



AUSTRALIA'S COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Australian NGO Coalition Submission
to the Human Rights Committee

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Introduction

This report to the United Nations (UN) Human Rights Committee (the **Committee**) examines Australia's compliance with the *International Covenant on Civil and Political Rights* (ICCPR). It has been prepared by a coalition of non-government organisations (NGOs) from across Australia. The report is intended to inform the Committee's sixth review of Australia during its 121st session in October/November 2017.

The report was prepared with substantial input, including drafting and review, from the 32 organisations listed as contributors on the following page. It is endorsed in whole or in part by the 56 NGOs identified in the list of supporting organisations on the following page.

This report is not a comprehensive analysis of all issues relevant to Australia's compliance with the ICCPR. Instead, it seeks to address some of the key areas identified in the Committee's List of Issues Prior to Reporting (LOIPR), highlight developments since the Committee's previous Concluding Observations dated 7 May 2009 and identify additional significant areas in which the Australian Government is failing to meet its obligations under the ICCPR.



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National Women's Alliances
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International Social Service Australia
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National Association of Community Legal Centres
National Children's and Youth Law Centre
National Congress of Australia's First Peoples
National Ethnic Disability Alliance
National Ethnic Disability Network
National Family Violence Prevention Legal Services Forum
National Mental Health Consumer and Carer Forum
NSW Council of Social Service
NSW Gay & Lesbian Rights Lobby
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People with Disability Australia
Public Interest Advocacy Centre
Refugee Advice & Casework Service (Aust) Inc.
Refugee Council of Australia
Remedy Australia
Save the Children
SCALES Community Legal Centre
The Council for the Care of Children
The Women's Services Network
Townsville Community Legal Service Inc.
Transgender Victoria
UNICEF Australia
Welfare Rights NSW
Women With Disabilities Australia
Women's Legal Service NSW
Women's Legal Services Australia
Youthlaw

A young child with curly brown hair is shown from the chest up, wearing a blue t-shirt. The child is holding a white megaphone with a black rim and a red handle, and is shouting into it with their mouth wide open. The background is a dark, textured blue. On the left side of the image, there is a large blue number '1' followed by the text 'General information on the national human rights situation' in white.

1 General information on the national human rights situation

1.1 DEVELOPMENTS SINCE AUSTRALIA'S FIFTH REVIEW UNDER THE ICCPR

Australia has not progressed significantly towards implementing its obligations under the ICCPR since the last periodic review. In its Concluding Observations made after the fifth periodic review, dated 7 May 2009, the Committee made 20 recommendations on principal subjects of concern.¹ Since that time, Australia has taken a number of steps towards the realization of ICCPR rights and the promotion of human rights generally, including:

- establishing a Joint Parliamentary Committee on Human Rights to scrutinize federal legislation for its compatibility with the seven core international human rights treaties;
- establishing the National Congress of Australia's First Peoples' as an Indigenous representative body in 2010;
- acceding to the Optional Protocol to the Convention on the Rights of Persons with Disabilities in August 2009;
- ensuring federal protection against discrimination on the new grounds of "sexual orientation", "gender identity", "intersex status" and "marital and relationship status" through the *Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Amendment Act 2013* (Cth);
- gradually working towards reform of the Constitution in consultation with Aboriginal peoples; and
- committing to ratify the Optional Protocol to the Convention against Torture in 2017.

However, Australia has not taken steps towards progressing many of the recommendations in the Concluding Observations. In particular, Australia has **not**:

- enacted comprehensive legislation to give effect to the ICCPR (see Chapter 2);
- withdrawn its reservations to the ICCPR (see Chapter 2);
- established appropriate procedures to implement the views of the Committee (see Chapter 2);
- amended counter-terrorism legislation to conform with ICCPR rights (see Chapter 3);
- enacted a law to comprehensively protect the right to equality and non-discrimination (see Chapter 4);
- enacted a law to protect against hate speech based on religion (see Chapter 13);
- properly resourced the new Indigenous representative body, the National Congress of Australia's First Peoples (see Chapter 14); or
- provided comprehensive reparations to members of the Stolen Generations (see Chapter 14).

Further, in some areas Australia has clearly gone backwards.

- Australia has maintained a system of mandatory indefinite detention of asylum seekers that arrive by boat and houses new arrivals in cruel, inhuman and degrading conditions in off-shore detention facilities in Papua New Guinea and Nauru (see Chapter 7).
- Australia has instituted a policy of boat turn-backs that violates Australia's *non-refoulement* obligations (see Chapter 7).
- Alarming reports have emerged of brutality against children held in youth detention in states and territories across Australia; triggering a Royal Commission in the Northern Territory and widespread public concern and criticism (see Chapter 11).
- Australian Federal Police continue to share information with foreign counterparts that could lead to the imposition of the death penalty, and which in fact led to the execution of two Australians, Andrew Chan and Myuran Sukumaran, by Indonesia in April 2015 (see Chapter 6).
- Australia has created more criminal offences under counter-terrorism legislation that unreasonably restricts rights (see Chapter 3).
- Australian police have been given greater powers to lock up Aboriginal and Torres Strait Islander people without charge (see Chapter 6).
- Prisons in Australia are increasingly overcrowded (see Chapter 10).
- Australia has introduced the most extreme metadata retention laws among its allies, requiring all metadata to be kept by telecommunications service providers for two years, which can be accessed by law enforcement without a warrant or any independent authorisation (see Chapter 16).

¹ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Australia*, 95th session, UN Doc. CCPR/C/AUS/CO/5, 7 May 2009.

2 Constitutional and legal frameworks and access to remedies (LOIPRs 1 – 6)

2.1 AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

Human rights are not given comprehensive and consistent legal protection in Australia. Australia remains the only western democratic nation without a bill of rights or similar legislative protection. Many basic rights remain unprotected and others are haphazardly covered by an assortment of laws. There are numerous examples of violations which fall through the gaps in the current regime, as discussed in this report. The state of human rights for many disadvantaged groups in Australia remains precarious.

In 2010, following a wide-ranging national consultation on the protection and promotion of human rights,² the Australian Government decided not to introduce a Human Rights Act. It said that “the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides us”.³ During the consultation, the adoption of a Human Rights Act was supported by over 87 per cent of a record 35,000 public submissions and was a key recommendation of the National Human Rights Consultation Committee.⁴

Instead of enacting a Human Rights Act, the Australian Government adopted the “Australian Human Rights Framework” in April 2010.⁵ Since then, most of the key elements of the Framework have been terminated or suspended. For example, the Australian Government has cut funding to the Human Rights Education Grants Scheme, backed away from its commitment to simplify and strengthen Commonwealth anti-discrimination laws, and implementation of Australia’s National Action Plan on Human Rights has stalled.

² Attorney-General’s Department, *National Human Rights Consultation Report* (2014) Commonwealth of Australia <www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>.

³ Commonwealth of Australia, *Australia’s Human Rights Framework* (April 2010), 1.

⁴ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009), xxiv.

⁵ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009), xxiv.

2.2 PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS⁶

One element of the Australian Human Rights Framework that has been implemented relates to parliamentary scrutiny of human rights. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) came into operation in 2012 and:

- requires that each new bill introduced into federal parliament is accompanied by a Statement of Compatibility of the proposed law's compliance with Australia's international human rights obligations; and
- establishes a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with the seven core international human rights treaties to which Australia is party (including CAT).

The Parliamentary Joint Committee on Human Rights (PJCHR) should be commended for its generally robust review of the human rights compatibility of proposed legislation.

However, the PJCHR has had limited effectiveness and influence and its recommendations are unenforceable and are routinely ignored. In some instances, the PJCHR stated that a bill breached, or was likely to breach, ICCPR rights and the government passed the bill anyway. For example the PJCHR found that a proposed "Foreign Fighters" law⁷ that created an effective travel ban by introducing a new offence of entering or remaining in a declared foreign area, would effectively reverse the onus of proof and threaten the right to a fair trial and the presumption of innocence.⁸ The bill was passed anyway. Many Ministerial responses to the PJCHR's recommendations essentially disagreed with the PJCHR's views, and some repudiated outright the PJCHR's warnings, even, for example, on bills that gave the Minister extraordinary powers to revoke citizenship and authorise the use of force against detained asylum seekers.⁹ Usually, even when bills are amended after a PJCHR report, there is no significant policy change. This could be a combination of the PJCHR's relatively weak influence and the fact that policy is almost "set in stone" by the time legislation has been tabled in Parliament due to the number of approval processes required to reach that stage.

Secondly, the PJCHR's reports are too often delayed, sometimes until after the bill has passed, by waiting for government responses. During the reporting period 2013-2014, responses from legislation proponents were often not being received until well after the PJCHR's deadline and, on occasion, not until after the bill or timeframe for disallowance had passed.¹⁰

Thirdly, the PJCHR's inquiries into broader human rights issues can only be conducted on a reference from the Attorney-General. Since the Attorney-General is a Government Minister, this power is unlikely to be exercised in politically-controversial matters. By contrast, the equivalent parliamentary committee in the United Kingdom can and does conduct own-motion inquiries into a variety of important human rights issues.

Finally, the human rights analysis contained in Statements of Compatibility prepared by the Australian Government is often very poor. For example, the Statement of Compatibility accompanying the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) which increases the threshold for determining whether a person satisfies the test for eligibility for complementary protection, provided inadequate analysis of the human rights implications of the bill, particularly in relation to *non-refoulement* obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the ICCPR.¹¹ The PJCHR commented that the Statement of Compatibility failed to identify and provide reasoned and evidence-based explanations of limitations on rights.¹² Many other Statements of Compatibility, even those which acknowledge limitations on fundamental rights, such as personal liberty and security, fail to deal with the relevant international jurisprudence.¹³ Others engage with the jurisprudence, but implicitly confirm that it has little effect on Australian Government policy.¹⁴

Australia should:

- **fully incorporate its international human rights obligations into domestic law by introducing a comprehensive, judicially-enforceable Human Rights Act;**
- **improve the quality of Statements of Compatibility and its responses to the findings of the PJCHR; and**
- **amend s 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to allow the PJCHR to conduct own-motion inquiries into human rights issues.**

⁶ List of Issues 2012, [2], [4].

⁷ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

⁸ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 23-26 June 2014, Legislative Instruments received 7-20 June 2014* (2014) [1.175]-[1.182].

⁹ See for example the responses of the Minister for Immigration and Citizenship in relation to the Australian Citizenship and Other Legislation Amendment Bill 2014 and the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 in the Committee's Report 24 of the 44th Parliament.

¹⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2013-2014* (2016) 17.

¹¹ Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) sch 2 item 4.

¹² Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 23-26 June 2014, Legislative Instruments received 7-20 June 2014* (2014) [1.225]-[1.231].

¹³ See eg Statements of Compatibility accompanying Law Enforcement Integrity Legislation Amendment Bill 2012 (Cth) and Australian Sports Anti-Doping Authority Bill 2013 (Cth).

¹⁴ See eg Statement of Compatibility accompanying *Migration Amendment Bill 2013* (Cth).

2.3 OPCAT (ARTS. 7, 9, 10, 12 AND 14)

Australia's announcement in February 2017 that it will ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) by December 2017 is welcome, and will assist in monitoring the implementation of articles 7, 9, 10 and 14.¹⁵ For Australia to adequately meet its obligations in relation to those articles, it must ensure that all places of detention under Australia's jurisdiction and control are able to be inspected by the Subcommittee on the Prevention of Torture (SPT), and the National Prevention Mechanism (NPM) once it is established.

Australia detains people in Australia, Nauru, Papua New Guinea (PNG), and on navy boats patrolling territorial waters¹⁶ and turns back potential asylum seeker boats so they cannot reach Australia and lodge an asylum claim.¹⁷ People detained in all of these places are at a heightened risk of torture and ill-treatment, which the OPCAT seeks to minimise or eliminate through its system of monitoring.

The Australian Government might argue that obligations under the OPCAT will only extend to places of detention within Australia. However in order to meet its obligations under articles 7, 9, 10 and 14 of the ICCPR, and other human rights treaties, Australia must ensure that OPCAT obligations are able to be implemented in all places where Australia chooses to detain people, as recommended by the SPT.¹⁸

Individuals detained in Nauru and PNG are largely living according to open centre arrangements. Those who are living at the Regional Processing Centres (RPCs) built and maintained by Australia are generally able to leave the centres according to protocols established by Australia. Others live in the community, but the Australian Government continues to exercise considerable control over their lives.¹⁹ All these asylum seekers and refugees continue to be restricted in their ability to leave the RPC countries or receive visitors in those countries, breaching articles 9 and 12. The nature of their confinement indicates that they are detained, notwithstanding that they are able to leave the RPCs or live outside of them.²⁰

It will be vital for the SPT and NPM to have access to all of these places of detention if they are to be able to adequately monitor Australia's implementation of relevant rights. Formal agreements with states where Australia detains asylum seekers and refugees, currently Nauru and PNG, which ensure access for the SPT and NPM monitoring Australia's implementation of the OPCAT, will be required for Australia to meet its obligations under the Protocol.²¹ Access for the SPT and NPM to any boats on which asylum seekers or others are detained pursuant to Australia's policy of boat turn backs will also be required. This access will allow assessment of the conditions under which individuals were detained, and assist in assessing the risk of *refoulement* during turn backs.

Australia should:

- enter into formal agreements with all states where it detains asylum seekers and refugees, to ensure that the SPT and Australia's NPM are able to access and monitor conditions in detention centres that Australia finances, operates or is otherwise responsible for, to ensure compliance with articles 7, 9, 10 and 14.
- grant the SPT and the NPM access to any vessels conducting turn back operations.

2.4 IMPLEMENTATION OF TREATY BODY VIEWS

Successive Australian Governments have disregarded the authority of views issued by UN treaty bodies. Since 1994, Australia has been found to be in breach of its international obligations with respect to 45 individual communications to various human rights treaty bodies (the Committee, the UN Committee on the Elimination of Racial Discrimination and CAT).²² In only 13 per cent of these cases has the author been fully remedied in accordance with the final views of the relevant committee. With the number of pending individual communications against Australia growing significantly, this undesirable trend needs to be addressed as a matter of priority.

The Australian Government has established a public online database of treaty body and Universal Periodic Review (UPR) recommendations, as well as a public list of communications against Australia (along with the Australian Government's responses to views). This is welcome, but it is no substitute for effective remedies.

Australia should implement the views of treaty bodies and, where necessary, provide remedies in accordance with those views.

¹⁵ Minister for Foreign Affairs The Hon Julie Bishop MP, Attorney-General Senator the Hon George Brandis QC, **Joint Media Release**, 9 February 2017, Improving oversight and conditions in detention, <https://www.attorneygeneral.gov.au/MediaReleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx>.

¹⁶ *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (28 January 2015); <https://www.theguardian.com/australia-news/2015/jan/28/detention-157-tamil-asylum-seekers-on-board-ship-ruled-lawful>.

¹⁷ Involuntary transportation constitutes a breach of article 9(1) of the ICCPR: Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)* (2014), CCPR/C/GC/35 at [5].

¹⁸ SPT, *Ninth annual report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/57/4, Annex, [26] and following.

¹⁹ In *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, it was found that a duty of care was owed by the Australian Government to a refugee living in the community in Nauru (at [276]), in part because of the degree of control the government exercises over the lives of refugees in Nauru (see, for example, [253], [31]).

²⁰ See Azadeh Dastyari, "Detention of Australia's Asylum seekers in Nauru: is deprivation of liberty by any other name just as unlawful?", (2015) 38(2) *UNSW Law Journal* 669, 680; *Guzzardi v Italy* (1980) 3 Eur Court HR (ser A) 333, 30-1 [95].

²¹ The SPT has recommended that such arrangements be made in circumstances where states parties detain people in other countries: SPT, *Ninth annual report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/57/4, Annex, [26] and following.

²² See Remedy Australia, an organization that monitors the provision of remedies by Australia in response to the views of treaty bodies, www.remedy.org.au (accessed 17 July 2017).

2.5 CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

The Australian Government is gradually working towards the recognition of Aboriginal peoples in the Constitution. The constitution does not currently recognise the distinct identity and existence of Aboriginal peoples in Australia's founding document. While some steps have been taken towards recognition of Aboriginal and Torres Strait Islander peoples in the Constitution,²³ no model for constitutional change has been finalised nor the timeframe for a referendum announced.

The First Nations Regional Dialogues held in 2016-17 in twelve locations around Australia were a deliberative process designed and led by Aboriginal and Torres Strait Islander people. At the national convention in Uluru in May 2017, delegates from the regional dialogues released the Uluru Statement from the Heart (**Uluru Statement**).²⁴ The Uluru Statement declares that Aboriginal and Torres Strait Islander peoples were at all times and remain sovereign; calls for recognition of Aboriginal and Torres Strait Islander peoples in a constitutionally-enshrined voice to parliament; and seeks the establishment of a Makaratta (treaty) Commission, separate to the Referendum process, to negotiate an agreement with government that addresses the inherent power disparity and entrenched disadvantage of Aboriginal and Islander peoples. Separately, the Referendum Council, a government-appointed body tasked with advising the Prime Minister and the Leader of the Opposition on progress and next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution, has recommended that the Australian Government hold a referendum to establish an Indigenous voice to parliament.²⁵ The Australian Government is yet to substantively respond to the Uluru Statement and the Referendum Council's recommendations.

Australia should:

- undertake concrete steps to implement the Final report of the Referendum Council, dated 30 June 2017, which recommends that the Australian Government:
 - establish a constitutional referendum to include an elected Aboriginal and Torres Strait Islander body in the Constitution, to provide a direct voice to Parliament on matters significantly impacting Indigenous peoples.
 - develop an extra-constitutional statement of recognition for Aboriginal and Torres Strait Islander peoples.
 - undertake concrete steps to establish a Makaratta Commission that incorporates and facilitates a process for Truth Telling, as recommended by the Referendums Council's Final Report and the Uluru Statement.
 - undertake further consultations with Aboriginal and Torres Strait Islander communities on the structure and function of the representative body and that these consultations be led by Aboriginal and Torres Strait Islander people and organisations.
- develop and adopt an apt legal framework for the promotion and protection of fundamental human rights of Indigenous Peoples of Australia including the thorough prohibition of racial discrimination against the Indigenous Peoples by way of legislation and administrative actions.

