with Aboriginal and Torres Strait Islander communities in relation to a new way forward.

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<sup>86</sup> Anaya, above n 5 [91-93].

<sup>87</sup> UPR recommendations 86.113. (Austria) and 86.118. (Belgium).

<sup>88</sup> HRC above n5.

## 11. People with Disability

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### 11.1 Implementation of the UN Convention on the Rights of Persons with Disabilities

#### (a) **Background**

People with disability do not enjoy their fundamental human rights on an equal basis with others in Australia.

Although the *Disability Discrimination Act 1992* (Cth) (DDA) provides limited protection from discrimination and harassment for people with disability in areas of employment, education and the provision of goods and services, many people with disability are unable to assert their rights due to the lack of human rights in legislation. As a result, many people with disability remain significantly disadvantaged in Australian society in relation to key indicators of social and economic well-being.

Recently, the Australian Government declared the CRPD as a relevant instrument for the purposes of the Australian Human Rights Commission Act. This means that people with disability can now make CRPD complaints to the Australian Human Rights Commission about breaches of rights recognised in CRPD. However, complaints are limited to acts or practices by or on behalf of a Commonwealth Government, which makes it difficult to seek recognition and redress for actions under areas that are the sole responsibility of State and Territory Governments.

Making complaints under the DDA or the AHRC Act can also be an onerous and lengthy process making it extremely difficult for people with disability, who may be segregated from the community and dependent on others to support their everyday needs.

The recent endorsement of the National Disability Strategy by all Australian Governments is a welcome step towards greater policy and practice compliance with the UN Convention on the Rights of Persons with Disabilities (CRPD). However, this Strategy still requires the development of specific measurable actions to address the key areas.

Australian law, policy and practice needs to ensure that people with disability are able to realise their human rights on an equal basis with others. The recommendations made by the Working Group following the Universal Periodic Review of Australia support this view:

“86.40. Continue its laudable measures to address the plight of persons with disabilities, in particular through pursuance of the draft National Disability Strategy, and share its experience in this regard (Botswana);

86.41. Complete as soon as possible a general framework of measures to ensure equality of chances for people with disabilities (Republic of Moldova);

86.44. Enact comprehensive legislation which prohibits discrimination on all grounds to ensure the full enjoyment of all human rights by every member of society (South Africa);

86.46. Strengthen the federal legislation to combat discrimination and ensure an effective implementation with a view to a better protection of the rights of

vulnerable persons, in particular children, persons in detention and persons with disabilities (Morocco);

86.47. Take firm measures to end discrimination and violence against women, children and people from vulnerable groups so as to enhance a better respect for their dignity and human rights (Viet Nam)".

**(b) Proposed Actions to comply with recommendations**

- As part of the National Human Rights Action Plan, Australia to conduct an independent audit of laws, policies and programs against the CRPD to identify and address inconsistencies with CRPD.
- Australia to incorporate the CRPD into its domestic law through legislation, and in this respect, reconsider acting on the overwhelming community support during the National Human Rights Consultations for the development of a National Human Rights Act.

## 11.2 Non-therapeutic sterilisation

**(a) Background**

Non-therapeutic sterilisation of people with disability remains an ongoing practice in Australia, and impacts most significantly on the rights of women and girls with disability.

Comprehensive law reform is required to provide effective guarantees against non-therapeutic sterilisation. From 2003 to 2007, Australia began to address non-therapeutic sterilisation of children by drafting nationally consistent legislation. However, this legislation aimed to regulate *authorisation* of non-therapeutic sterilisation rather than *prohibit* this form of abuse. The Australian Government discontinued this work because it believed that evidence indicated that sterilisation of children with intellectual disability had declined and that existing guardianship and court mechanisms for authorising sterilisation procedures were working adequately.

To some extent, State and Territory guardianship and child protection laws regulate and provide a degree of protection from non-therapeutic sterilisation for children and young people and adults with disability, but none makes non-therapeutic sterilisation explicitly unlawful.

Offences that apply under State and Territory guardianship and child protection laws generally only apply to persons who 'carry out' special medical treatments without appropriate authorisation. In practice, this means the medical practitioner who performs the procedure. The offence does not apply to persons who procure this procedure (for example, parents and others exercising parental responsibility, carers and service providers) or to others who assist in, or aid and abet, the procedure (for example, nursing staff, health administrators, insurers, disability professionals and service providers).

Existing criminal offences have been ineffective in eliminating non-therapeutic sterilisation of persons with cognitive disability. This is supported both by anecdotal reports of disregard for these offences among medical practitioners, and health

insurance statistics which continue to report a significant number of insurance claims for such procedures. The offences may operate as more effective deterrents if they were not so narrowly drawn. If they were to apply to those who procure, assist, aid and abet these crimes it would be more difficult for those willing to perform such procedures unlawfully to conceal, or secure others' silent acquiescence in the offence.

In addition, it is reported that one effect of the criminal proscription of non-therapeutic sterilisation in some State and Territory legislation, such as the *Guardianship and Children and Young Persons (Care and Protection) Acts* has been the evasion of the law by seeking performance of the procedure in other jurisdictions (both within Australia and in other countries (sometimes referred to as 'forum shopping'). It is suggested that some disability and medical professionals actually recommend this to persons seeking to procure sterilisation, and even advise them where to go, and how to go about it. Currently, there is no criminal penalty associated with procuring a special medical procedure in another jurisdiction, or in aiding or abetting another person to do so.

This evidence counters the Australian Government's view that existing Tribunal and Court mechanisms are working adequately. This view ignores both anecdotal reports and health insurance statistics which provide evidence that non-therapeutic sterilisation still occurs in greater numbers than officially reported; that it occurs outside judicial mechanisms; and that these procedures are actively sought in other jurisdictions both within Australia and in other countries.

In 2005, the Committee on the Rights of the Child recommended in its Concluding Observations that Australia "prohibit sterilisation of children, with or without disabilities"<sup>89</sup>. In 2010, the Committee for the Elimination of Discrimination Against Women recommended in its Concluding Observations that Australia "enact national legislation prohibiting, except where there is a serious threat to life or health, the use of sterilisation of girls, regardless of whether they have a disability, and of adult women with disabilities in the absence of their fully informed and free consent"<sup>90</sup>.

In 2011, the recommendations made by the Working Group following the Universal Periodic Review of Australia included:

"86.39. Comply with the recommendations of the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women concerning the sterilization of women and girls with disabilities (Denmark); Enact national legislation prohibiting the use of non-therapeutic sterilisation of children, regardless of whether they have a disability, and of adults with disability without their informed and free consent (United Kingdom); Repeal all legal provisions allowing sterilization of persons with disabilities without their consent and for non-therapeutic reasons (Belgium);

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<sup>89</sup> Committee on the Rights of the Child, *Concluding Observations*, Australia, September 2005, 46 e.

<sup>90</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Observations*, Australia, July 2010, 43.

Abolish non-therapeutic sterilization of women and girls with disabilities (Germany)<sup>91</sup>.

**(b) Proposed Actions to comply with recommendations**

- Enact uniform, national legislation prohibiting the non-therapeutic sterilisation of children, regardless of whether they have a disability, and of adults with disability in the absence of their fully informed and free consent, unless there is a serious threat to life or health. Such legislation should outline the circumstances in which only therapeutic sterilisation can occur:
  - where the procedure is necessary to save life or to prevent serious damage to the person's health; and
  - where the procedure is authorised by a court or tribunal under legislation.

The only exception to court or tribunal authorisation of therapeutic sterilisation would be where an emergency procedure is required, which will have the direct or indirect effect of sterilisation of the child or young person, or adult where this is reasonably necessary to save life or prevent serious damage to the person's health.

- As part of the National Human Rights Action Plan, Australia to undertake independent research into the incidence of non-therapeutic sterilisation in Australia, analysing both formal data and reports, and anecdotal reports and insurance statistics.
- As part of the National Human Rights Action Plan, support amendments to State and Territory crimes legislation that would provide for the inclusion of a new offence in relation to the performance of non-therapeutic sterilisation of a child under the age of 18 years, or of an adult with disability without their full and informed consent. Such a provision ought also to make it an offence to procure, or seek to procure, such a procedure, and to assist or aid and abet in such a procedure.