2.6 RESERVATIONS TO THE ICCPR (ARTS. 10, 14 AND 20)

In its Concluding Observations made after Australia's fifth periodic review, the Committee recommended that Australia should consider withdrawing its reservations to article 10(2)(a) and (b) and 10(3) (segregation of juvenile detainees), article 14 (compensation for miscarriage of justice) and article 20 (war propaganda and advocacy of national, racial or religious hatred to be prohibited by law) of the ICCPR.²⁶ Australia has not withdrawn those reservations.

Australia should withdraw its reservations to articles 10, 14 and 20 of the ICCPR.

²³ For example, the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) was passed; and funding has been provided to Reconciliation Australia for the *Recognise* campaign to build community support.

²⁴ Referendum Council, *Uluru Statement from the Heart*, (Statement, 26 May 2017) <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart.PDF>.

²⁵ Referendum Council, *Final Report of the Referendum Council* (30 June 2017) <<https://www.referendumcouncil.org.au/final-report>>.

²⁶ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Australia*, 95th session, UN Doc. CCPR/C/AUS/CO/5, 7 May 2009, [9].

A security camera mounted on a metal pole against a blue sky background. The camera is white and cylindrical, with a lens in the center. It is attached to a horizontal metal arm that extends from a vertical pole. The background is a clear blue sky with some light clouds. The overall tone of the image is blue.

3

Counter-terrorism

(LOIPRs 7 – 8)

3.1 COUNTER-TERRORISM LAWS (ARTS. 2, 7, 9, 12, 14, 15, 17, 19, 22 AND 26)

Australia has a large, complex and often disjointed web of counter-terrorism legislation. Many of these laws infringe fundamental human rights, including those protected in articles 2, 7, 9, 12, 14, 15, 17, 19, 22 and 26,²⁷ as well as unjustifiably undermine government accountability.

Laws ostensibly related to national security are often broadly drafted, criminalising many activities that may not give rise to any national security risk. They include laws that:

- Criminalise a broad and vague range of preliminary activities that would not normally justify criminal penalty such as recklessly possessing a thing that could be used in, or collecting or making a document likely to facilitate, an unspecified terrorist act.²⁸
- Ban travel to “declared” areas of foreign countries where terrorist organisations operate, and effectively reverse the onus of proof, violating the presumption of innocence, the right to a fair trial and freedom of movement.²⁹
- Suppress free speech and press freedom by threatening 10 year prison terms for disclosing any information relating to Australian Security Intelligence Organisation (ASIO) “special intelligence operations” (SIOs).³⁰ The PJCHR noted that a journalist could be found guilty of an offence even though they did not intentionally disclose information about an SIO and that the potential “chilling effect” of the new offences could undermine public reporting and scrutiny of ASIO’s activities.³¹ S 35P(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) was amended in 2016 to provide that criminal penalties only apply to disclosures of ASIO SIOs which endanger health or safety, or ASIO activities, following recommendations made by the Independent National Security Legislation Monitor (**INSLM**) that the earlier provisions imposed an unjustified imposition on freedom of expression.³² However, there is no public interest exception, and no requirement that national security be (potentially) compromised by the disclosure, meaning that reporting that would not compromise national security, but would be in the national interest (such as on corruption, for example) could still attract a prison sentence of up to five years.

- Suppress free speech by threatening up to five year prison terms for recklessly advocating terrorism.³³ The PJCHR expressed concern that “the offence could ... apply in respect of a general statement of support for unlawful behaviour (such as a campaign of civil disobedience or acts of political protest) with no particular audience”, such as criticism of foreign oppressive, non-democratic regimes, and was therefore likely to conflict with the right to freedom of opinion and expression.³⁴
- Suppress freedom of association by criminalising association with members of terrorist organisations, without any requirement that the individual concerned has committed or will commit a criminal offence before they are liable for criminal penalties for the crime of association.³⁵
- Infringe freedom from arbitrary detention by allowing indefinite post-sentence detention for people convicted of terrorism offences.³⁶
- Threaten the right to a fair trial by allowing for convictions potentially based on evidence not seen by the accused.³⁷
- Undermine the right to privacy with surveillance laws that grant certain law enforcement agencies unrestricted access to metadata without a warrant or independent oversight (see further discussion in section 16.6).³⁸

²⁷ Since 2001, Australia has enacted over 60 counter-terrorism laws. See, eg, George Williams, “The Legal Legacy of the War on Terror” (2013) 12 *Macquarie Law Journal* 3, 7.

²⁸ *Criminal Code Act 1995* (Cth), Pt 5.3, ss101.4, 101.5.

²⁹ *Criminal Code Act 1995* (Cth), ss 11.4, 119.2(1).

³⁰ Section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**).

³¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixteenth Report of the 44th Parliament* (2014) 57.

³² The Hon Roger Gyles AO QC, *Independent National Security Legislation Monitor Report on the impact on journalists of section 35P of the ASIO Act*: October 2015, <https://www.inslm.gov.au/sites/default/files/files/impact-s35p-journalists.pdf>, 8-28.

³³ *Criminal Code Act 1995* (Cth), s80.2C.

³⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Sixteenth Report of the 44th Parliament* (2014), 52.

³⁵ *Criminal Code Act 1995* (Cth), s102.8.

³⁶ *Criminal Code Act 1995* (Cth), div105A.

³⁷ *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s31(8).

³⁸ *Telecommunications Act 1997* (Cth), s280; *Telecommunications (Interception and Access Act) 1979* (Cth), Pt5-1A.

3.2 CONTROL ORDERS (ARTS. 2, 9, 12, 14, 17, 19, 23 AND 26)

Control orders can be made to restrict a person's movements and communications or to require them to wear a tracking device if, among other things, the order would substantially assist in preventing a terrorist act.³⁹ Control orders can be made even in circumstances where a person has not been charged and may never be tried, and in relation to people who are not accused or suspected of having committed a crime in the past, or posing a threat of committing a crime in the future. They can also be made irrespective of a person's ongoing dangerousness.

The PJCHR has said that the control orders regime involves "very significant limitations on human rights", including the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to protection of the family; the rights to equality and non-discrimination; and the right to work.⁴⁰ The PJCHR considered that "the control orders regime may not satisfy the requirement of being reasonable, necessary and proportionate in pursuit of their legitimate objective".⁴¹

Australia's INSLM has said that control orders are not necessary in their current form.⁴² The INSLM recommended that the control orders provisions be repealed, and consideration instead be given to authorising such orders only against people convicted of an offence who are shown to have failed to rehabilitate or who continue to present a security risk.⁴³

3.3 ASIO QUESTIONING AND DETENTION POWERS (ARTS. 9, 12, 14, 15, 17, 19 AND 22)

ASIO's questioning and detention warrants are some of the most intrusive and worrying aspects of Australia's counter-terrorism regime. The former High Court Chief Justice, Sir Gerard Brennan, described the powers and procedures as follows:

*In summary, a person may be detained in custody, virtually incommunicado, without ever being accused of involvement in terrorist activity, on grounds which are kept secret and without effective opportunity to challenge the basis of his or her detention.*⁴⁴

The warrant authorises a specified person to be immediately taken into custody for questioning and detained for up to 7 days with limited external communications, without being suspected of any crime.⁴⁵ Reasonable and necessary force may be used to take the person into custody.⁴⁶

39 *Criminal Code Act 1995* (Cth) s 104.4(1)(c)(i).

40 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014) 17.

41 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014) 15-17.

42 Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2013) Commonwealth of Australia, <www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf>.

43 Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2013) Commonwealth of Australia, <www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf> 40.

44 The Hon Sir Gerard Brennan AC KBE, 'The Law and Justice Address' (Speech delivered at the Justice Awards, Parliament House, 31 October 2007).

45 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G(3) and (4). Question and questioning and detention warrants are currently under review by the Parliamentary Joint Committee on Intelligence and Security. The review is due to be completed in March 2018.

46 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34V(1)(a)(i).

If someone does not provide information that is asked of them under a questioning and detention warrant (even if the information might tend to incriminate them), or tells anyone they are being questioned under the warrant without permission, they are liable for five years in prison.⁴⁷ The subjects of these warrants need not be suspected or accused of any wrongdoing themselves, the Minister simply needs to believe that they could substantially assist the collection of intelligence that is important in relation to a terrorism offence. While the use of these laws is rare,⁴⁸ legislation currently allows for infringement of fundamental rights, and anyone who suffers under them would have no avenue for redress. These warrants are currently the subject of a review by the Parliamentary Joint Committee on Intelligence and Security, which is due to report on 7 March 2018.⁴⁹ The INSLM recommended that legislation providing for questioning and questioning and detention warrants be repealed or allowed to lapse, with only questioning warrants being replaced.⁵⁰

A fundamental component of procedural fairness is that a decision-maker must inform a person of the case against them and provide them with an opportunity to be heard. However, questioning and detention warrants are made *ex parte*. The subject of the warrant is not informed of the reasons put forward for the issue of the warrant. And if a person wanted to challenge the issue of a warrant, their legal advisor would not be entitled to see any document except the warrant.⁵¹

This denial of procedural fairness is far beyond what is necessary.⁵² The INSLM has recommended the repeal of questioning and detention warrants, finding they are an unjustifiable intrusion on personal liberty and either violate, or are dangerously close to violating, the right to freedom from arbitrary detention under article 9(1).⁵³

Many of Australia's counter-terrorism laws are broadly drafted, based on little or no evidence to demonstrate that they will be effective in reducing or eliminating the threat of terrorism, and capture many more activities than those necessary to protect national security. As such they will not always (or even usually) meet the threshold of being necessary and proportionate burdens on human rights for the purposes of national security. Furthermore, many of them are used so infrequently (some, such as questioning and detention warrants, have never been used),⁵⁴ supporting the view that they are not in fact necessary for national security purposes.

Australia should:

- **comprehensively review counter-terrorism legislation to ensure that it complies with its obligations under the ICCPR, in particular articles 9, 12, 14, 15, 17, 19 and 22. All laws impacting on human rights should be strictly necessary for national security purposes, and proportionate to an identifiable threat to national security.**
- **repeal or amend laws restricting freedom of speech, imposing harsh criminal penalties for activities that pose no threat, and undermining accountability of government agencies, in line with ICCPR obligations.**
- **repeal control order and ASIO questioning and detention powers.**

⁴⁷ *Australian Security Intelligence Organisation Act 1979* (Cth) s 34L.

⁴⁸ For example, no questioning warrant has been issued since 2010, no questioning and detention warrant has ever been issued. See ASIO Annual Reports 2004-5 to 2015-16 available at <https://www.asio.gov.au/asio-reportparliament-2015-16.html>.

⁴⁹ This deadline is mandated by legislation, see *Intelligence Services Act 2001* (Cth) s 29(1)(bb).

⁵⁰ The Hon Roger Gyles AO QC, *Independent National Security Legislation Monitor: Certain Questioning and Detention Powers in relation to Terrorism*, (October 2016), <https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>, recommendations 7 and 8.

⁵¹ *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZQ(4)(b).

⁵² The INSLM did not discover a scenario, hypothetical or real, that would require the use of ASIO's questioning and detention warrants where no other alternatives existed that would achieve the same purpose: Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2013) Commonwealth of Australia, <www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf> p 105.

⁵³ Independent National Security Legislation Monitor, *Declassified Annual Report 20th December 2012* (2013) Commonwealth of Australia, <www.dpmc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220.pdf> p 106.

⁵⁴ Pursuant to s 34G of the *Australian Intelligence Security Organisation Act 1997*.

3.4 USE OF EVIDENCE OBTAINED UNDER TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ARTS. 6, 7 AND 9)

Torture is a crime in Australia.⁵⁵ However there are inadequate safeguards to ensure that evidence obtained under torture or other cruel, inhuman or degrading treatment or punishment (CIDTP) is not used in Australian courts, especially relating to counter-terrorism charges and asylum claims, raising concerns under articles 6, 7 and 9.

Counter-terrorism legislation passed in recent years does not adequately safeguard against the use of CIDTP in counter-terrorism operations, or in relation to evidence used in terrorism-related prosecutions. Section 35K of the ASIO Act grants participants in SIOs immunity from civil or criminal liability. While the immunity does not extend to torture (which is undefined), there is nothing in the legislation that would withhold the immunity in relation to CIDTP.⁵⁶

Evidence from foreign jurisdictions can be used in Australian terrorism-related prosecutions, unless it is “obtained directly as a result of torture or duress”.⁵⁷ This provision admits evidence obtained indirectly as a result of torture,⁵⁸ or as a result (directly or indirectly) from CIDTP.

Convictions from overseas courts based on evidence obtained as a result of torture have been used to indefinitely detain at least one asylum seeker.⁵⁹ This is particularly concerning for asylum seekers and refugees, who have reduced ability to challenge adverse security assessments. Despite the Australian Government being aware for years of the flawed basis of conviction, the asylum seeker remained in detention in May 2017, in violation of article 9.

Australia should:

- remove ASIO’s legislative grant of immunity for engaging in CIDTP.
- ensure that courts considering evidence from other jurisdictions in terrorism and other prosecutions impose a positive obligation on the party seeking to rely on the evidence to show that it has not been obtained as a result of torture or CIDTP, either directly or indirectly.
- provide reparations, including financial compensation and mental and physical health care, to individuals who have been subject to torture or CIDTP.

⁵⁵ *Criminal Code Act 1995* (Cth) div 274, s 274.2.

⁵⁶ Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament*, [1.39], [1.41].

⁵⁷ *Foreign Evidence Act 1994* (Cth) s 27D(2).

⁵⁸ Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, [1.226].

⁵⁹ Ben Doherty and Sarah Malik, “Sayed Abdellatif: Interpol to review status of Egyptian asylum seeker held in Australia”, 11 May 2017, *the Guardian*, <https://www.theguardian.com/australia-news/2017/may/10/sayed-abdellatif-interpol-to-review-status-of-egyptian-asylum-seeker-held-in-australia>; Ben Doherty and Sarah Malik, “Australian Government concedes evidence against asylum seeker was obtained by torture”, 26 November 2016, *The Guardian*, <https://www.theguardian.com/world/2016/nov/26/australian-government-concedes-evidence-against-asylum-seeker-was-obtained-by-torture>; Working Group on Arbitrary Detention, Opinion No. 8/2015 (Australia), A/HRC/WGAD/2015, http://www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opinion%202015%208_Australia_Sayeed_Abdellatif_AUV.pdf.



Sayed Abdellatif's continued detention due to an adverse security assessment based on evidence linked to torture

Sayed Abdellatif arrived in Australia by boat in 2012 with his wife and six children. The whole family has received a positive refugee status determination, and other than Sayed, have been released into community detention. Sayed, however, remains detained, due to a criminal conviction in Egypt that is known to have been based on evidence extracted under torture, and which has since been discredited and overturned.⁶⁰ The UN Working Group on Arbitrary Detention has found that his detention is arbitrary.⁶¹ Despite the fact that the Australian Inspector General on Intelligence and Security concluded “that he does not present a security risk to Australia” in 2014,⁶² as at May 2017, Sayed remained in indefinite detention with no access to any means of disputing his detention.

60 Ben Doherty and Sarah Malik, “Sayed Abdellatif: Interpol to review status of Egyptian asylum seeker held in Australia”, 11 May 2017, *the Guardian*, <https://www.theguardian.com/australia-news/2017/may/10/sayed-abdellatif-interpol-to-review-status-of-egyptian-asylum-seeker-held-in-australia>.

61 Human Rights Council: Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its seventy-second session, 19-28 April, No. 8/2015 (Australia)*, A/HRC/WGAD/2015, http://www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opinion%202015%208_Australia_Sayeed_Abdellatif_AUV.pdf.

62 Human Rights Council: Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its seventy-second session, 19-28 April, No. 8/2015 (Australia)*, A/HRC/WGAD/2015, http://www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opinion%202015%208_Australia_Sayeed_Abdellatif_AUV.pdf, [10].



4 Equality and non-discrimination (LOIPR 9)

4.1 AUSTRALIA'S ANTI-DISCRIMINATION LAWS (ARTS. 2 AND 26)

Australia does not protect equality and non-discrimination in its Constitution. Under federal law, legislation makes discrimination unlawful on the basis of race, sex, disability and age.⁶³ Current anti-discrimination laws in Australia are inadequate due to their inconsistency, limited scope, failure to address systemic or intersectional discrimination and wide exemptions and exceptions. These laws fail to adequately meet obligations under articles 2 and 26.

While we welcome the recent expansion of protections to include relationship status, sexual orientation, gender identity and intersex status, many attributes are not adequately protected at the federal level, such as religion, political opinion and criminal record, and domestic/family violence survivor status.⁶⁴ Despite initial moves to consolidate federal anti-discrimination law (consistent with the recommendations made by the Committee) this reform was abandoned in 2013. The retention of separate legislation dealing with different grounds of discrimination makes it difficult for complainants to frame complaints relating to discrimination on the basis of intersecting or multiple grounds.

⁶³ Federal anti-discrimination laws include the *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth). States and Territories have also enacted anti-discrimination legislation.

⁶⁴ *Sex Discrimination Act 1984* (Cth).

Numerous exemptions and exceptions to anti-discrimination law act as a defence to claims of discrimination, meaning that conduct that would otherwise be unlawful is allowed. For example, wide-reaching exceptions for religious organisations in the areas of employment and education mean that LGBTI persons can be treated unfavourably at work or in education, without recourse.⁶⁵

The discrimination complaints process fails to adequately address the power imbalance between complainants and respondents, as complainants bear the onus of proof. As it is a costs jurisdiction, many complainants settle through confidential informal dispute resolution processes, causing broader dialogue around systemic discrimination to be stymied. The time limit for making complaints has recently been reduced to 6 months, and complainants must now seek leave to take their matters to court,⁶⁶ limiting access to effective remedies.