### 11.3 Exercising the right to vote

**(a) Background**

The ability of people with disability to vote independently and in secret in national, state and local government elections is still not a reality for many people with disability in Australia. This is despite the legal requirements to provide voting accessibility for people with disability under the *Disability Discrimination Act 1992 (Cth)* (DDA) and obligations under Article 29 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

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<sup>91</sup> Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review, Australia*, Tenth session, Geneva, 24 January – 4 February 2011, 86.39.

Barriers to exercising a right to vote include:

- Lack of accessible polling venues; lack of accessible information; and lack of access to the same postal voting arrangements as other citizens;
- Lack of ballot papers in accessible formats, such as Braille, and in formats other than print means that many people with disability have to rely on another person to record their vote, and therefore are not able to cast a secret ballot;
- Provisions in legislation that enables people to be excused from voting if they are of 'unsound mind' – these provisions exclude many people on the grounds of their impairment rather than on their capacity to understand and make decisions. This is contrary to principles and concepts of 'capacity' contained in Article 12 of CRPD.
- Receiving penalty notices for not voting when many people with disability may not understand voting information or may be unwell at the time of the election.

Effective, systematic improvements need to be made to current voting procedures to entitle people with disability the right to vote freely and independently. The recommendations made by the Working Group following the Universal Periodic Review of Australia support this view:

“86.40. Continue its laudable measures to address the plight of persons with disabilities, in particular through pursuance of the draft National Disability Strategy, and share its experience in this regard (Botswana);

86.41. Complete as soon as possible a general framework of measures to ensure equality of chances for people with disabilities (Republic of Moldova);

86.44. Enact comprehensive legislation which prohibits discrimination on all grounds to ensure the full enjoyment of all human rights by every member of society (South Africa);

86.46. Strengthen the federal legislation to combat discrimination and ensure an effective implementation with a view to a better protection of the rights of vulnerable persons, in particular children, persons in detention and persons with disabilities (Morocco)”

**(b) *Proposed Actions to comply with recommendations***

As part of the National Human Rights Action Plan, the Australian Government should conduct a thorough, critical review of the legislative and administrative arrangements governing electoral matters to ensure that people with disability can fully and equally participate in electoral processes, including obtaining the right to cast a secret ballot freely and independently.

## 12. Women's Rights

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### 12.1 Introduction

We strongly encourage the Australian Government to accept all the UPR recommendations made to strengthen women's rights.

We refer the Government to the Joint Australian NGO Coalition's UPR Submission and Information Booklet, which set out the importance of accepting and implementing each of the UPR recommendations relating to women's rights.

### 12.2 UPR Recommendations and 2010 CEDAW Concluding Observations

In addition to the UPR recommendations, we refer to the 2010 CEDAW Concluding Observations on Australia and the CEDAW Action Plan, which was developed by a coalition of NGOs to set out the steps Australian governments should take to implement the CEDAW Concluding Observations.<sup>92</sup> As well as the significant cross-over in the UPR recommendations with the 2010 CEDAW Concluding Observations, the CEDAW Committee members and NGOs involved in the CEDAW process have significant experience and undertook a significant amount of work in the area of women's rights. As such, the CEDAW Action Plan should form the basis of the governments' responses to both the CEDAW Committee and UPR recommendations on women's rights.

We have also provided some additional information on issues we understand may be contentious.

We note that some important potentially contentious women's rights have been addressed in detail elsewhere in this submission: same sex marriage has been addressed in the section on equality and the prohibition of non-therapeutic sterilisation of girls and women with disabilities has been addressed under the section on Persons with Disabilities. We include recommendations on these below.

### 12.3 Targets and quotas for women on boards – Participation in public and political life<sup>93</sup>

In the CEDAW Concluding Observations on Australia in 2010, the Committee reiterated its previous recommendations that Australia adopt temporary special measures to ensure the equal participation and representation of women in public and political life.<sup>94</sup>

Australia's Governor General, Ms Bryce, recently reflected that "the progress of women in business at the very highest decision-making levels is too slow" and that in "certain circumstances quotas are a valid measure".<sup>95</sup> As well as reasons of equality, there is a strong

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<sup>92</sup> For a full copy of the Plan see: YWCA, *CEDAW Action Plan For Women in Australia*, 2011, accessed on 20 March 2011 at: <http://www.ywca.org.au/sites/ywca.org.au/files/CEDAW%20Action%20Plan%20final.pdf>.

<sup>93</sup> UPR Recommendations 86.52, 86.54, 86.55, 86.60; 86.109; 86.110, 86.119, 86.120.

<sup>94</sup> Concluding Comments on CEDAW, Australia, 30 July 2010, paragraphs 26, 27, 35, accessed on 20 March 2011 at: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-AUS-CO-7.pdf>.

<sup>95</sup> Tony Wright, G-G calls for female quotas, *The Age*, 8 March 2011 accessed on 20 March 2011 at: <http://www.theage.com.au/executive-style/executive-women/gg-calls-for-female-quotas-20110307->

business case for gender diversity on boards, with growing evidence that a gender-diverse board improves corporate governance, increases profits, lessens unnecessary risk-taking and reduces 'group-think'.<sup>96</sup>

Norway is an excellent example of the success of quotas. In 2003 the Norwegian government introduced legislation requiring women make up 40% of the boards of wholly state-owned and inter-municipal companies and public limited companies. The proportion of female board members increased from 7% in 2003 to 39% in July 2008.<sup>97</sup> Corporate leaders in Norway say that this was a necessary reform.<sup>98</sup>

We note that Minister for the Status of Women, Ms Ellis, recently said the Government was committed to its election pledge to have women make up 40% of public board positions by 2015.<sup>99</sup> The Government has also committed to a census in 18 months to measure the percentage of women's membership on public boards.

**(a) Implementation of recommendations**

To contribute to the equal participation of specific groups of women on public and private boards, the following initiatives should occur:

- Data on women's participation on public and private boards must be disaggregated by gender, ethnicity, disability, age, socio-economic status and geographical location and be made publicly available.
- The federal government must allocate funding to the Australian Institute for Company Directors to meet at least 25% of demand for training (as established in the 2010 application process), and establish within this process targets for scholarships to support training for Aboriginal and Torres Strait Islander women, women with disabilities, and CALD women to improve their representation on public and private boards.<sup>100</sup>
- As part of the broader discussion of a 30% target for female private board participation and 40% target for female public board participation, additional

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[1bl80.html?comments=157](#). Shadow treasurer, Mr Hockey also supports the notion of quotas on board participation, suggesting a 30% quota. See: Hockey backs quota for women on boards, *SMH*, 8 March 2011 accessed on 20 March 2011 at: <http://news.smh.com.au/breaking-news-national/hockey-backs-quota-for-women-on-boards-20110308-1blcf.html>. Others also support quotas. See: Alan Kohler, "The feminine touch on executive boards", ABC News, 6 December 2010 accessed on 20 March 2011 at: <http://www.abc.net.au/news/stories/2010/12/06/3085230.htm>.

<sup>96</sup> See for example Goldman Sachs JBWere, Australia's Hidden Resource: The Economic Case For Increasing Female Participation, 26 November 2009, accessed on 24 March 2011 at [www.eowa.gov.au/Pay\\_Equity/Files/Australias\\_hidden\\_resource.pdf](http://www.eowa.gov.au/Pay_Equity/Files/Australias_hidden_resource.pdf) and McKinsey & Company, Women Matter: gender diversity, a corporate performance driver, 2007, accessed on 24 March 2011 at [www.mckinsey.com/locations/swiss/news\\_publications/pdf/women\\_matter\\_english.pdf](http://www.mckinsey.com/locations/swiss/news_publications/pdf/women_matter_english.pdf).

<sup>97</sup> Arni Hole, "Government action to bring about gender balance" (Norway experience article written by the Director General, Ministry of Children and Equality, Norway) accessed on 20 March 2011 at: <http://www.20-first.com/406-0-a-personal-account-of-the-quota-legislation-in-norway.html>

<sup>98</sup> Ibid.

<sup>99</sup> "Hockey backs quota for women on boards", *SMH*, 8 March 2011 accessed on 20 March 2011 at: <http://news.smh.com.au/breaking-news-national/hockey-backs-quota-for-women-on-boards-20110308-1blcf.html>

targets must be set within two years to ensure the participation of Aboriginal and Torres Strait Islander women, women with disabilities and CALD women.