Australia should:

- **enact a comprehensive Equality Act that addresses all the prohibited grounds of discrimination, promotes substantive equality and provides effective remedies, including against systemic and intersectional discrimination.**
- **amend the *Australian Human Rights Commission Act 1986* (Cth) to reinstate the 12-month time limit to lodge a complaint of discrimination and to make the Federal Court and Federal Circuit Court a no cost jurisdiction for discrimination complaints.**

4.2 DISCRIMINATION ENDORSED BY THE CONSTITUTION (ARTS. 2 AND 26)

The Australian Constitution does not currently enshrine the right to equality. On the contrary, it expressly permits governments to pass laws that adversely discriminate against people on the basis of race.⁶⁷

Australia should ensure that the right to non-discrimination and equality is duly acknowledged and respected in the Australian Constitution.

4.3 RIGHTS OF OLDER PEOPLE

In its last universal periodic review the Australian Government committed to promoting and protecting the rights of older people across a number of international human rights law channels. The commitment extends to modelling and advocating for the better use of existing UN reporting mechanisms, dedicating a section on the rights of “older Australians” in relevant treaty and universal periodic review reports, seeking to have the rights of older persons reflected in UN resolutions and encouraging Special Rapporteurs to consider how their mandate applies to older persons.⁶⁸ The Australian Government reconfirmed this commitment at the Seventh and Eighth Working Sessions of the Open-ended Working Group on Ageing (OEWGA)⁶⁹.

The human rights of older persons are the subject of current active mandates from the General Assembly to the OEWGA and from the Human Rights Council to the Independent Expert on the Enjoyment of all human rights by older persons.⁷⁰ Both processes have raised substantive rights issues for older persons including matters experienced by older persons in Australia, for example:

- a) The absence of a national plan and comprehensive legislative and policy framework on elder abuse;⁷¹
- b) The absence of a regulatory framework for restrictive practices and interventions in aged care;⁷² and
- c) The absence of laws about family agreements and resolution of disputes over “assets for care” arrangements.⁷³

Australia should enact uniform national laws protecting older persons from abuse, neglect and exploitation and ensuring older people are involved in decisions about their health and care, and introduce a regulatory framework for restrictive practices and interventions in aged care.

⁶⁵ See *Sex Discrimination Act 1984* (Cth) s 38.

⁶⁶ *Human Rights Legislation Amendment Act 2017* (Cth).

⁶⁷ Section 51(xxvi) of the Australian Constitution gives parliament the power to make laws for people of any race, and in *Kartinyeri v Commonwealth* [1998] HCA 22 the High Court confirmed that that provision gave parliament the power to make laws that were adverse to people of a particular race.

⁶⁸ Statement of Australia to the 7th Working Session of the Open-ended Working Group on Ageing, New York, 12 December 2016; Statement of Australia to the 8th Working Session of the Open-ended Working Group on Ageing, New York, 5 July 2017.

⁶⁹ Human Rights Council, Report of the Working Group on the Universal Periodic Review* Australia, A/HRC/31/14, 13 January 2016.

⁷⁰ General Assembly, 65th Session, Follow-up to the Second World Assembly on Ageing, A/RES/65/182, 4 February 2011; General Assembly, 67th Session, Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons, A/RES/67/139, 13 February 2013; General Assembly, 70th Session, Measures to enhance the promotion and protection of the human rights and dignity of older persons, A/RES/70/164, 22 February 2016; Human Rights Council, The human rights of older persons, A/HRC/RES/33/5, 5 October 2016;

⁷¹ Australian Law Reform Commission, Elder Abuse – A National Legal Response, Final Report, ALRC Report 131, May 2017, Recommendation 3, p.9.

⁷² Ibid, Recommendation 4-10, p. 11

⁷³ Ibid, Recommendation 6-1, p.13.



5

Violence against women (LOIPRs 10 – 11)

Violence against women is endemic in Australia. Domestic, family and sexual violence are forms of gender-based violence that are most commonly perpetrated by males against females. Violence against women is a cause and consequence of gender inequality and discrimination.⁷⁴

One in three women in Australia experience physical violence and almost one in five women experience sexual violence.⁷⁵ Of the women experiencing physical violence, 85 per cent were assaulted by a current or former partner, family, friend or other known male. Three-quarters of physical attacks occur in the woman's home.⁷⁶ The social, health and economic consequences of family, domestic and sexual violence are enormous, with costs to the Australian economy being estimated at \$22 billion in 2015-16 and expected to rise without appropriate action.⁷⁷ The ongoing prevalence of violence against women and children raises concerns under articles 2, 3, 7, 24 and 26.

5.1 ABORIGINAL AND TORRES STRAIT ISLANDER WOMEN (ARTS. 2, 3, 7, 24 AND 26)

Aboriginal and Torres Strait Islander women are 45 times more likely to experience family violence than non-Aboriginal women.⁷⁸ Further, their experiences of violence are likely to be more severe and to occur more often than for women from non-Indigenous backgrounds. This results in Aboriginal and Torres Strait Islander women being 32 times more likely to be hospitalised as a result of family violence and 10 times more likely to die from violent assault than other women. Also, Aboriginal and Torres Strait Islander women are up to 3.7 times more likely than other women to be victims of sexual violence.⁷⁹ A 2003 study of Aboriginal women in NSW prisons found that over 75 per cent of Aboriginal women had being sexually assaulted as a child, just under 50 per cent had been sexually assaulted as adults and almost 80 per cent were victims of family violence.⁸⁰

5.2 WOMEN WITH DISABILITY

Women and girls with disability are at far greater risk of violence, particularly sexual violence, compared to their peers.⁸¹ Legislation, policy and service frameworks largely focus on addressing domestic and family violence and sexual assault, but women with disability experience all forms of violence by a greater number of perpetrators across a broader range of settings, including in institutional, residential and other care settings.⁸² They also encounter more barriers when they try to protect themselves and seek justice.⁸³ Available data reports that a quarter of rape cases are perpetrated against women with disability;⁸⁴ that between 50-70 per cent of women with psychosocial disability have experienced past physical or sexual abuse, including child sexual assault;⁸⁵ 45 per cent of women in psychiatric hospitals had been sexually assaulted, 67 per cent had been sexually harassed and 85 per cent felt unsafe;⁸⁶ and 22 per cent of women and girls with disability who had made contact with domestic and family violence services identified as having been affected by violence.⁸⁷

74 United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, (signed and entered into force 3 September 1981), *Intensification of efforts to eliminate all forms of violence against women*, GA Res 61/143, A/RES/61/143 61st sess, (19 December 2006).

75 Peta Cox, Horizon Research Report, *Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey 2012*, Issue 1, Australia's National Research Organisation for Women's Safety (ANROWS) (2015), Sydney; and Woodlock, D., Healey, L., Howe, K., McGuire, M., Geddes, V. and Granek, S. (2014) *Voices against violence paper one: Summary report and recommendations*, Women with Disabilities Victoria, Office of the Public Advocate and Domestic Violence Resource Centre Victoria.

76 Australian Bureau of Statistics (ABS), *Personal safety survey Australia 2012*, cat. no. 4906.0, ABS, Canberra, 2013.

77 KPMG (2016) *The Cost of Violence against Women and their Children in Australia*, https://www.dss.gov.au/sites/default/files/documents/08_2016/the_cost_of_violence_against_women_and_their_children_in_australia_-_final_report_may_2016.pdf.

78 Gordon, S. Hallahan, K. Henry, D. (2002) *Putting the picture together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, Department of Premier and Cabinet, Western Australia, 47 available at [https://www.slp.wa.gov.au/publications/publications.nsf/DocByAgency/FEB7D71FB3A6AF1948256C160018F8FE/\\$file/Gordon+Inquiry+Final.pdf](https://www.slp.wa.gov.au/publications/publications.nsf/DocByAgency/FEB7D71FB3A6AF1948256C160018F8FE/$file/Gordon+Inquiry+Final.pdf) (accessed 31 August 2017).

79 The Australian Productivity Commission, *Overcoming Indigenous Disadvantage - Key Indicators 2016*, 2014, page 4.98, table 4A.12.13 available at <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf>. See: Australian Institute of Health and Welfare 2006. *Family violence among Aboriginal and Torres Strait Islander peoples*. Cat. no. IHW 17. Canberra: AIHW. Viewed 29 August 2017 <<http://www.aihw.gov.au/publication-detail/?id=6442467912>>.

80 Lawrie cited in Natalie Taylor & Judy Putt, "Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia," *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology, September 2007 at 2.

81 Frohmader, C. and Sands, T. 'Fact Sheet: Violence Against People With Disabilities in Institutions and Residential Settings' (Fact Sheet, November 2015), Women With Disabilities Australia & People with Disability Australia <http://www.pwd.org.au/documents/orgdocs/FS-Violence-PWD2014.doc>.

82 See eg, Women With Disabilities Australia (WWDA), 'Improving Service Responses for Women with Disability Experiencing Violence: 1800RESPECT', Final Report, August 2016; Women with Disabilities Australia, Submission to the UN Analytical Study on Violence Against Women with Disabilities (2011).

83 See: Women with Disabilities Australia, Submission to the UN Analytical Study on Violence Against Women with Disabilities (2011).

84 Reported from Victorian study in Carolyn Frohmader, Women with Disabilities Australia, *Submission to the UN Analytical Study on Violence against Women and Girls with Disabilities*, December 2011, 13.

85 Victorian Women and Mental Health Network, 'Nowhere to be Safe: Women's Experiences of Mixed-Sex Psychiatric Wards' (Report, April 2008) 4-5 <<http://www.vicser.org.au/uploads/documents/general%20docs/Nowhere%20to%20be%20Safe%20Final%20layout.pdf>>.

86 Victorian Mental Illness Awareness Council, *Zero Tolerance for Sexual Assault: A Safe Admission for Women* (2013) <<http://www.vmiac.org.au>>.

87 Women With Disabilities Australia, *Stop the violence: National Symposium on Violence Against Women and Girls with Disabilities*, 25 October 2013, Available at: <<http://www.stvp.org.au/documents/STVP-BackgroundPaper.pdf>> 48.

5.3 WOMEN IN RURAL AND REMOTE COMMUNITIES (ARTS. 2, 3, 7 AND 26)

Women living in rural or remote areas are also at a higher risk of experiencing domestic violence.⁸⁸ One local study of 25 community organisations servicing clients in rural, regional and remote areas of Australia found that clients presented with numerous legal problems, particularly family violence (73 per cent), housing (69 per cent), and family law (65 per cent).⁸⁹ Certain outer rural, regional and remote areas of NSW experience incidents of assault and sexual offences at high rates.⁹⁰ Sexual harassment also occurs at high rates in the workplace in rural, regional and remote locations.⁹¹

For rural and regional women experiencing family violence there are a number of barriers to obtaining access to justice. They range from a lack of appropriate and accessible support services to a lack of transport that compounds barriers to safety.⁹² There is also poor access to mediation services, poor security, and a lack of: separate waiting areas or client interview rooms; safe spaces for victims of violence; and video-conferencing facilities in smaller regional courts.⁹³

Furthermore, women experiencing family violence are disadvantaged by a lack of local access to specialist Magistrates Courts including the Family Violence Division⁹⁴. Women's safety is placed at risk in regional areas where the complexities of family violence are not understood or dealt with appropriately by the court.⁹⁵ The Law Council of Australia identified that the inequality in service provision creates particular risks for a range of groups, including survivors of family violence.⁹⁶

5.4 MIGRANT WOMEN (ARTS. 2, 3, 7, 23 AND 26)

Exact figures on the number of culturally and linguistically diverse (CALD) women affected by violence remain uncertain. Some research indicates that women from non-English speaking backgrounds experience higher levels of violence than the general population.⁹⁷

2012 research from the Family Law Council flagged growing concerns about family violence within new and emerging communities.⁹⁸ In 2016 the Judicial Council on Cultural Diversity reported on migrant and refugee women's experiences of the justice system found that such women are far more likely to enter the legal system at a point of extreme vulnerability, often as a result of family violence or family breakdown.⁹⁹

While the evidence was mixed on the prevalence of family violence in migrant and refugee communities, the report's authors noted that the stresses caused by moving to Australia could increase the risk of family violence. Further, migrant and refugee women were more likely to experience particular forms of family violence, including abuse by extended family members, abuse related to their immigration status, dowry demands and forced marriage.¹⁰⁰

The Australian Bureau of Statistics' 2009 Personal Safety Survey found that without intervention, the cost of violence perpetrated against immigrant and refugee women was estimated to reach \$4 billion in 2021-22, which is the time period corresponding with the targets set out in *The National Plan to Reduce Violence against Women and their Children*. This figure represents 26 per cent of the total cost of violence in 2021-22.

88 The Women's Services Network (WESNET), 2000, Domestic violence in rural Australia: a literature review, Department of Transport and Regional Services, Canberra: <http://dpl/Books/2000/DomesticViolenceRegional.pdf>. See also: *Domestic and family violence in regional, rural and remote communities An overview of key issues* Monica Campo and Sarah Tayton CFCA Practitioner Resource— December 2015 <https://aifs.gov.au/cfca/publications/domestic-and-family-violence-regional-rural-and-remote-communities>. See also: Lucinda Jordan and Lydia Philips, *Women's experiences of surviving family violence and accessing the Magistrates' Court in Geelong, Victoria* (CRRL, Deakin University: 2013, 9, citing eg Council of Australian Governments, *National Implementation Plan to Reduce Violence against Women* (Commonwealth of Australia: 2012).

89 Hume Riverina Community Legal Service ('HRCLS'), *Piecing together the puzzle: the perspective of community organisations about legal need* (June 2015), <https://humeriverinacommunitylegalservice.wordpress.com/2015/08/26/piecing-together-the-puzzle-the-perspective-of-community-organisations-about-legal-need/>

90 See: New South Wales Bureau of Crime Statistics and Research crime mapping tool <http://crimetool.bocsar.nsw.gov.au/bocsar/>.

91 One study found that of 84 rural women interviewed, 73 per cent reported having experienced unwelcome, sexualised behaviour in the workplace. See: Skye Saunders, *Whispers from the Bush: The Workplace Sexual Harassment of Australian Rural Women* (The Federation Press: 2015), 2-3.

92 Lucinda Jordan and Lydia Philips, *Women's experiences of surviving family violence and accessing the Magistrates' Court in Geelong, Victoria* (CRRL, Deakin University: 2013, 9, citing eg Council of Australian Governments, *National Implementation Plan to Reduce Violence against Women* (Commonwealth of Australia: 2012).

93 Law Council of Australia The Justice Project, 'Rural, Regional and Remote Australians Consultation Paper', (2017), available at <<https://www.lawcouncil.asn.au/docs/f8d03b1-d339-e711-93fb-005056be13b5/Report%20into%20the%20Rural,%20Regional%20and%20Remote%20Areas%20Lawyers%20Survey%20-%20Executive%20Summary.pdf>>.

94 Tony Vinson and Margot Rawsthorne, with Adrian Beavis and Matthew Ericson, *Dropping off the edge 2015: persistent communal disadvantage in Australia* (Jesusuit Social Services/Catholic Social Services Australia: 2015). See also Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey* (July 2009), <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/rural-regional-and-remote-areas-lawyers>.

95 Centre for Rural and Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Submission to the Productivity Commission Inquiry into Access to Civil Justice*, 4 <<http://www.pc.gov.au/inquiries/completed/access-justice/submissions>>.

96 Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey* (July 2009), <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/rural-regional-and-remote-areas-lawyers>.

97 (Australian Institute of Criminology, 'Emerging Issues in domestic/family violence research', Research in Practice Report, No10, April 2010, available at http://www.aic.gov.au/documents/b/7/2/%7Bb720c47b-56f2-4c4d-aa2c-57a2278fd87e%7Drip10_001.pdf).

98 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Commonwealth: 2012), 3, available at <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/ImprovingtheFamilyLawSystemforClientsfromCulturallyandLinguisticallyDiverseBackgrounds.DOC>>.

99 Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts* (2016) 6, available at <http://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Migrant_and_Refugee_Women.pdf>.

100 Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts* (2016), available at <http://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Migrant_and_Refugee_Women.pdf>.

5.5 NATIONAL PLAN TO REDUCE VIOLENCE AGAINST WOMEN AND THEIR CHILDREN

Despite the adoption in 2016 of a Third (three year) Action plan under the *National Plan to Reduce Violence Against Women and Their Children (National Plan)*, the available data shows no decrease in prevalence of violence against women,¹⁰¹ key actions under the plan remain unimplemented, and there is no independent mechanism to monitor the plan's implementation and effectiveness. There are widespread concerns that the action plan is under-resourced and not sufficiently focused on prevention, and that many forms of gender based violence experienced by diverse groups of women are excluded or marginalised from policy development. Additional opportunities are required for diverse groups of women to contribute to policy development, particularly Aboriginal and Torres Strait Islander women, women from CALD backgrounds and women with disability, all of whom experience severe violence more often than other women, and encounter more barriers when they try to protect themselves or seek justice.

The National Plan does not address the experiences of refugee women in detention and women in custody and there is little attention given to the links between women experiencing violence and sexual assault, and higher rates of incarceration. The 2009 New South Wales Inmate Health Survey found that 66 per cent of female inmates had been involved in at least one violent relationship and 29 per cent of female inmates had been subjected to at least one form of sexual violence.¹⁰²

Australia should:

- **establish an independent mechanism to evaluate the implementation of the National Plan and provide adequate resources for the National Plan, including resourcing NGOs, legal assistance services and specialist domestic, family and sexual violence services, and particularly ensure that its funding processes support specialist women's services and Aboriginal and Torres Strait Islander community controlled services with expertise in working with victims/survivors.**

- **implement processes for meaningful participation and collaboration with women experiencing intersecting discrimination, particularly Aboriginal and Torres Strait Islander women, women with disability and CALD women, in the development, implementation and monitoring of action plans.**
- **amend the Family Law Act 1975 (Cth) to better protect the safety of women and children by removing a presumption of "equal shared parental responsibility" and language of "equal shared time" to shift culture and practice towards a greater focus on safety and risk to children.¹⁰³**

5.6 SEXUAL ASSAULT AND HARASSMENT AT UNIVERSITY (ARTS. 2, 9 AND 26)

A 2017 report by the Australian Human Rights Commission found that sexual assault and harassment is extremely prevalent in university settings.¹⁰⁴ The report found that more than half of all university students (51 per cent) had been sexually harassed on one occasion in 2016 and over one in five students (21 per cent) experienced sexual harassment in a university setting in that year. Women were almost twice as likely as men to have been sexually harassed. Reporting of sexual assault and sexual harassment is significantly low, with data indicating only 2 per cent of students who experienced sexual harassment and 9 per cent of students who experienced sexual assault made a formal report or complaint to the university. The majority of students had little knowledge on how to report or make a complaint to their university about the abuse. The survey also identified structural barriers to reporting, with results indicating that only 6 per cent of students thought that their university was currently doing enough to provide and promote clear and accessible information on sexual harassment procedures, policies and support services, and only 4 per cent thought this was the case in relation to sexual assault.

The report recommended that university leaders make a strong commitment to action, develop measures aimed at preventing sexual assault and harassment, implement effective processes for responding to sexual assault and sexual harassment, and raise awareness of support services and reporting processes.

Australia should ensure that all Australian universities implement the recommendations of the *Change the Course* report.

¹⁰¹ See Australian Bureau of Statistics, *Personal safety survey Australia 2012: Changes in prevalence of violence over time*. cat. no. 4906.0, Australian Bureau of Statistics, Canberra, 2012, available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter2002012> (accessed 31 August 2017): "there was no statistically significant change from 2005 to 2012 in the proportion of women who had experienced violence in the 12 months prior to the survey. In 2005 an estimated 5.8% of all women had experienced violence in the 12 months prior to interview compared to 5.3% in 2012..."

¹⁰² See: Devon Idig, Libby Topp, Bronwen Ross, Hassan Mamoon, Belinda Border, Shalin Kumar and Martin McNamara, 2009 *NSW Inmate Health Survey*, Justice Health, Sydney 2010 at 131.

¹⁰³ See Women's Legal Services Australia 5 step plan to put safety first in family law for other recommendations to improve the safety of the family law system for women and children: http://www.womenslegal.org.au/files/file/SAFETY%20FIRST%20POLICY%20PLATFORM.MAY%202016_FINAL.pdf.

¹⁰⁴ In 2016 the Australian Human Rights Commission conducted an independent national survey of over 300,000 students across 39 Australian universities about their experiences of sexual assault and sexual harassment. In August 2017, the Commission released its report, Australian Human Rights Commission, *Change the Course - National Report on Sexual Assault and Sexual Harassment at Australian Universities* (2017), available at: https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_2017_ChangeTheCourse_UniversityReport.pdf.

6 Law enforcement

(LOIPRs 12 – 13)

Racially discriminatory policing continues to be a problem throughout Australia.¹⁰⁵ Particularly concerning are reports of police using excessive force against Aboriginal and Torres Strait Islander people and ethnic minorities, the broadening of police powers to lock people up, and the disproportionately high numbers of Aboriginal and Torres Strait Islander deaths in police custody.

6.1 EXCESSIVE POLICE POWERS TO LOCK PEOPLE UP

Police have excessively broad discretionary powers to lock people up, particularly under punitive alcohol-related laws in the Northern Territory.¹⁰⁶ These powers are being disproportionately used against Aboriginal and Torres Strait Islander people contrary to article 12.¹⁰⁷

In the Northern Territory, paperless arrest laws allow police to detain people for four hours without charge for trivial offences such as singing an obscene song or abandoning a refrigerator.¹⁰⁸ In 2016, 70 percent of people who police detained and released with an infringement notice under paperless arrest laws were Aboriginal and Torres Strait Islander people.¹⁰⁹

Further, excessive protective custody laws related to public drunkenness allow police to apprehend and detain anyone they believe is likely to commit an offence, however trivial, or is likely to “cause substantial annoyance” to people.¹¹⁰ Between 2008-09 and 2015-16, 92 percent of people who police locked up under protective custody powers were Aboriginal and Torres Strait Islander people.¹¹¹ The Australian Capital Territory, Western Australia and Tasmania have similar protective custody laws to those in the Northern Territory, however there is an additional requirement that police take steps to satisfy themselves that there is no alternative, prior to detaining a person in a police cell.¹¹²

Australia should:

- ensure that the Northern Territory Government repeal the paperless arrest provisions of the *Police Administration Act* (NT).
- ensure that state and territory governments limit protective custody powers to situations where the person is likely to cause significant harm to themselves or others, damage to property, or is incapable of protecting themselves from physical harm; and require police to exhaust all reasonable alternatives to detention.

¹⁰⁵ See eg Declan Gooch and Dugald Sanders, “‘Entrenched racism’ in NSW Police harming young people, Indigenous leader says” *Australian Broadcasting Corporation* (online) 29 March 2017 available at <http://www.abc.net.au/news/2017-03-29/entrenched-racism-in-nsw-police-harming-young-people-leader-says/8398122> (accessed 18 July 2017); Michael Gordon, “Deaths in custody: Deaths in black and white” *The Sydney Morning Herald* (online) 15 April 2016 available at <http://www.smh.com.au/comment/deaths-in-custody-confronting-the-truth-20160415-g07bek.html> (accessed 18 July 2017).

¹⁰⁶ *Police Administration Act* (NT), s 128 (**protective custody laws**); *Police Administration Act* (NT), s 133AA-133AC (**paperless arrest laws**); see Human Rights Law Centre, *Putting an end to the over-criminalisation of public drinking in the Northern Territory*, Submission to the Northern Territory Alcohol Policies and Legislation Review, 21 July 2017.

¹⁰⁷ *Inquest into the death of Kumanjayi Langdon* [2015] NTMC 16, [87].

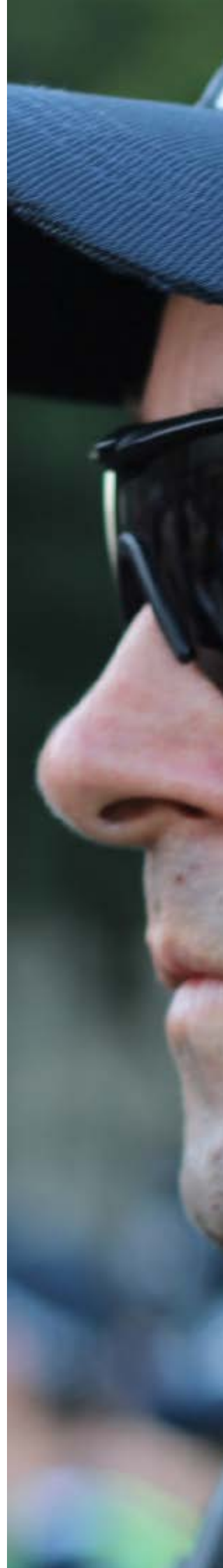
¹⁰⁸ Jonathon Hunyor, ‘Imprison Me NT: Paperless Arrests and the Rise of Executive Power in the Northern Territory’ (2015) 8(21) *Indigenous Law Bulletin* 3, 3, citing *Summary Offences Act* (NT) s 53(1), 65AA.

¹⁰⁹ Human Rights Law Centre, *Putting an end to the over-criminalisation of public drinking in the Northern Territory*, Submission to the Northern Territory Alcohol Policies and Legislation Review, 21 July 2017, 6.

¹¹⁰ *Police Administration Act* (NT), s 128.

¹¹¹ Northern Territory Police, Annual Report 2015-16 (2016) 171.

¹¹² *Intoxicated People (Care and Protection) Act 1994* (ACT) ss 4(1)(2), (6); *Protective Custody Act 2000* (WA) s 6; *Police Offences Act 1935* (Tas) s 4A(4).



Ms Mandijarra's arrest for drinking in Western Australia¹¹³

In 2012, an Aboriginal woman named Ms Mandijarra died shortly after being detained for a minor offence, punishable only by a fine, of “street drinking” (ie alcohol consumption on unlicensed premises without consent) in Broome, Western Australia. The Coroner ultimately found that Ms Mandijarra’s death may have been prevented if she had been admitted to hospital as police were not medically trained or able to discern she was ill. The Coroner noted that in most years since 2011, the majority of people kept at the Broome Police Station for alcohol-related offences or detained under protective custody laws were Aboriginal and Torres Strait Islander people. The Coroner recommended that the arrest and detention of people for street drinking be abolished.

Kumanjayi Langdon's arrest for drinking in the Northern Territory¹¹⁴

In May 2015 an Aboriginal man, Kumanjayi Langdon, was arrested under the Northern Territory’s paperless arrest laws and locked up in Darwin for drinking in public (an offence punishable only by a fine of \$74 and not imprisonment). Less than three hours later he was found dead in his holding cell. The Coroner who investigated Kumanjayi’s death concluded that whilst the arrest was lawful, he “had the right to die as a free man”. The Coroner also stated that “the paperless arrest scheme disproportionately impacts on Aboriginal people” and that the scheme “perpetuates and entrenches Aboriginal disadvantage.” He recommended that the laws be repealed, warning that “unless the paperless arrest laws are struck from the Statute books, more and more disadvantaged Aboriginal people are at risk of dying in custody, and unnecessarily so”.

¹¹³ *Liquor Control Act 1988* (WA), s 199(1); Coroner’s Court of Western Australia, *Inquest into the death of Ms Mandijarra* 6042-12, 31 March 2017, [241], [268], [271], [362]–[363], [374].

¹¹⁴ *Inquest into the death of Kumanjayi Langdon* [2015] NTMC 16, [8]–[12], [87], [88], [90].

6.2 EXCESSIVE FORCE AGAINST ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

Aboriginal and Torres Strait Islander people are over-represented in the criminal justice system. The over-policing of Aboriginal communities through increased police numbers, patrols and surveillance contribute to this.¹¹⁵ The over-policing of Aboriginal and Torres Strait Islander people increases negative contacts with police and feelings of harassment, which in turn increases the likelihood of Aboriginal and Torres Strait Islander people being arrested and charged with offences, being refused bail and ending up in prison.¹¹⁶ The Chief Justice of Western Australia recently stated that “Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested...at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.”¹¹⁷ The increase in contact with police has also led to reports of excessive use of force when being arrested or whilst in police custody. Examples of excessive police force against Aboriginal and Torres Strait Islander people include:

- Two police officers tasering an Aboriginal man 13 times while he was in custody after he refused to go to a cell to be strip-searched;¹¹⁸
- Police tasering an Aboriginal man who reportedly required urgent medical assistance, with the man dying soon after;¹¹⁹
- A police officer racially abusing an Aboriginal man he was detaining, telling the man “I’d like to tie the hose around your neck, set you on fire, and drag you around the streets attached to our car with lights and sirens on”;¹²⁰

- Police officers conducting a “detention and seizure operation” when Aboriginal people in a remote community collected Christmas hampers that contained alcohol (which was prohibited);¹²¹ and
- A police officer filmed using excessive force against an Aboriginal woman, reportedly after attending the scene in response to a domestic violence incident.¹²²

Australia should ensure that a substantial component of police training involves cultural awareness to promote better understanding and relations between police and Aboriginal and Torres Strait Islander people, which is delivered by Aboriginal and Torres Strait Islander people, and incorporates information on the history of Aboriginal-police relations and the role of police as enforcers of previous policies of expropriation, protection and assimilation.

6.3 UNDER-POLICING OF ABORIGINAL AND TORRES STRAIT ISLANDER VICTIMS OF VIOLENCE

In addition to being over-policed as offenders, Aboriginal and Torres Strait Islander women are also under-policed as victims/survivors of crime.¹²³ There are numerous accounts of police, the majority of whom are non-Indigenous and male, minimising Aboriginal and Torres Strait Islander women’s experiences of violence and viewing their responses as atypical and “difficult”.¹²⁴

Australia should:

- **commit to increased funding and support for Aboriginal and Torres Strait Islander community-led prevention and early intervention efforts to reduce violence against women and offending by women.**
- **ensure police protocols, guidelines and training prioritise the protection of, and provision of support to, Aboriginal and Torres Strait Islander women and children subjected to violence, and emphasise gender-specific and culturally-appropriate police responses.**

¹¹⁵ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011), 200.

¹¹⁶ The Senate, *Finance and Public Administration References Committee: Aboriginal and Torres Strait Islander experience of law enforcement and justice services*, October 2016, 80–81.

¹¹⁷ The Senate, *Finance and Public Administration References Committee: Aboriginal and Torres Strait Islander experience of law enforcement and justice services*, October 2016, 70.

¹¹⁸ Joanna Menagh, “Police officers found guilty of assault after repeatedly tasering detainee Kevin Spratt” *Australian Broadcasting Corporation News* (online) 22 January 2014 available at <http://www.abc.net.au/news/2014-01-21/police-officers-found-guilty-of-assault-of-spratt/5211642> (accessed 31 July 2017).

¹¹⁹ “Man dies after being tasered by officers in East Perth” *The West Australian* (online) 12 May 2017 available at <https://thewest.com.au/news/wa/man-dies-after-being-tasered-by-officers-in-east-perth-ng-b88474557z> (accessed 31 July 2017).

¹²⁰ SA Police Ombudsman, *Annual Report 2015*, October 2015, 14, available at <http://www.policeombudsman.sa.gov.au/wp-content/uploads/2015/10/2014-15-Annual-Report.pdf> (accessed 18 July 2017). See also “Slap on wrist for racist South Australian police officer” *News.com.au* (online) 29 October 2015 available at <http://www.news.com.au/national/south-australia/slap-on-wrist-for-racist-south-australian-police-officer/news-story/42c3a47d17bed52b1c6f93d7b10cae6> (accessed 18 July 2017).

¹²¹ Sean Kerins, *Policing the frontier: Christmas in Borroloola*, Centre for Aboriginal Economic Policy Research, Topic Issue No. 3/2013, February 2013, 4, available at http://caepr.anu.edu.au/sites/default/files/Publications/topical/TI2013_03_Kerins_alcohol_management.pdf (accessed 18 July 2017).

¹²² Andrea Booth, “Queensland police video: Rights organisations demand public independent investigation as police begin internal one” *Special Broadcasting Service* (online) 22 January 2016 available at <http://www.sbs.com.au/nitv/article/2016/01/21/queensland-police-video-rights-organisations-demand-public-independent> (accessed 18 July 2017).

¹²³ Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women’s growing over-imprisonment*, May 2017, 5, 31 available at https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378a91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf (accessed 1 August 2017).

¹²⁴ Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women’s growing over-imprisonment*, May 2017, 31 available at https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378a91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf (accessed 1 August 2017).

*Punitive response to Ms Mullaley's experience of family violence*¹²⁵

In March 2013, Ms Mullaley was violently assaulted by her partner and found injured and naked by police officers. She was then charged with assaulting the police who attended the scene. The police became distracted by Ms Mullaley's agitated behaviour and with processing charges against her. This contributed to their "delayed and ineffective response" to the abduction of Ms Mullaley's child, who was later murdered by her partner. The Corruption and Crime Commission of Western Australia investigated the incident and noted that police failed to consider whether the cause of Ms Mullaley's behaviour "might be the result of an attack that left her naked and injured". It was noted that "assumptions were made about the cause of aggression and other behaviour instead of a dispassionate analysis of the whole scene which began with violence to [Ms] Mullaley".

¹²⁵ Corruption and Crime Commission, *Report on the Response of WA Police to a Particular Incident of Domestic Violence on 19-20 March 2013*, 2016, 2, 4.

6.4 ABORIGINAL AND TORRES STRAIT ISLANDER DEATHS IN POLICE CUSTODY

It is reported that 209 Aboriginal and Torres Strait Islander people died in police custody or in custody-related operations between 1980 to mid-2013.¹²⁶ No police officer has ever been convicted of any offence relating to an Aboriginal and Torres Strait Islander death in police custody.¹²⁷

At the heart of the 1991 Royal Commission into Aboriginal Deaths in Custody's recommendations is the proposition that to reduce Aboriginal deaths in custody, governments need to reduce the rates at which Aboriginal people are taken into custody.¹²⁸ However, as noted above, Aboriginal and Torres Strait Islander people are increasingly being taken into custody for minor offences such as public drinking.

Australia should:

- implement the remaining recommendations of the Royal Commission into Aboriginal Deaths in Custody aimed at reducing the over-incarceration of Aboriginal and Torres Strait Islander people by police, including legislation that places a statutory duty upon police to consider and use alternatives to arrest, charging and police custody.
- ensure that state and territory governments introduce laws for fully-funded compulsory custody notification services, which require police to notify the relevant Aboriginal legal service every time an Aboriginal or Torres Strait Islander person is taken into custody.

¹²⁶ Australian Institute of Criminology, *Deaths in custody in Australia to 30 June 2011*, 2013, 137 available at http://aic.gov.au/media_library/publications/mr/mr20/mr20.pdf (accessed 18 July 2017); Australian Institute of Criminology, *Deaths in custody in Australia: National Deaths in Custody Program 2011-12 and 2012-13*, 2015, ix available at http://aic.gov.au/media_library/publications/mr/mr26/mr26.pdf (accessed 18 July 2017).

¹²⁷ Craig Longman, "Scales of justice still tipped towards police who harm people in their custody", *The Conversation* (online) 15 April 2016 available at <https://theconversation.com/scales-of-justice-still-tipped-towards-police-who-harm-people-in-their-custody-57125> (accessed 18 July 2017).