- The Government commit to introducing a mandatory target if a voluntary target of 40% female public board participation is not achieved by the 2013 review date and that the Government extend its census and review to private boards and commit to introducing a mandatory target if a voluntary target of 30% female private board participation is not achieved by the review date.

#### 12.4 National Pay Equity Strategy<sup>101</sup>

Strong action is required to make equal pay for women a reality in Australia. In CEDAW Concluding Observations on Australia in 2010 the Committee urged the Australian Government to develop a National Pay Strategy and assess the *Fair Work Australia Act's* effectiveness in eliminating the pay gap.<sup>102</sup>

Minister Ellis recently referred to the Australian Government being “serious about achieving equal pay”, as reflected in “Senator Jacinta Collins chairing a new national consultative group that will manage the implications of the sector’s equal pay test case going forward.”<sup>103</sup> Ms Ellis also announced reforms to the *Equal Opportunity for Women in the Workforce Act* including that “pay equity will be enshrined in the objects of the Act and businesses will be required to report against it.”<sup>104</sup> Action is required in this area.

##### (a) Implementation of Recommendations

The NGO Coalition recommends that the federal government must honour its commitment to pay equity by funding any pay increases arising from the application to Fair Work Australia for an equal remuneration order for social and community service workers lodged by the Australian Services Union (and four other unions).

#### 12.5 Women in Prisons<sup>105</sup>

In order to improve human rights for women in prison, the Australian Government must:

- Implement the UN Rules for the Treatment of Women Prisoners and non-Custodial Measures for Women Offenders (‘UN Rules’) and the National Revised Standard Guidelines for Corrections in domestic law, including specific avenues for resolving breaches and reviewing decisions, and provide oversight to the Australian Human Rights Commission.
- Establish inter-jurisdictional mechanisms to establish consistent processes and practices for implementing the UN Rules across Australia;

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<sup>100</sup> In 2010, the AICD received 2,000 applications for 70 scholarship places from these target groups.

<sup>101</sup> UPR Recommendations 86.99, 86.54.

<sup>102</sup> Concluding Comments on CEDAW, paragraphs 38-39.

<sup>103</sup> Kate Ellis, National Press Club Address, 9 March 2011, accessed on 20 March 2011 at: <http://www.acci.asn.au/Files/Kate-Ellis-Address-to-National-Press-Club>

<sup>104</sup> Ibid.

<sup>105</sup> See UPR Recommendations 86.82, 86.94, 86.71.

- Identify gaps in current policy, legislation, regulations, structures, relationships and practice on the treatment of women and girls in the criminal justice system and reasons behind such gaps.
- Research and advocate for alternatives across all Australian jurisdictions to parental detention, researching in the impact of imprisonment on children, and identifying and promoting good practices relating to the needs and physical, emotional, social and psychological development of babies and children affected by parental detention and imprisonment.<sup>106</sup>
- Adopt legislation to establish alternatives to imprisonment and to give priority to the financing of such systems, as well as to the development of the mechanisms needed for their implementation.
- Ensure that women prisoners are identified and treated as a vulnerable group with specific needs and requirements across government policy generally.
- Actively participate in the development by the UN Office on Drugs and Crime of the Handbook for Prison Managers and Policymakers on Women and Imprisonment.

#### **12.6 Women with Disabilities<sup>107</sup>**

The federal government must enact universal, national legislation which prohibits non-therapeutic sterilisation of any child unless there is a serious threat to health or life, and prohibits non-therapeutic sterilisation of any woman in the absence of fully informed and free consent, by the 2014 CEDAW reporting period.

#### **12.7 Rights of LBTI Communities<sup>108</sup>**

The government should both make discrimination unlawful on the basis of sexual orientation and gender identity as well as recognise same sex marriage.

#### **12.8 Additional Recommendations**

The following recommendations are based on the CEDAW Action Plan and respond to both the UPR and CEDAW recommendations, which have been referenced throughout. The CEDAW Action Plan was a response to the 2010 CEDAW Concluding Observations, and does not attempt to cover the full range of women's advocacy issues in Australia. Some additional recommendations, not covered by the Action Plan, have been added to take into account the UPR recommendations.