¹²⁸ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, [1.3.6].

Ms Dhu¹²⁹

In 2014 a 22-year-old Aboriginal woman named Ms Dhu died in a police cell less than 48 hours after being taken into custody for unpaid fines. A few hours after being arrested, Ms Dhu complained of severe pain while breathing. Video footage released by the Coroner shows Ms Dhu crying and moaning in pain, police dragging and carrying Ms Dhu's limp body to a police van and one officer pulling Ms Dhu by the wrist to sit her up before dropping her, causing her to hit her head. Prior to being arrested Ms Dhu had sustained a fractured rib through family violence, which became infected. Being detained in police custody meant that she could not seek her own medical treatment and she ultimately died a cruel death from complications caused by the rib fracture. The Coroner found that Ms Dhu was treated unprofessionally and inhumanely by police officers and that the actions of both police and health professionals had been affected by "underlying preconceptions" and "unfounded assumptions" about Ms Dhu as an Aboriginal person.

¹²⁹ Coroner's Court of Western Australia, *Inquest into the death of Ms Dhu (11020-14)*, 16 December 2016, [45], [239], [856]-[863]; Calla Wahlquist, "Ms Dhu death in custody inquest hears details of the last 48 hours of her life" *The Guardian* (online) 23 November 2015 available at <https://www.theguardian.com/australia-news/2015/nov/23/ms-dhu-death-in-custody-inquest-hears-details-of-the-last-48-hours-of-her-life> (accessed 19 July 2017); Robert Burton-Bradley, "Coroner: Ms Dhu's death preventable, police 'unprofessional and inhumane'" *Special Broadcasting Service* (online) 19 December 2016 available at <http://www.sbs.com.au/nitv/nitv-news/article/2016/12/16/coroner-ms-dhus-death-preventable-police-unprofessional-and-inhumane> (accessed 18 July 2017).

6.5 RACIAL PROFILING, BIASED AND DISCRIMINATORY POLICING OF ETHNIC MINORITIES (ARTS. 7, 9, 12 AND 17)

A 2015 report found that both African-Australian and Pacific Islander communities were deeply affected by racial policing in Victoria, and that young people from those communities avoided the city centre where they felt vulnerable to police harassment and assaults and did not lodge complaints for fear of police retribution.¹³⁰

This follows claims made in a 2013 court case, that young African people were two and a half times more likely to be stopped and searched by Victoria police.¹³¹ These statistics were based on expert analysis of the Victoria Police database. The case was a public interest litigation involving a claim of racial discrimination by racial profiling against several members of the Victorian Police, the Chief Commissioner of Victoria Police and the State of Victoria. The case was brought by a group of African-Australian men who claimed they were regularly stopped, assaulted and searched by police officers for no legitimate reason.¹³² The case settled on the eve of trial in 2013. In a joint statement read out in court, Victoria Police acknowledged that it had received numerous complaints of racial discrimination, including those filed by the plaintiffs.¹³³

Racially discriminatory police conduct, such as that outlined above, is contrary to articles 7, 9, 12 and 17.

Australia should:

- ensure that state and territory governments mandate human rights and anti-racism training for police officers at all levels.
- ensure that state and territory governments implement data-collection schemes to monitor and publicly report on incidences of racial profiling by police.

6.6 NO INDEPENDENT INVESTIGATIONS OF POLICE MISCONDUCT AND DEATHS

No Australian jurisdiction has established a system for independent, impartial investigation of deaths in police custody or of allegations of torture and mistreatment. Complaints against police officers are primarily investigated by other police officers, usually from the same law enforcement agency.¹³⁴ Queensland has implemented a model which more directly involves the State Coroner into deaths associated with police contact.¹³⁵ However, this remains far from being a fully impartial investigation by a body independent to the police, in line with international law standards.¹³⁶

Australia should establish an independent body for investigating complaints against police and deaths in police custody that is hierarchically, institutionally and practically independent of the police. The independent body must have features to ensure that investigations are effective, comprehensive, prompt, and transparent, subject to public scrutiny and, in the case of deaths in custody, involve the family of the deceased.

¹³⁰ Daniel Haile-Michael and Maki Issa, *The more things change, the more they stay the same*, 2015, 6, 14 available at http://www.policeraccountability.org.au/wp-content/uploads/2015/07/More-Things-Change_report_softcopy.pdf (accessed 19 July 2017). See also Bec Smith and Shane Reside, 'Boys, you wanna give me some action?' *Interventions into Policing of Racialised Communities in Melbourne*, 2009, 11-18 available at <http://smls.org.au/wp-content/uploads/2016/09/Boys-Wanna-Give-Me-Some-Action.pdf> (accessed 18 July 2017).

¹³¹ Peter Seidel and Tamar Hopkins, "No one should be stopped by police just because they're black" *The Sydney Morning Herald* (online) 19 February 2013 available at <http://www.smh.com.au/comment/no-one-should-be-stopped-by-police-just-because-theyre-black-20130218-2end5.html> (accessed 18 July 2017).

¹³² Vince Chadwick, "Victoria Police settle racial harassment case" *The Age* (online) 18 February 2013 available at <http://www.theage.com.au/victoria/victoria-police-settle-racial-harassment-case-20130218-2emfd.html> (accessed 18 July 2017).

¹³³ Anthony Kelly, "An end to racial profiling in sight" (2013) 8 *Insight* 44, 44.

¹³⁴ Office of Police Integrity, *Review of investigations of deaths associated with police contact*, June 2011, 26 available at <<http://www.ibac.vic.gov.au/docs/default-source/reviews/opi/review-of-the-investigative-process-following-a-death-associated-with-police-contact---tabled-june-2011.pdf?sfvrsn=8.pdf?sfvrsn=4>> (accessed 18 July 2017).

¹³⁵ Office of Police Integrity, *Review of investigations of deaths associated with police contact*, June 2011, 9, 26 available at <<http://www.ibac.vic.gov.au/docs/default-source/reviews/opi/review-of-the-investigative-process-following-a-death-associated-with-police-contact---tabled-june-2011.pdf?sfvrsn=8.pdf?sfvrsn=4>> (accessed 18 July 2017).

¹³⁶ Craig Longman, "Police investigators too in-house to probe deaths in custody" *The Conversation* (online) 15 April 2011 available at <<https://theconversation.com/police-investigators-too-in-house-to-probe-deaths-in-custody-838>>.

Mulrunji Doomadgee

In 2004, an Aboriginal man named Mulrunji Doomadgee died in a Palm Island police cell as a result of injuries sustained from force to his abdomen, either deliberately inflicted or accidentally suffered.¹³⁷ Mulrunji was arrested for public nuisance and died 45 minutes afterwards. In the aftermath of Mulrunji's death in custody, police officers ignored Aboriginal witnesses' testimony, conducted unnecessary and disproportionate entries and searches of property across Palm Island, deployed a disproportionately large police presence in what was "an overwhelming show of force against that community", and failed to impartially investigate Mulrunji's death.¹³⁸ In particular, the investigating officers failed to communicate with the local community members, failed to treat the arresting officer as a suspect, allowed the officer to continue to perform policing duties, and even ate dinner at his house when they first arrived on Palm Island.¹³⁹

In 2016 the Federal Court found that the Queensland Police's conduct after Mulrunji's death amounted to racial discrimination against the Palm Island Aboriginal Community.¹⁴⁰ The investigating officers "operated with a sense of impunity, impervious to the reactions of Palm Islanders, and very much with an 'us and them' attitude".¹⁴¹ Further, the court stated that "for those in command and control of particular policing activities, and for those in charge of a police investigation into the death of a person in police custody, to perform their functions differently by reference to the race of the people they are dealing with is also, in my respectful opinion, an affront to the rule of law".¹⁴²

¹³⁷ Office of State Coroner, *Inquest into the death of Mulrunji*, 14 May 2010.

¹³⁸ *Wotton v State of Queensland (No 5)* [2016] FCA 1457 [1199], available at <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1457>> (accessed 18 July 2017).

¹³⁹ *Wotton v State of Queensland (No 5)* [2016] FCA 1457 [833] – [890], available at <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1457>> (accessed 18 July 2017).

¹⁴⁰ *Wotton v State of Queensland (No 5)* [2016] FCA 1457, available at <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1457>> (accessed 18 July 2017).

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¹⁴² *Wotton v State of Queensland (No 5)* [2016] FCA 1457, [1806] available at <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1457>> (accessed 31 July 2017).

6.7 AUSTRALIA'S ROLE IN THE DEATH PENALTY ABROAD

In its 2009 Concluding Observations, the Committee recommended that Australia take the necessary steps to ensure that no person is extradited to a State where they may face the death penalty, and that Australia does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State.¹⁴³

Under the *Extradition Act 1988* (Cth) the Attorney General may not surrender a person to another country where the penalty of death might be imposed unless satisfied, on the basis of an undertaking from that country, that the person will not be tried, the death sentence will not be imposed or, if the death sentence is imposed that it won't be carried out (s 22(3)(c)).

However, Australian law does not currently prevent the Australian Federal Police (AFP) from sharing information with foreign counterparts that would lead to imposition of the death penalty abroad.

Between December 2009 and December 2014, the AFP reported more than 370 people a year to authorities in death penalty jurisdictions, placing those people at risk of execution, and raising concerns under article 6. More than 95 per cent of these referrals were reportedly for drug cases. Police continue to grant about 93 per cent or more of requests for information from police forces in death penalty countries.¹⁴⁴

Despite some improvements in the AFP's guidelines following the Bali 9 case (see case study below), there is nothing in law or the AFP's guidelines that would stop police from sharing information, prior to arrest, that might lead to the death penalty.¹⁴⁵

¹⁴³ Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Australia, 95th session, UN. Doc. CCPR/C/AU/CO/5, 7 May 2009, [20].

¹⁴⁴ See Michael Bachelard, "Death Penalty: Australian Federal Police dubs 1847 suspects", Sydney Morning Herald (online), 7 September 2015 available at <<http://www.smh.com.au/national/death-penalty-australian-federal-police-dubs-1847-suspects-20150901-gjcsar.html>>.

¹⁴⁵ Lisa Cox, "Bali Nine executions: AFP defends its role in arrests", Sydney Morning Herald (online), 4 May 2015, available at <<http://www.smh.com.au/federal-politics/political-news/bali-nine-executions-afp-defends-its-role-in-arrests-20150504-1mz88a.html>>.

CASE STUDY

The execution of Andrew Chan and Myuran Sukumaran

In April 2005, the AFP provided the Indonesian National Police (INP) with information concerning an operation to import heroin from Bali to Australia. Using that information, the INP arrested nine Australian citizens. The leaders of the group, Andrew Chan and Myuran Sukumaran, were subsequently convicted. They were executed by firing squad in April 2015.

It was foreseeable that the AFP's provision of information to the INP would lead to members of the Bali 9 facing the death penalty. It was also open to the AFP to arrest the Bali 9 when they returned to Australia and ensure that they were tried in Australian courts that would not impose the death penalty. After the men were executed, the AFP indicated that it wouldn't rule out sharing information in the same way again.

7 Detention practices for refugees and asylum seekers

(LOIPRs 12 – 15)

7.1 REFUGEE AND ASYLUM SEEKERS (ARTS. 6, 7, 9, 10, 17 AND 23)

Successive Australian Governments have implemented a range of punitive policies, practices and laws designed to deter asylum seekers arriving by boat. Many of these policies violate Australia's commitments under the ICCPR, including:

- Turning back asylum seeker boats at sea without adequate *non-refoulement* protections.
- The detention and processing of asylum seekers in harsh conditions offshore.
- Mandatory, indefinite detention of people who arrive without a visa.
- Removal of legal assistance and adequate safeguards for refugee protection claims.
- The cancellation of visas without adequate protection safeguards.
- The denial of family reunions for people who arrived by boat.

7.2 BOAT TURNBACKS AND DETENTION AT SEA (ARTS. 6 AND 7)

In 2013, the Australian Government implemented a militarised regime to prevent people arriving in Australia by boat from seeking asylum. Australian naval and customs officers are under orders to turn back boats carrying asylum seekers “when it is safe to do so”. As of April 2017, 30 boats carrying 765 people have been turned back to their country of departure.¹⁴⁶ This policy of turning back people seeking asylum without an adequate assessment of their protection claims breaches Australia's *non-refoulement* obligation in article 6 and 7.

In 2014, the Australian Government legislated for new powers to detain people at sea (both within Australian waters and on the high seas) and to transfer them to any country or a vessel of another country – even if Australia does not have that country's consent to do so. These powers can be exercised without consideration of Australia's *non-refoulement* obligations, the law of the sea or any other international obligations.¹⁴⁷ One such case involved the forced return of asylum seekers back to Vietnam, where they claimed they faced persecution, and the subsequent finding by the UNHCR that these people were refugees (see case study below).¹⁴⁸

These new powers allow the Minister of Immigration and Border Protection to hold asylum seekers in arbitrary, indefinite and potentially incommunicado detention at sea and to forcibly transfer them to countries where they could face persecution and other forms of serious harm, without any scrutiny by the public, courts or Australian Parliament. They grant a level of authority to the Minister which is well in excess of what is considered permissible under international maritime and human rights treaties.

Australia should abandon the boat turnbacks policy and amend the *Maritime Powers Act 2013* (Cth) to remove powers to detain asylum seekers and refugees on the high seas and transfer them to any country or a vessel of another country.

¹⁴⁶ Minister for Immigration and Border Protection, 'Press Conference with AVM Stephen Osborne, Commander JATF< AUStal Ship Yard, Western Australia' (Friday, 07 April 2017) <

¹⁴⁷ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload)* Act 2014.

¹⁴⁸ Shira Sebban, 'Turned back by Australia, Vietnamese recognised as refugees in Indonesia' *Sydney Morning Herald* (online) 11 June 2017 available at <<http://www.smh.com.au/world/turned-back-by-australia-vietnamese-recognised-as-refugees-in-indonesia-20170608-gwn475.html>>.

92 asylum seekers from Vietnam

In 2015, 92 asylum seekers from Vietnam were intercepted by the Australian Navy and held for over one month on vessels on the high seas.¹⁴⁹ The group were assessed through Australia's "enhanced screening procedure", which provides a very limited refugee status determination procedure. The asylum seekers state that they were not provided with an interpreter and that they only realised they were being returned when they reached port in Vietnam. Upon return, a number of the group faced 15 years jail for "illegally" leaving Vietnam and complained of being severely mistreated while in prison. Two of the families who had been returned decided again to leave Vietnam by boat due to ongoing fear of persecution. Their boat was rescued by Indonesian officials after sinking near Java, Indonesia. They were subsequently taken to UNHCR in Indonesia where they were assessed as facing persecution and were found to be refugees.

¹⁴⁹ Shira Sebban, 'Turned back by Australia, Vietnamese recognised as refugees in Indonesia' *Sydney Morning Herald* (online) 11 June 2017 available at <<http://www.smh.com.au/world/turned-back-by-australia-vietnamese-recognised-as-refugees-in-indonesia-20170608-gwn475.html>>.

Photo credit: Matthew Abbott

7.3 OFFSHORE DETENTION

Since 19 July 2013 people seeking asylum who attempt to arrive in Australia by boat are subject to offshore processing, and are ineligible to ever be resettled in Australia. Under this policy, asylum seekers are transferred to Refugee Processing Centres (RPCs) in the Republic of Nauru and PNG's Manus Island, where their claims are assessed under the laws of those countries. If they are found to be refugees, they will be settled in a country other than Australia. Currently those countries include Nauru, PNG, Cambodia and the United States. However, discussions between Prime Minister Malcolm Turnbull and President Donald Trump reveal that the United States has no obligation to take any refugees from offshore processing, only to consider their cases.¹⁵⁰

The UN Special Rapporteur, as well as the Australian Parliament, has found that Australia maintains "effective control" over these centres and is responsible for the people it sends there.¹⁵¹

As at 30 April 2017, 373 people are held in the Nauru processing centre, including 278 adult men, 50 women and 45 children.¹⁵² This group includes both refugees and people seeking asylum. A further 757 people have been found to be refugees and released into the Nauruan community. At 27 February 2017 this includes 449 men, 184 women and 124 children.¹⁵³ On Manus Island, as at 27 February 2017 839 adult men remain in the processing centre, while 57 live in the East Lorengau Refugee Transit Centre on Manus Island and 32 refugees have been resettled elsewhere in PNG.¹⁵⁴

Accommodation standards, facilities and services in the detention centres remain well below international standards. There have been consistent and alarming reports of abuse (sexual and otherwise), including of those living in the community in Nauru and of gay and lesbian people. Leaked incident reports from Nauru reveal over 2000 cases of assaults, sexual abuse, self-harm attempts, child abuse and medical incidents.¹⁵⁵ There has been one murder and seven other deaths from inadequate medical and mental health care in offshore detention centres.¹⁵⁶ Iranian asylum seeker Reza Barati was murdered while in Manus Island detention centre. Two detention centre workers contracted by the Australian Government were found guilty of his murder.¹⁵⁷ Most recently, Hamed Shamshiripour died on Manus Island, with his death likely caused by suicide. He had spent four years on Manus Island and was found to be a refugee in 2016. While the Australian Government was repeatedly made aware of his mental health issues and requests were made for him to be brought to Australia for care, the Australian Government refused to bring him to Australia.¹⁵⁸

Refugees and asylum seekers in the Manus Island detention centre have recently been forced to leave the compound, with the Australian Government implementing harsh measures to induce the men to leave, including cutting off power and water and ending cleaning and sanitation services.¹⁵⁹ The Australian Government has attempted to force people to move to the East Lorengau Refugee Transit Centre on Manus Island so that it can close the detention centre by 31 October 2017. However, many fear harm and violence directed at them by the local community if they leave the detention centre. Further, those who have been brought to Australia from offshore detention for medical procedures have now been told they will lose their income and accommodation, in an effort to pressure them to return to Nauru and Manus Island or to return to their home country.¹⁶⁰

¹⁵⁰ Greg Miller, Julia Vitkovskaya, and Reuben Fischer-Baum, "This deal will make me look terrible": Full transcripts of Trump's calls with Mexico and Australia' *Washington Post* (online) 3 August 2017 available at https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/?utm_term=.647fe0b8aca3.

¹⁵¹ Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru (24 April 2017) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/91/PDF/G1709891.pdf?OpenDocument>; Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report; Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report.

¹⁵² Department of Immigration and Border Patrol, Immigration Detention and Community Statistics Summary 30 April 2017, <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-30-april-2017.pdf> 4.

¹⁵³ Senate Estimates Hearing, 'Questions taken on notice' 27 February 2017 http://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/add_1617/DIBP/QoNs/AE17-049.pdf.

¹⁵⁴ Legal and Constitutional Affairs Legislation Committee: Senate Committee 'Estimates', Monday 27 February 2017, http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/ac9b833f-cd57-4b33-9926-9b4e27fe5733/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2017_02_27_4792_Official.pdf;fileType=application%2Fpdf#search=22committees/estimate/ac9b833f-cd57-4b33-9926-9b4e27fe5733/0000%22.

¹⁵⁵ The Guardian, 'Explore the Nauru Files' <https://www.theguardian.com/news/series/nauru-files>.

¹⁵⁶ Border Crossing Observatory, *Australian Border Deaths Database*, <http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>.

¹⁵⁷ Ben Doherty and Helen Davidson, 'Reza Barati: Men convicted of asylum seeker's murder to be free in less than four years', <https://www.theguardian.com/australia-news/2016/apr/19/reza-barati-men-convicted-of-asylum-seekers-to-be-free-in-less-than-four-years>.

¹⁵⁸ Martin MacKenzie-Murray, 'Driven to death on Manus Island', *The Saturday Paper* (online) <https://www.thesaturdaypaper.com.au/news/politics/2017/08/12/driven-death-manus-island/1502460005062>.

¹⁵⁹ Martin MacKenzie-Murray, 'Driven to death on Manus Island', *The Saturday Paper* (online) <https://www.thesaturdaypaper.com.au/news/politics/2017/08/12/driven-death-manus-island/1502460005062>.

¹⁶⁰ Richard Baker, Nick McKenzie, 'Federal government to launch crackdown on asylum seekers', *The Age* (online) 27 August 2017 available at <http://amp.theage.com.au/national/investigations/federal-government-to-launch-crackdown-on-asylum-seekers-20170826-gy4vnh.html>.

The Special Rapporteur on violence against women, its causes and consequences, in her end of mission statement delivered on 27 February 2017 repeated the Special Rapporteur on the human rights of migrants “that accounts of rape and sexual abuse of female asylum seekers and refugees by security guards, service providers, refugees and asylum seekers or by the local community, without providing a proper and independent investigation mechanism, was making life of women in the RPCs unbearable.”¹⁶¹

The Special Rapporteur on the human rights of migrants, in his report on his mission to Australia further found that “the forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards.”¹⁶²

Inadequate conditions, situations of abuse, death, arbitrary detention as well as restricted legal access for asylum seekers and refugees in offshore detention is in violation of articles 6, 7, 9 and 10.

Australia should immediately close the regional processing centres on Manus Island and Nauru, and all refugees and asylum seekers should be immediately brought to Australia.

7.4 DETENTION OF CHILDREN OFFSHORE

All asylum seekers who arrive in Australia by boat, including children, are subject to mandatory regional processing.¹⁶³ As at June 2017, 42 children were being held in a regional processing centre in the Republic of Nauru.¹⁶⁴ There have been numerous concerns raised about the conditions in Nauru including substantiated reports of physical and sexual assaults of children.¹⁶⁵ These conditions are linked to alarming rates of mental illness and self-harm among children. For example, in a 12-month period in 2013-2014, 17 children being held in Nauru engaged in self-harm.¹⁶⁶ These reports clearly indicate breaches of article 7. Further, separating children from their other family members during regional processing breaches article 17.

¹⁶¹ Dubravka Šimonović, ‘End of Mission Statement’ 27 February 2017, <http://un.org.au/files/2017/02/End-of-mission-statement-by-Dubravka-Simonovic-draft-final.docx>.

¹⁶² Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru (24 April 2017) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/91/PDF/G1709891.pdf?OpenElement>> 16.

¹⁶³ Migration Act 1956 (Cth) s 198AD.

¹⁶⁴ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (30 June 2017) <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-30-june-2017.pdf>.

¹⁶⁵ Department of Immigration and Border Protection, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (2015) 36–42.

¹⁶⁶ Department of Immigration and Border Protection, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (2015) 36.

Australia should cease processing child asylum seekers in regional processing centres and bring them to Australia immediately.

7.5 INDEFINITE MANDATORY DETENTION ONSHORE

Australia maintains a policy of indefinite mandatory immigration detention for anyone who arrives without a visa. This policy breaches articles 9 and 10. As of 30 April 2017, there are 1392 people held in closed immigration detention centres, of which 514 have been detained for over one year and 314 for greater than two years.¹⁶⁷ The Committee has repeatedly held that Australia’s policy of mandatory detention is in violation of the ICCPR.¹⁶⁸ Despite these findings, these cases have not been remedied by Australia.

Despite the existence of a legislative principle that the detention of minors is to be of last resort, this does not override the legislative requirement to detain a person who does not have valid visa.¹⁶⁹ Consequently, there is no impediment to the detention of children.

Laws introduced in 2015 have seen the use of restraints rapidly increase,¹⁷⁰ with Department of Immigration and Border Protection figures showing that in 2014-15 there were 2,386 incidents of use of force while in 2015-16 this number rose to 8,637 incidents of use of force.¹⁷¹

¹⁶⁷ Australian Government Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (30 April 2017) <<https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-30-april-2017.pdf>>.

¹⁶⁸ *Human Rights Committee Views Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) (“A v Australia”); *Human Rights Committee Views Communication No 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) (“Baban v Australia”); *Human Rights Committee Views Communication No 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (“C v Australia”); *Human Rights Committee Views Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013) (“FKAG et al v Australia”); *Human Rights Committee Views Communication No 1442/2005*, 97th sess, UN Doc CCPR/C/97/D/1442/2005 (23 November 2009) (“Kwok v Australia”); *Human Rights Committee Views Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013) (“MMM et al v Australia”); *Human Rights Committee Views Communication No 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) (“Shafiq v Australia”) (HRC, 2006); *Human Rights Committee Views Communication Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (11 September 2007) (“Shams et al v Australia”).

¹⁶⁹ Migration Act 1958 (Cth) s 4AA.

¹⁷⁰ Migration Amendment (Regional Processing Arrangements) Act 2015 (Cth) inserted s 198AH into the Migration Act 1958 (Cth) which provides the Commonwealth with the power to take any ‘action’ in relation to regional processing centres. The term ‘action’ is defined in s 198AH to include ‘exercising restraint over the liberty of a person’.

¹⁷¹ Senate, Legal and Constitutional Affairs Legislation Committee, *Senate Estimates – Immigration and Protection Portfolio*, (27 February 2017) 141 available at <http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/ac9b833f-cd57-4b33-9926-9b4e27fe5733/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2017_02_27_4792_Official.pdf;fileType=aapplication%2Fpdf#search=%22committees/estimate/ac9b833f-cd57-4b33-9926-9b4e27fe5733/0000%22>.

Australia should:

- repeal the mandatory detention provisions in the *Migration Act 1958* (Cth).
- codify that asylum seekers should be detained only as a last resort and for the shortest possible time. Children should never be detained for immigration purposes, in line with article 24 and best interest of the child obligations.
- stipulate in law maximum time limits on immigration detention.
- introduce a system of periodic judicial review of all decisions to detain.

7.6 INDEFINITE DETENTION UNDER ADVERSE ASIO ASSESSMENTS

There are also approximately 10 people being held indefinitely in Australian detention centres.¹⁷² These people have been found to be refugees facing persecution, yet due to an adverse security assessment by ASIO, Australia's security agency, they have not been granted a visa. As they do not have a visa and cannot be returned, they face life in indefinite detention, despite no criminal conviction.¹⁷³ These decisions are not reviewable,¹⁷⁴ and ASIO may withhold information from the refugee in question if the Director-General feels its inclusion would be contrary national security interests,¹⁷⁵ meaning the subject of the decision may never know why they have been denied a visa or have the opportunity to challenge the assessment.

The Committee has found that Australia's treatment of this group of people violates articles 7 and 9.¹⁷⁶ Despite this decision, Australia has not released these refugees.

Australia should ensure that all people subject to its jurisdiction have access to merits and judicial review of adverse security assessments.

7.7 ASYLUM APPLICATION PROCESSING (ARTS. 7, 9, 10 AND 12)

Australia has introduced a "fast track" refugee status determination process for asylum seekers who arrived by boat after 12 August 2012 who were not taken to Nauru or Papua New Guinea for offshore processing. This group face a very limited and inadequate review process, presenting serious concerns that people with credible fears of harm may be returned.

This cohort has been in Australia for years, waiting for the Minister of Immigration to exercise his powers to allow them to apply for a visa. On 21 May 2017, the Minister arbitrarily imposed a deadline of 1 October 2017 for all asylum claims from this group to be submitted. Those who fail to submit by this deadline will be prevented from making a claim and will face detention and deportation. This deadline will mean that many will have to submit incomplete and inadequate claims because they are unable to access refugee legal centres that provide free legal assistance. These legal centres are stretched beyond capacity due to significant funding cuts by the Australian Government, with most legal services losing over 80 per cent of their funding. Without legal support asylum seekers are required to complete arduous application forms in English without any knowledge about Australia's asylum processes or support in recalling traumatic experiences.

Australia should remove the arbitrary 1 October 2017 deadline, and fund refugee legal assistance services to provide free legal assistance and interpreters to assist this group to submit their claims for protection.

¹⁷² Daniel Flitton, 'Australia slammed for locking up refugees on ASIO advice' *The Sydney Morning Herald* (online) 16 May 2016 available at <http://www.smh.com.au/national/australia-slammed-for-locking-up-refugees-on-secret-asio-advice-20160515-govuwc.html> (accessed 30 August 2017).

¹⁷³ UNSW Sydney, Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet - Refugees with an adverse security assessment by ASIO*, (23 May 2016) available at <<http://www.kaldorcentre.unsw.edu.au/publication/refugees-adverse-security-assessment-asio>> (accessed 1 September).

¹⁷⁴ *Migration Act 1958* (Cth) s 411(1)(c).

¹⁷⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) s 37(2)(a).

¹⁷⁶ Human Rights Committee, *Views: Communication No 2233/2013*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (18 April 2016) 17 [11].

7.8 REMOVAL ON CHARACTER GROUNDS (ARTS. 7, 9, 10, 12, 13, 17 AND 23)

Legislative amendments to section 501 of the *Migration Act 1958* in December 2014 significantly broadened grounds on which an individual can fail a character test and therefore be subject to removal or deportation. The Minister for Immigration has the broad, discretionary power to cancel a person's visa (temporary or permanent) on the basis of character issues. A person who is reasonably suspected of posing any risk to the Australian community can be subject to visa cancellation. The UN Special Rapporteur on the Human Rights of Migrants has expressed concern about the breadth of these powers.¹⁷⁷ They place people from refugee backgrounds at risk of *refoulement* or prolonged indefinite immigration detention, in breach of articles 7, 9, 10 and 12. There have been cases of young former refugees from South Sudan who have had their visa cancelled and have been deported back to South Sudan.¹⁷⁸ The use of visa cancellations and deportations highlights grave concerns regarding Australia's *non-refoulement* obligations, with legal centres highlighting the impact these laws are having on young people and concerns about racism.¹⁷⁹

Visa cancellations raise concerns under article 13 given the lack of procedural fairness provided under the visa cancellation process. Visa cancellation may also violate articles 17 and 23 if a person is deported and unable to maintain a relationship with their family.

Australia should repeal the 2014 amendments to the Migration Act to limit visa cancellation powers under section 501.

7.9 FAMILIES KEPT APART (ART. 17)

Refugees who arrived in Australia by boat and have yet to achieve citizenship have virtually no opportunities for family reunion. While they can be technically eligible to apply to sponsor family members in some situations, they are considered the “lowest processing priority” meaning that their applications have very little chances of success. In addition, Temporary Protection Visa (TPV) and Safe Haven Enterprise Visa (SHEV) holders are not permitted to sponsor family members under any program. These policies violate Australia's obligations under article 17. Further, there are significant delays for people from refugee backgrounds in obtaining citizenship.

Family separation has a severe impact on refugee communities in Australia, with many service providers highlighting mental health concerns and the social and economic impact of separation. As people cannot travel back overseas, many are left without any prospect of being reunited with their family. Case studies reported to the Refugee Council of Australia detail cases where people have attempted suicide after being told they are not able to reunite with their family, while others have reported depression, anxiety and the impact these issues have on a person's ability to settle in Australia.¹⁸⁰

Australia should:

- **allow refugees who arrived by boat, including TPV and SHEV holders, to sponsor family members.**
- **allocate at least 5000 visas under the family stream of the Migration Program for refugee and humanitarian entrants, and introduce needs-based concessions under this stream to make family visas more accessible.**

¹⁷⁷ Francois Crepeau, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, A/HRC/35/25/Add.3.

¹⁷⁸ Emily Woods, 'Police and Border Force to deport 'a number' of Apex gang members' *The Age* (online) 19 January 2017 available at <http://www.theage.com.au/victoria/police-and-border-force-to-deport-a-number-of-apex-gang-members-20170118-gtu7f6.html> (accessed 31 August 2017).

¹⁷⁹ Tammy Mills, 'Deporting Apex gang members 'inherently racist', legal groups say' *The Age* (online) 28 April 2016 available at <http://www.theage.com.au/victoria/deporting-apex-gang-members-inherently-racist-legal-groups-say-20160428-gogte6.html> (accessed 31 August 2017).

¹⁸⁰ Refugee Council of Australia, *Report - Addressing the Pain of Separation for Refugee Families*, November 2016 available at <http://www.refugeecouncil.org.au/wp-content/uploads/2016/11/RCOA-Report-Family-Reunion-11-16-WEB.pdf> (accessed 31 August 2017).

8

Elimination of slavery and servitude

(LOIPR 16)

The Australian Government has demonstrated a strong commitment to the elimination of human trafficking and slavery. We welcome the passage in 2013 of a law that created federal offences of servitude, forced labour and forced marriage under the *Criminal Code Act 1995* (Cth),¹⁸¹ and to protect witnesses.¹⁸² These amendments have enhanced legislative frameworks addressing human trafficking and slavery in Australia.

8.1 EXPLOITATION IN AUSTRALIA (ART. 8)

Labour exploitation in a wide range of industries and the emerging issue of forced marriage represent the fastest growing areas of human trafficking and slavery identified in Australia, breaching obligations under article 8. The 2012 UN Special Rapporteur on trafficking in persons' report on Australia noted that of the 325 investigations and assessment of allegations undertaken by the Australian Federal Police between January 2004 and March 2012 under Australia's anti-trafficking program, "the large majority of cases, victims were found to be working in the sex industry. However, a growing number of cases of other forms of trafficking, including for forced and exploitative labour, [were] emerging".¹⁸³ A recent government report has raised serious concerns about conditions of work in a range of industries, particularly agriculture, hospitality and construction, as well as the exploitation of victims in intimate relationships, including in the context of domestic work.¹⁸⁴ Increasing reports of temporary migrants and migrant workers' vulnerability to exploitation have focussed attention on the precarious employment circumstances of this vulnerable group.

¹⁸¹ *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth).

¹⁸² *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013* (Cth).

¹⁸³ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, addendum: Mission to Australia*, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 3 [5].

¹⁸⁴ *Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016* (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 20; See for example the underpayment of workers at 7-Elevens throughout Australia, exposed in a joint investigation between Four Corners and Fairfax Media in 2015.

Recent data has indicated that temporary workers with restrictive visa conditions are particularly vulnerable to exploitation.¹⁸⁵ This is especially the case where work and migration status is linked to a specific visa. Other compounding factors include geographical or social isolation, financial stress or coercive or deceptive recruitment practices. There is a need to raise awareness among frontline agencies about the barriers to identifying victims. These barriers include fear of law enforcement, fear of traffickers and victims' lack of awareness about their rights and entitlements in Australia.

Australia should:

- **implement preventative monitoring of temporary visa programs, continuous training of frontline officers, and the development of a system to streamline referrals to the Support for Trafficked People Program to prevent the exploitation of migrant workers.**
- **ensure the Fair Work Ombudsman and support services are properly resourced.**
- **amend visa conditions to ensure that victims of exploitation have the opportunity to find other work, free from the threat of deportation for breach of visa conditions, which acts as a disincentive to reporting exploitative employers and labour hire companies.**

8.2 VISAS AND PARTICIPATION IN CRIMINAL JUSTICE PROCESS (ART. 2)

A government-funded Support for Trafficked People Program (STPP) provides support to people who have been subjected to trafficking, slavery and slavery-like practices who meet eligibility criteria.

Once a suspected victim of human trafficking, slavery or slavery-like practices has been identified by the Australian Federal Police, they are eligible for the grant of a Bridging Visa F and may be referred to the government-funded STPP for case work support. This support is limited, usually up to 45 days, unless the victim agrees to assist the police. The AFP is currently the only source of referrals to the program. While further government support is available to survivors, this is contingent on the victim's participation in the criminal justice process. Participation in a police investigation is also required for victims to be eligible for a permanent Referred Stay visa. These requirements were described by the Special Rapporteur on trafficking in persons as a significant barrier which should be removed, as it places an additional burden on victims of human trafficking and slavery, and fails to recognise their status as victims and survivors.¹⁸⁶ Moreover, a 2017 report prepared by the Joint Parliamentary Committee on Law Enforcement made recommendations that access to the support program be de-linked from compliance with criminal investigations.¹⁸⁷

Australia should ensure that visa eligibility and access to the STPP are assessed on a case-by-case basis, taking into consideration compelling and compassionate circumstances and Australia's *non-refoulement* obligations.