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<sup>106</sup> United Nations Resolution 63/241 of 24 December 2008.

<sup>107</sup> Concluding Comments on CEDAW, paragraph 43; UPR Recommendations 86.39.

<sup>108</sup> See UPR Recommendations: 86.44, 86.66 – 86.70.

**(a) *Anti-discrimination and human rights protection***<sup>109</sup>

Recommendation 6 In order to ensure a stronger human rights framework for Australian women, the federal and state/territory governments must ensure that:

- The consolidation and harmonisation of anti-discrimination laws retains all of the current anti-discrimination protections contained in the Sex Discrimination Act and other anti-discrimination legislation, implements the recommendations of the 2008 Senate Committee report, and further strengthens protections against discrimination.
- The National Action Plan on Human Rights comprehensively addresses all the gender and intra-gender analysis gaps in human rights protection in Australia, and includes implementation of structures for proper recording and measuring of the enjoyment of human rights.
- A national *Human Rights Act* is enacted which protects the full range of civil, political, economic, social and cultural rights.

Recommendation 7 The amendment bill to the *Sex Discrimination Act* should be passed by Federal Parliament by mid-2011, and should reflect the recommendations of the 2008 Senate Committee report.

Recommendation 8 A special temporary measure must be introduced that specifically aims to increase the role of Aboriginal and Torres Strait Islander women in public and political life. This should take the form of an annual grant round made available to NGO- and community-led programs, and funded to the amount of 25% of the current funding allocated to government-led leadership programs for Aboriginal and Torres Strait Islander women. After five years, the grant program should be reviewed.

**(b) *Violence against women***<sup>110</sup>

Recommendation 9 In preparation for the 2012 CEDAW reporting period, Australian governments must

- Implement and adequately fund the *National Plan to Reduce Violence against Women and Children ('The Plan')*, including domestic and family violence specialist services that are culturally appropriate for Aboriginal and Torres Strait Islander women, CALD women, rural and remote women, LGBTIQ women, women with disabilities and older women.
- Establish and fund an independent body to monitor and evaluate the National Plan's implementation, which includes involvement from the Australian Women Against Violence Alliance.

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<sup>109</sup> Concluding Comments on CEDAW, paragraph 25; UPR Recommendations 86.42, 86.43, 86.44, 86.45, 86.46, 86.47, 86.48, 86.51, 86.52, 86.66; 86.67; 86.68.

<sup>110</sup> Concluding Comments on CEDAW, paragraphs 29, 40-41, 43, 44-45; UPR Recommendations: 86.39, 86.47, 86.48, 86.53, 86.72, 86.73, 86.74, 86.76-86.82; 86.85, 86.86, 86.87, 86.92, 86.101, 86.118,

- *The Plan* acknowledges the crucial importance of access to mental health services and counselling for victims of violence.<sup>111</sup> This must extend to women in prison.<sup>112</sup>
- Amend the family law system and legislation to better protect the safety of women and children.<sup>113</sup>
- Make publicly available the information on the number and nature of reported cases of domestic violence, on the conviction and the sanctions imposed on perpetrators, as well as any assistance and rehabilitation measures provided to victims of domestic violence. This data must be disaggregated by gender, ethnicity, disability, age, socio-economic status and geographical location.
- Review State procedures for crimes compensation that are available to survivors of human trafficking and establish a harmonised system to enable trafficked persons to access these rights by November 2011.

Recommendation 10 The federal government must provide sufficient funding to alleviate violence-related homelessness. This commitment should be reflected in

- a 20% reduction in the turn-away rate of family violence shelters by the 2012 reporting period; and
- inclusion in the implementation of the National Plan of specific and culturally appropriate measures to alleviate homelessness for Aboriginal and Torres Strait Islander women, particularly those in rural and remote areas.

**(c) *Employment***<sup>114</sup>

Recommendation 11 In relation to paid parental leave, the federal government must

- Remove Australia's reservation to paid maternity leave under article 11(2) of CEDAW by the July 2012 reporting deadline to the CEDAW Committee.
- Ensure that the outcomes of the two-year review of the Paid Parental Leave Act include the introduction of superannuation, leave for fathers, an extended period of paid leave and an increased level of payment.