¹⁸⁵ See Hannah Andreovski, Jacqueline Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: An Indonesian case study' (2013) 451 Trends and Issues in crime and criminal justice, 2-4, <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi451.pdf>.

¹⁸⁶ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Joy Ngozi Ezeilo, addendum: Mission to Australia, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 16 [53].

¹⁸⁷ Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on Law Enforcement, *An inquiry into human trafficking, slavery and slavery-like practices*, July 2017, [2.104]-[2.118].

8.3 REPARATION FOR VICTIMS OF HUMAN TRAFFICKING AND SLAVERY (ART. 2)

Reparation orders under section 21B of the *Crimes Act 1914* (Cth) and state and territory victims of crime compensation schemes are insufficient to provide an effective remedy for victims, breaching article 2(3). Very few cases relating to human trafficking and slavery have proceeded to prosecution.¹⁸⁸ Reparations orders are discretionary and depend on the capacity of the offender to make financial reparations.¹⁸⁹

We are not aware of any instance in which reparation orders have been made for the benefit of a victim. Civil action is unrealistic in almost all cases of human trafficking and slavery. Further, existing state and territory compensation schemes are vastly different, and do not provide consistent assistance to victims of human trafficking and slavery, which are federal crimes in Australia.

Australia should establish a national victims of crime compensation scheme to fulfil Australia's obligations under article 2(3), as recommended by the UN Special Rapporteur on trafficking in persons, especially women and children.¹⁹⁰

8.4 FORCED MARRIAGE (ARTS. 3, 8, 23 AND 24)

Victims of forced marriage in Australia, many of whom are children, have had their rights violated under articles 3, 8, 23(3), and 24. In the 2015-16 financial year alone, the AFP received 69 referrals to investigate forced marriage matters, representing approximately 41 per cent of all referrals for matters involving human trafficking, slavery and slavery-like practices.¹⁹¹ However, there have been few prosecutions for forced marriage in Australia, which could be attributed to a reluctance from victims to engage in the criminal justice process, particularly where perpetrators are family members.¹⁹² Other avenues available to protect children and young people who are forced into a marriage include the child protection legislation and civil or family law frameworks.

Australia should:

- collect reliable statistics on forced marriage to clarify the extent of the problem, so that adequate resources can be allocated.
- implement a civil law statutory framework creating protective orders for adults and young people at risk of forced marriage.
- develop coordinated child protection legislation across all Australian jurisdictions, to provide clear grounds for protection agencies at the state and territory level to intervene on behalf of children at risk of forced marriage.

8.5 MODERN SLAVERY ACT

In 2017, the focus has shifted to the issue of human trafficking and slavery in supply chains, and the role of the private sector in identifying and addressing these human rights abuses.¹⁹³ Australian businesses directly or indirectly facilitate human trafficking and slavery through the supply chains of goods and services, in violation of article 8.¹⁹⁴

Australia should:

- enact legislation in the form of a Modern Slavery Act, including robust sanctions and penalties, to ensure that Australian entities, including public bodies, are not engaging in behaviour which violates Australia's obligations under article 8 or its obligations under the United Nations Guiding Principles on Business and Human Rights.
- lead by example and implement procurement policies and training to eliminate forced labour and other serious human rights abuses from the supply chains of procured goods and services.
- establish an Independent Anti-Slavery Commissioner to ensure the highest level of compliance with Australia's obligations under the ICCPR in relation to human trafficking and slavery, through the provision of high-level oversight, monitoring and the review of individual complaints.
- ratify the Protocol to the Forced Labour Convention.
- implement a National Action Plan on Business and Human Rights.

¹⁸⁸ 'Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 27. Two people have pleaded guilty to the offence of causing a person to enter into servitude since the release of this report.

¹⁸⁹ Law Council of Australia, Submission to the Attorney-General's Department, *Consultation on the Criminal Justice Response to Slavery and People Trafficking: Reparation and Vulnerable Witness Protections*, 3 March 2011, [107]–[109].

¹⁹⁰ Joy Ngozi Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Joy Ngozi Ezeilo, addendum: *Mission to Australia*, UN Doc A/HRC/20/18/Add.1 (18 May 2012) 16 [64].

¹⁹¹ Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 1.

¹⁹² See Case Study 2, Trafficking In Persons: The Australian Government Response 1 July 2015 – 30 June 2016' (Eighth Report Of The Interdepartmental Committee On Human Trafficking And Slavery, Commonwealth of Australia, 2016) 37.

¹⁹³ See the Australian Parliament's *Inquiry into establishing a Modern Slavery Act in Australia*.

¹⁹⁴ See eg, Outsourced to North Korea; How a foreign supply chain went through China to Pyongyang', *The Wall Street Journal* (online) 23 February 2016 <<https://www.wsj.com/articles/outsourced-to-north-korea-1456185838>>; ABC, 'Slaving Away: The dirty secrets behind Australia's fresh food', *Four Corners*, 4 May 2015 (Caro Meldrum-Hanna and Ali Russell) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm#transcript>>.



9

Aboriginal and Torres Strait Islander incarceration

(LOIPRs 17 – 19)

Aboriginal and Torres Strait Islander people are grossly overrepresented at all stages of the criminal justice process. The national imprisonment rate for Aboriginal and Torres Strait Islander adults is 13 times higher than that for non-Indigenous adults.¹⁹⁵ Whilst Aboriginal and Torres Strait Islander people make up only 2 percent of the national population, they account for 27 percent of the national prison population.¹⁹⁶

¹⁹⁵ Australian Bureau of Statistics, 2016, *Prisoners in Australia*, 2016, cat. no. 4517.0 (8 December 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Imprisonment%20rates~12>.

¹⁹⁶ Australian Bureau of Statistics, 2016, *Corrective Services, Australia, December quarter 2016*, cat. no. 4512.0 (16 March 2017) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/EA5D95B5A3E4F302CA258138001761A1?opendocument>.

9.1 INDIGENOUS WOMEN

As at 30 June 2016, Aboriginal and Torres Strait Islander women made up 34 per cent of the female adult prison population but only 2 per cent of Australia's female adult population.¹⁹⁷ The Special Rapporteur on contemporary forms of racism and racial discrimination, xenophobia and related intolerance highlighted in his 2017 report on his mission to Australia that "the incarceration rate of indigenous women is on the rise and they are the most overrepresented population in prison".¹⁹⁸

The rates at which Aboriginal and Torres Strait Islander women are imprisoned by governments has increased at more than twice the rate of Aboriginal and Torres Strait Islander men since 2000.¹⁹⁹ Around 80 per cent are mothers and up to 90 per cent are victim/survivors of family and/or sexual violence.²⁰⁰ Many women in the justice system care for their own children, the children of others and members of extended family and community. As such, imprisoning Aboriginal and Torres Strait Islander women has a devastating impact on families and communities and increases the risk of their children entering child protection and youth justice systems, in which they are already over-represented.²⁰¹

Australia should invest in Aboriginal and Torres Strait Islander-led programs designed specifically for Aboriginal and Torres Strait Islander women, with the aim of reducing over-representation in the criminal justice system.

9.2 RELATIONS WITH POLICE

Poor relations between Aboriginal and Torres Strait Islander people and police have been known for years. In 1991 the Royal Commission into Aboriginal Deaths in Custody documented discriminatory police attitudes, including stereotyping, constant surveillance, over-policing, unnecessary use of arrest powers, rough and discourteous behaviour and failings to investigate grievances against fellow officers.²⁰² These concerns remain relevant for Aboriginal and Torres Strait Islander people today. This year an Australian Law Reform Commission (ALRC) discussion paper noted the impact police responses have upon the rate of imprisonment of Aboriginal and Torres Strait Islander people.²⁰³ The relationship between Aboriginal and Torres Strait Islander people and police must urgently be addressed to ensure that entrenched racism in the police force does not continue to result in increasing the rates of incarceration of Aboriginal and Torres Strait Islander people.

Australia should implement the recommendation of the Royal Commission that "[police services] take all possible steps to eliminate violence or rough treatment or verbal abuse...and use of racist or offensive language" when dealing with Aboriginal and Torres Strait Islander people.

9.3 MANDATORY SENTENCING (ARTS. 2, 9, 10, 14, 24 AND 26)

Mandatory sentencing exists in many Australian jurisdictions.²⁰⁴ The practice of mandatory sentencing prevents a court from taking into account the individual circumstances of the offender and the offence during sentencing, often leading to harsh, unjust outcomes. In addition, minimum mandatory sentences disrupt employment opportunities and family connections, further disrupting the offender's opportunity of rehabilitation.

¹⁹⁷ Australian Bureau of Statistics, *Prisoners in Australia, 2016* (8 December 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0-2016-Main%20Features-Imprisonment%20rates-12>.

¹⁹⁸ Mutuma Ruteere, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia*, UN Doc A/HRC/35/41/Add.2 (9 June 2017) 45.

¹⁹⁹ Productivity Commission, *Overcoming Indigenous Disadvantage* (2016).

²⁰⁰ Human Rights Law Centre and Change the Record, *Over-represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-imprisonment* (2017) 13, 17.

²⁰¹ Human Rights Law Centre and Change the Record, 'Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment' (May, 2017) 5.

²⁰² Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 1, 1; vol 2, 226 [13.5.6], 229 [13.5.18]; vol 2, 220 [13.4.50].

²⁰³ Australian Law Reform Commission, Discussion Paper: Incarceration rates of Aboriginal and Torres Strait Islander People, DP 84, July 2017, pg 107.

²⁰⁴ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014, pg 8: "Jurisdictions vary as to the kind of offences that attract a mandatory sentence. For instance, mandatory sentencing applies in Western Australia (WA) for repeat adult and juvenile offenders convicted of residential burglary, grievous bodily harm or serious assault to a police officer; the Northern Territory (NT) for murder, rape and offences involving violence; New South Wales (NSW) for murder of a police officer or the offence of assault by intentionally hitting a person causing death, if committed by an adult when intoxicated (the 'one punch' assaults while intoxicated offence); Queensland for certain child sex offences, murder, and motorcycle gang members who assault police officers or are found in possession or trafficking in firearms or drugs; South Australia (SA) for certain serious and organised crime offences and serious violent offences; Victoria for actions of intentional or reckless gross violence; and the Commonwealth for certain people smuggling offences."

Mandatory sentencing practices are of particular concern in the Northern Territory and Western Australia where the discriminatory impact on Aboriginal and Torres Strait Islander people is most apparent. In the Northern Territory there is mandatory sentencing for second or subsequent breaches of a domestic violence orders and drug offences, violent offences and certain aggravated property offences²⁰⁵ and in Western Australia mandatory sentencing applies to home burglary, assaulting a public officer and certain driving offences.²⁰⁶ These two jurisdictions also have the highest rates of Indigenous incarceration. Further, data reported by the Australian Bureau of Statistics in 2013 noted that the most common offences for Aboriginal and Torres Strait Islander people to be charged with were acts intended to cause injury, unlawful entry with intent and robbery, extortion and related offences - all of which are mandatory sentencing offences.²⁰⁷ The notion of mandatory sentencing regimes disproportionately affecting Aboriginal and Torres Strait Islander people is not new. As reported by the Law Council of Australia “under the 1997 mandatory sentencing regime in the Northern Territory, Indigenous adults were approximately 8.6 times as likely as non-Indigenous adults to receive a mandatory prison term”.²⁰⁸

Mandatory sentencing laws that apply to children further marginalise Aboriginal and Torres Strait Islander children in contact with the justice system. For example, in Western Australia, from 2000–2005 approximately 87 per cent of all children sentenced under the mandatory sentencing laws for home burglary were Aboriginal and Torres Strait Islander children. The President of the Children’s Court observed that on 15 May 2012, there were 93 juvenile sentenced detainees in Western Australia. Of these, almost 40 per cent had been sentenced under the mandatory sentencing laws for home burglary.²⁰⁹

In 2014 the UN Committee against Torture recognised the disproportionate impact that Australia’s mandatory sentencing laws have on Aboriginal and Torres Strait Islander peoples and called for the Australian Government to review them “with a view to abolishing them”.²¹⁰

Australia should repeal mandatory sentencing regimes that adversely affect Aboriginal and Torres Strait Islander people.

9.4 PRISON FOR FINE DEFAULTS (ART. 9)

Imprisonment for fine default is a particular concern in Western Australia. In 2014, Ms Dhu died in custody in Western Australia after being taken in for unpaid fines (see section 6.4). In 2016 the Aboriginal Legal Service of Western Australia (ALSWA) noted the vast discrepancy between the more than 1000 people imprisoned each year in that state exclusively for fine default, and the dozens or fewer in NSW and Victoria.²¹¹ ALSWA noted that the cost of keeping a fine defaulter in prison was estimated at between \$345 and \$770 per day, whereas unpaid fines are only “cut out” at a rate of \$250 per day.²¹²

Imprisoning people for fine default is an inappropriate and unjust form of detention that violates the rights articulated under article 9.1.

Rather than enforcing punitive consequences to fine default, there must be efforts and resources invested in addressing the underlying factors that have resulted in the inability to pay fines and those that led to the imposition of fines in the first instance. For example, a positive alternative developed in New South Wales is the “Work and Development Order (WDO) Scheme”. The WDO Scheme allows people who cannot pay fines because of vulnerabilities, such as homelessness, mental illness, disability or acute economic hardship, to undertake voluntary work, health treatment, education or training, financial counselling or a mentoring program as an alternative to punitive enforcement of fines. Critically, these activities can address the causes of offending and the breach of an order does not result in the further enforcement of penalties.

Courts will often impose fines out of necessity, in the absence of rehabilitation and diversion programmes. The failure to allocate sufficient resources to rehabilitation and diversion services to address the root causes of offending behaviour must be addressed in order to avoid an increase in the incarceration of Aboriginal and Torres Strait Islander people.

Australia should implement work and development order schemes based on the NSW model of individualised assessment for vulnerable and disadvantaged fine defaulters in all Australian jurisdictions. The schemes should ensure that additional penalties are not imposed for a breach of an order.

²⁰⁵ See further Aggravated property offences: Sentencing Act s78B, Violent offences - Sentencing Act, Part 3, Division 6A, Sexual offences - Sentencing Act, Part 3, Division 6B, Second and subsequent drug offence - Misuse of Drugs Act s 37(2) - (5), Second and subsequent offence under the Domestic and Family Violence Act s 121(2) and s 122(2).

²⁰⁶ S 53AE of the *Juvenile Justice Act 1983*; 2013 the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*; Criminal Code Amendment Act 2009 (WA).

²⁰⁷ Australian Bureau of Statistics, *Prisoners in Australia*, 2013 Report, 5 December 2013.

²⁰⁸ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014 [116].

²⁰⁹ Judge Dennis Reynolds, *Youth Justice in Western Australia – Contemporary Issues and its future direction*, (University of Notre Dame, 13 May 2014) 19.

²¹⁰ United Nations Committee against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia* (2014) [12].

²¹¹ Aboriginal Legal Service of Western Australia, *Addressing fine default by vulnerable and disadvantaged persons: Briefing Paper*, August 2016, 3.

²¹² Aboriginal Legal Service of Western Australia, *Addressing fine default by vulnerable and disadvantaged persons: Briefing Paper*, August 2016, 3-4.

9.5 HEALTH CARE

Aboriginal and Torres Strait Islander people in the criminal justice system, experience high levels of mental illness and psychosocial distress.²¹³ High rates of depressive episodes, anxiety and post-traumatic stress disorder were recently observed among Aboriginal and Torres Strait Islander people in prison.²¹⁴ In one study, Aboriginal and Torres Strait Islander detainees reported receiving unclear information about their medications and less than a third reported custodial assuagement of their psychological distress.²¹⁵

Aboriginal and Torres Strait Islander people in detention commonly experience inadequate and culturally inappropriate health and wellbeing services.²¹⁶ This may be attributed to a number of factors including a lack of culturally responsive service provision, poor clinician-patient cross-cultural communication, a mistrust of Western clinicians/medicine and an inability to accommodate Aboriginal and Torres Strait Islander models of health.²¹⁷

Australia should ensure:

- **greater utilisation of Aboriginal and Torres Strait Islander Community Controlled Health Organisations in prison health service delivery.**
- **that non-Indigenous health staff receive cultural training to ensure complex and unique needs of Aboriginal and Torres Strait Islander detainees are acknowledged, in line with the Royal Commission of Aboriginal Deaths in Custody's recommendation 154.**
- **that prison medical services liaise with Aboriginal health services to ensure appropriate cultural training for non-Indigenous prison medical staff.**
- **that Aboriginal Liaison Officers and Aboriginal Wellbeing Officers be mandatory in all prison facilities.**

9.6 DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM (ART. 10)

Article 10.3 notes that the essential aim of the penitentiary system should be reformation and social rehabilitation. Currently there are not enough culturally appropriate diversion options for Aboriginal and Torres Strait Islander people, particularly in rural and remote areas, that provide alternatives to the formal criminal justice system to prevent incarceration and support rehabilitation.

Diversion options must be made widely available in all jurisdictions, tailored to the specific needs of Aboriginal and Torres Strait Islander women, men and children, and their use should be encouraged within the police services. The range of offences for which diversion is available should also be widened. In particular, we support the development of mental health courts and drug and alcohol courts where the causes of the offending behaviour are identified and addressed through treatment and support services while the person is monitored by the court.²¹⁸

Further, additional resources must be directed toward place-based rehabilitation strategies and programs that have been developed by the community, including the development of Aboriginal and Torres Strait Islander specific courts. Culture is a key protective factor that supports families and communities. Aboriginal and Torres Strait Islander culture and community control is essential and community-led strategies can ensure culturally safe and adaptive responses.