Recommendation 12 Implement a targeted campaign to significantly improve the rates of reporting of sexual harassment in the workplace within two years.

Recommendation 13 The federal government must develop a comprehensive childcare policy, which includes out of school hours and vacation care, and referring the development of a more transparent and equitable approach to financing childcare to the Productivity Commission for review, by the 2014 CEDAW reporting period.

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<sup>111</sup> *National Plan to Reduce Violence Against Women and Children*, National Outcome 4.

<sup>112</sup> See: United Nations Resolution 61/143 of 19 December 2006,

<sup>113</sup> As reflected in the Women's Legal Services Australia and Australian Women Against Violence Alliance joint submission to the Commonwealth Attorney-General's Family Violence Bill public consultation, dated 14 January 2011: see <http://awava.org.au/>.

<sup>114</sup> Concluding Comments on CEDAW, paragraphs 38-39, 45; UPR Recommendations 86.16, 86.54, 86.56, 86.99.

**(d) Education<sup>115</sup>**

Recommendation 14 To significantly improve the employment-related outcomes of the education system for Australian women

- the intersectionality of educational outcomes for specific groups of women (including Aboriginal and Torres Strait Islander women, CALD women, rural and remote women, LGBTIQ women, women with disabilities, older women and single mothers) must be reflected in the collection, quality assurance, analysis and public reporting of disaggregated data, in addition to the categories being implemented in line with the Martin indicators, and this data made publicly available and accessible as a matter of course within two years and thereafter.
- COAG must update and implement a national vocational education and training policy for women, including strategies for increasing the affordability and access of vulnerable groups of women to VET, by the 2014 CEDAW reporting period.

**(e) Aboriginal and Torres Strait Islander Women<sup>116</sup>**

Recommendation 15 By the 2012 CEDAW reporting period, the federal government must:

- Commit to and provide for a budgetary allocation for culturally appropriate Aboriginal and Torres Strait Islander women's legal services in urban, rural and remote areas of Australia to assist victims of sexual assault and family violence, in addition to current funding for Aboriginal Legal Services and Family Violence Units.
- Continue to support the establishment of peak advisory bodies, including the National Congress and NATSIWA, and strengthen their role in policy development, advocacy and accountability especially through gender balanced representation on these bodies.

**(f) Women with disabilities<sup>117</sup>**

Recommendation 16 The federal government must commission and fund a comprehensive assessment of the situation of women with disabilities in Australia within two years, in order to establish a baseline of disaggregated data against which future progress towards CEDAW rights can be measured.

Recommendation 17 The federal government must instigate a temporary special measure to enable women with disabilities to take on leadership positions, in the form of a program that is separate to training for board and sector-specific advisory group representation, with targets for participation in mainstream advisory groups by 2014.

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<sup>115</sup> Concluding Comments on CEDAW, paragraphs 26-27, 35-37, 40-42; UPR Recommendations: 86.101, 86.112, 86.113, 86.115, 86.116, 86.117, 86.118, 86.119.

<sup>116</sup> Concluding Comments on CEDAW, paragraphs 27, 34-37, 40-41; UPR Recommendations: 86.37, 86.92, 86.101, 86.106, 86.107, 86.109 - 86.120.

<sup>117</sup> Concluding Comments on CEDAW, paragraphs 26, 35, 42-43; UPR Recommendations 86.39, 86.52.

**(g) *Culturally and linguistically diverse women***<sup>118</sup>

Recommendation 18 In order to improve workplace participation rates of CALD women, the federal government should, by the 2014 CEDAW reporting period

- Allocate specific funding to Centrelink to contract CALD-appropriate employment service providers as part of the Job Services Australia network, in order to significantly increase the rate of access of CALD women to employment opportunities.
- through the services provided by Australian Education International's National Office of Overseas Skills Recognition (DEEWR), increase the availability and affordability of bridging courses to increase the rate of migrant women attaining requalification in Australia.
- ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

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<sup>118</sup> Concluding Comments on CEDAW, paragraphs 26-27, 44-45, 49; UPR Recommendations 86.9, 86.10, 86.142.