Australia should increase investment in options to divert Aboriginal and Torres Strait Islander offenders from the formal criminal justice system to prevent incarceration.

9.7 JUSTICE TARGETS

The disproportionately high rates of imprisonment and violence experienced by Aboriginal and Torres Strait Islander people is a national crisis.

²¹³ Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal Peoples* (October 2010); James Ogloff et al, *Koori Prisoner Health and Cognitive Function Study* (Victorian Department of Justice, 2013).

²¹⁴ Edward Heffernan, Kimina Andersen, Abhilash Dev, Stuart Kinner, 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons' (2012) 197(1) *Medical Journal of Australia* 37.

²¹⁵ Stephane Shepherd, James Ogloff and Stuart Thomas, 'Are Australian prisons meeting the needs of Indigenous offenders?' (2016) 4:13 *Health and Justice* 6.

²¹⁶ Halacas, C & Adams, K (2015), *Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care for Aboriginal People*, Victorian Aboriginal Community Controlled Health Organisation, Collingwood, 9.

²¹⁷ Stephane Shepherd, James Ogloff and Stuart Thomas, 'Are Australian prisons meeting the needs of Indigenous offenders?' (2016) 4:13 *Health & Justice* 6.

²¹⁸ National Aboriginal & Torres Strait Islanders Legal Services, Submission No 34 to Senate Standing Committee on Community Affairs, *Submission to the Senate Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia*, April 2016 [29].

Currently the Council of Australian Governments' (COAG) Closing the Gap Strategy articulates the commitment of all levels of government to address Aboriginal and Torres Strait Islander disadvantage across eight areas, including health, schooling and justice. However, the area dedicated to justice is the only area that is not accompanied by any specific, measurable targets. This is a clear gap in the failure to acknowledge the root causes of growing rates of Aboriginal and Torres Strait Islander incarceration. National justice targets, which are aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander people come into contact with the criminal justice system, should include targets to reduce incarceration and violence rates, as well as child removal and disability. It is pertinent that the development of justice targets should involve the development of sub-targets that focus on the importance of resourcing Aboriginal and Torres Strait Islander community controlled organisations, whom deliver front line services that would assist in meeting an identified justice target (article 1.1). These targets should be developed with genuine collaboration between Aboriginal and Torres Strait Islander community controlled organisations and government and should be adopted as the part of the refresh of the Closing the Gap framework and must be committed to by all federal, state and territory governments.²¹⁹

Australia should adopt national justice targets to end the disproportionate rates of over-imprisonment and violence experienced by Aboriginal and Torres Strait Islander peoples.

9.8 INDIGENOUS DESIGNED AND LED SOLUTIONS (ART. 1)

It is critical that Australia's First Peoples are properly represented at the national level to ensure meaningful engagement with government, industry and the non-government sectors (article 1.1).

For the last quarter century numerous reports have repeatedly emphasised the importance of Aboriginal and Torres Strait Islander people having a genuine say in decisions which have a direct impact on their lives and communities.²²⁰ However, there is still a lack of genuine collaboration and meaningful engagement by government with Aboriginal and Torres Strait Islander peoples and organisations.

This year marks the ten-year anniversary of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). As such, this is an important time for government to reflect upon the implementation of UNDRIP in domestic law and policy.

It is essential that governments emphasise and build on Aboriginal and Torres Strait Islander individual, family and community strengths. The prioritisation of self-determination and community-led strategies will ultimately ensure the development of culturally safe and effective responses to addressing complexities underlying social and political disadvantages suffered by Aboriginal and Torres Strait Islander people.

9.9 THE REDFERN STATEMENT

Led by the National Congress of Australia's First Peoples and launched in 2016, by peak sectoral Aboriginal and Torres Strait Islander community controlled organisations, with the support of non-Indigenous organisations, the Redfern Statement exists as a blueprint to address the disadvantage and inequality faced by Aboriginal and Torres Strait Islander people today in the areas of health, disability, housing, child development, safety and wellbeing, justice and family violence.²²¹ The statement highlights the importance of community led solutions and self-determination in addressing health, disability, housing, child development, safety and wellbeing, justice and family violence issues affecting Aboriginal and Torres Strait Islander people, communities and organisations. The statement details a call for meaningful engagement by government, industry and the non-government sectors with Aboriginal and Torres Strait Islander people, communities and community controlled organisations.

Australia should prioritise the implementation of the recommendations from the Redfern Statement.

²¹⁹ NATSILS & NFVPLS Communique, Redfern Statement Family Violence and Justice Workshop [not publicly available on 31 July 2017].

²²⁰ Human Rights and Equal Opportunity Commission, *Bringing Them Home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), 23 <<https://www.humanrights.gov.au/publications/bringing-them-home-report-1997>>; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011), 282-283.

²²¹ Aboriginal Peak Bodies, 'The Redfern Statement' (Policy Submission, ANTaR, 9 June 2016).

9.10 ACCESS TO JUSTICE FOR INDIGENOUS PEOPLE

Aboriginal and Torres Strait Islander peoples come into contact with the justice system at much higher levels than the rest of the Australian population in relation to some legal matters, whilst also having significant levels of unmet legal need.²²² From significantly higher rates of imprisonment and involvement with child protection systems²²³ to vast unmet need for civil and family law services, access to justice directly impacts upon Aboriginal and Torres Strait Islander peoples' physical, emotional and social wellbeing.

Aboriginal and Torres Strait Islander people face vast unmet legal need.²²⁴ A lack of adequate funding for civil and family law services is a major issue that prevents people from accessing the help they need to address issues, like family violence, before they escalate. For example, an inability to access legal help at an early stage can mean a mother cannot access legal assistance about steps that can be taken to prevent a public housing eviction or address intimate partner violence until a child has been through the traumatic experience of being taken into child protection because of those issues.

The Productivity Commission has found that the "inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system".²²⁵

9.11 ACCESS TO APPROPRIATE LEGAL AND WELFARE CHECKS WHILE IN CUSTODY

The Royal Commission into Aboriginal Deaths in Custody recommended that Aboriginal Legal Services be notified upon the arrest or detention of any Aboriginal person.²²⁶

Custody Notification Services are an initiative designed to ensure appropriate access to legal assistance services for Aboriginal and Torres Strait Islander people at the first point of contact with the justice system. Aboriginal and Torres Strait Islander people should receive legal advice in a culturally sensitive manner at the earliest possible opportunity, in order to prevent persons being detained from acquiescing to police demands in a manner which could jeopardise subsequent court proceedings.

Further, notification requirements provide an opportunity for an Aboriginal or Torres Strait Islander person being detained to receive a culturally sensitive welfare check and assurance, that where medical attention may be required, it is provided with immediacy.

Custody notification systems operate variably across Australian states and territory. The death of Ms Dhu in WA police custody in 2014 highlights the need for such schemes to be uniform across Australia (see section 9.4 for case study). Despite repeatedly asking for help, Ms Dhu died of an infection flowing from a fractured rib – an injury sustained as a result of family violence. Being unable to pay fines saw her locked up and treated inhumanely by police officers before dying in their care. Had a resourced and effective CNS been in place in Western Australia in 2014, Ms Dhu may have had a lawyer to advocate for her welfare and her death may have been prevented.²²⁷

Australia should:

- **in consultation with Aboriginal and Torres Strait Islander Legal Services, introduce custody notification laws that make it mandatory for the police to notify Aboriginal and Torres Strait Islander Legal Services of any Aboriginal and Torres Strait Islander person taken into custody.**
- **resource Aboriginal and Torres Strait Islander Legal Services to respond to notifications with legal and welfare checks.**

222 For more on this issue see the publications of the Indigenous Legal Needs Project: <https://www.jcu.edu.au/indigenous-legal-needs-project>.

223 In 2014, Aboriginal and Torres Strait Islander children were 9.2 times more likely to be in out of home care than their non-Indigenous peers. Child Family Community Australia, CFCA Resource Sheet: Child protection and Aboriginal and Torres Strait Islander children (Australian Institute of Family Studies, September 2015).

224 Productivity Commission, Access to Justice Arrangements, Inquiry report, Volume 2.

225 Productivity Commission, Access to Justice Arrangements, Inquiry report, Volume 2, 784.

226 Recommendation 224 of the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) states: "...in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than such arrests or detentions for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required."

227 The introduction of a custody notification scheme modelled on the NSW scheme was called for by the Aboriginal Legal Services of WA and recommended for consideration by the WA Government during the Inquest into the death of Ms Dhu: R V C Fogliani, Western Australia State Coroner, *Record of Investigation into Death of Ms Dhu* (15 December 2016) 144 [841]-[844], recommendation 10.

9.12 RESOURCING ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES (ARTS. 1 AND 14)

The eight Aboriginal and Torres Strait Islander Legal Services (ATSILS) which were set up in line with the principle of self-determination (article 1.1), along with the network of the Aboriginal Family Violence Prevention Legal Services (FVPLSs) are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander community controlled legal services (i.e. ATSILS and FVPLSs) are the preferred providers for Aboriginal and Torres Strait Islander peoples.

ATSILS provide a unique legal service that recognises and responds to cultural factors that may influence and/or affect a client. The demand for ATSILS services continues to grow, with particularly high demand in the areas of: criminal services, including casework and advice matters; civil services, especially in the areas of tenancy and police complaints; child protection and family law services; and representation to defendants of Domestic Violence Orders, which the ATSILS are not currently funded to provide except for in very limited circumstances.

Despite the critical need and rising demand for ATSILS services, the amount of real funding provided to the ATSILS has been declining since 2013, while the cost of providing services has risen.

In the 2017-18 Federal Budget the government restored funding to ATSILS of \$16.7 million over the forward estimates. However, after 2020, ATSILS will be subject to funding cuts as a result of the Government's 2013 ongoing savings measure. These cuts will have a major impact on highly vulnerable Aboriginal and Torres Strait Islander peoples and impact upon the ability of ATSILS to deliver services that ensure Aboriginal and Torres Strait Islander people are equal before the law and have access to a fair trial (article 14.1).

FVPLSs provide culturally safe and holistic, specialist legal and non-legal support for Aboriginal and Torres Strait Islander victims/survivors of family violence, predominantly women and their children. FVPLSs are chronically underfunded and routinely face funding uncertainty, unable to meet the extremely high levels of unmet need. Commonwealth funding for FVPLSs has remained at 2013-14 levels, with no government commitment to increase funding. There has also been no commitment to apply a CPI increase over this funding period, equating to a cumulative loss of approximately \$9.7 million.

Furthermore, FVPLSs funding is limited to certain identified rural and remote locations, leaving significant geographical areas and communities without access to culturally safe and specialist family violence supports. FVPLSs need increased, secure and long term (i.e. 5 yearly) funding to adequately support Aboriginal and Torres Strait Islander victim/survivors of family violence. The reinstatement of a stand-alone National FVPLS Program is also essential to ensure security of funding, national coverage of services and capacity to address unmet need for Aboriginal and Torres Strait Islander victim/survivors of family violence.

Australia should adequately and sustainably fund Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services to meet existing demand for services, address unmet legal need regardless of geographic location and to develop models of holistic support and case management.

9.13 ACCESS TO INTERPRETERS

At present there is a growing unmet need for highly trained interpreters in numerous Aboriginal and Torres Strait Islander languages.²²⁸ At the time of European settlement there were over 250 Aboriginal and Torres Strait Islander languages spoken throughout Australia, with recent estimates putting the current number of Indigenous languages spoken nationwide at around 120.²²⁹ For many Aboriginal and Torres Strait Islander people English is not a first, second or third language.

The provision of interpreters is crucial to ensure access to justice for Aboriginal and Torres Strait Islander people, particularly those who do not speak English as a first, second or third language and are unfamiliar with police investigations and court procedures (article 14.3(f)).

Poor communication at a person's first point of contact with the criminal justice system can have enormous implications. When language and communication difficulties go undetected, particular actions can be mistaken for indications of guilt during police interviews or in the court room. Alternatively, poor communication may result in a defendant having no comprehension of the proceedings taking place before them. This is particularly common where interpreters are used in complicated court proceedings where interpreters may lack the necessary skills or level of experience required to adequately interpret for our clients.

Australia should provide Aboriginal and Torres Strait Islander language interpreters nationally.

²²⁸ Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report Volume 2*, 5 September 2014, 761 available at <<http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf>>.

²²⁹ Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australian Languages*; <http://aiatsis.gov.au/explore/articles/indigenous-australian-languages>.

N²³⁰

N is charged with several serious driving offences, including driving under suspension. He is deaf, and does not know sign language. N has significant difficulties explaining himself and will often nod during conversations, which leads to people to believe he is replying “yes”, when, in fact, he does not understand. He has a very limited and idiosyncratic form of sign language. Every now and then he does something that resembles signing.

N is not able to communicate with his lawyer. An AUSLAN interpreter has been utilised, but because N cannot sign, he is not able to convey instructions to his lawyer of any complexity. N’s lawyer sought to arrange a Warlpiri finger talker through the Aboriginal Interpreter Service, but the interpreter concerned was not willing or able to come to court.

N is currently on bail, but has spent significant periods on remand at Darwin Correctional Centre. His charges are yet to be finally determined, and an application for a stay of proceedings is pending. N is effectively trapped in the criminal justice system. He cannot plead guilty or not guilty because he is not able to communicate with his lawyer and provide instructions. He had previously been granted bail, but after failing to attend court as required, his bail was revoked. Significantly, his inability to convey information (or to understand what his lawyer was trying to tell him) in relation to his charges has also been highly problematic in relation to bail. For example, when he was explaining to his lawyer with the assistance of the AUSLAN interpreter where he was to reside, both the interpreter and lawyer understood N to be referring to a particular community. It was only when the interpreter was driving N home, with N giving directions on how to get there, that it was discovered that he was actually referring to a different community altogether.

²³⁰ The following case study was provided by North Australian Aboriginal Justice Agency to the Senate Community Affairs References Committee 2010 Inquiry into Hearing Health in Australia and was included in the Committee’s final report.

10

Prison conditions

(LOIPRs 17 – 19)

10.1 OVERCROWDING

Prisons in Australia are increasingly overcrowded. In 2015-16 the prison occupancy rate across Australia was at 111.4 per cent of design capacity.²³¹ In Western Australia, at least three prisons were operating at over 170 per cent of their design capacity at 30 June 2016, with no major capacity building projects in the pipeline.²³² Overcrowding is particularly an issue in women's prisons.²³³ In the Northern Territory, an Alice Springs prison built to house 25 women has at times accommodated over 70 women, while the Darwin Correctional Precinct has recently reported a female population almost double its capacity.²³⁴

The extent of the overcrowding is resulting in unsuitable prisoner accommodation, poor service provision and an escalation of violence and self-harm.²³⁵ Prison operators are managing the overcrowding by doubling up (or in some cases tripling up) prisoners in a cell, where one prisoner sleeps on a mattress on the floor with their head close to an exposed toilet.²³⁶ This raises serious concerns about privacy, dignity and hygiene.²³⁷

In 2016, the Queensland Coroner found that prison overcrowding had contributed to the death of 22 year old man Leonard Gordon, who was murdered just two days before his release.²³⁸ Mr Gordon was jailed for a minor offence and his death could have been prevented if he had been accommodated "where he was not exposed to other inmates with a propensity for violence".²³⁹ The lack of separate prison facilities for women in the Darwin Correctional Precinct meant that in 2015 a female prisoner came into contact with a man who had sexually assaulted her in the past, who was another prisoner within the facility.²⁴⁰

Australia should ensure state and territory governments take significant and immediate action to improve the living conditions of prisoners in Australia, increase the supply of prison accommodation, access to rehabilitation and treatment services and invest in strategies that will wind back the growth in prisoner numbers.

10.2 SOLITARY CONFINEMENT

Prison operators in Australia are putting inmates in prolonged solitary confinement, in breach of article 7. In 2014, a news outlet reported that around 228 adult prisoners across Victoria, Queensland, South Australia and Tasmania were in some form of solitary confinement, either in high-security or management units or on a "separation regime".²⁴¹ However, as solitary confinement is not regulated and the number of prisoners held in solitary confinement is not reported or released in any systematic way, the extent of the problem is difficult to quantify.²⁴²

²³¹ Australian Government Productivity Commission, *Report on Government Services 2017*, 7 February 2017, Chapter 8: Corrective services, 8.15 available at <http://www.pc.gov.au/research/ongoing/report-on-government-services> (accessed 24 July 2017).

²³² Office of the Inspector of Custodial Services Government of Western Australia, *Western Australia's Prison Capacity*, December 2016, 6 available at <http://www.oics.wa.gov.au/wp-content/uploads/2016/12/Prison-Capacity-Review-Final.pdf> (accessed 31 July 2017).

²³³ Felicity James, "Separate NT women's prisons needed to address 'appalling' conditions: lawyer" *Australian Broadcasting Company News* (online) 11 March 2017 available at <http://www.abc.net.au/news/2017-03-10/separate-nt-womens-prisons-needed-to-address-overcrowding/8344672> (accessed 31 July 2016).

²³⁴ Keith Hamburger, Alan Ferris, John Hocken, Lee Downes, Therese Ellis-Smith, Neil McAllister, *A safer Northern Territory through correctional interventions: Report of the review of the Northern Territory Department of Correctional Services*, BDO, Perth/Knowledge, 31 July 2016, 109, available at <http://apo.org.au/system/files/70848/apo-nid70848-53506.pdf> (accessed 31 July 2017).

²³⁵ F8 Information for the OHCHR on human rights, pg 4; Queensland Ombudsman, *Overcrowding at Brisbane Women's Correctional Centre: An investigation into the action taken by Queensland Corrective Services in response to overcrowding at Brisbane Women's Correction Centre*, September 2016, i.

²³⁶ Queensland Ombudsman, *Overcrowding at Brisbane Women's Correctional Centre: An investigation into the action taken by Queensland Corrective Services in response to overcrowding at Brisbane Women's Correction Centre*, September 2016, vii.

²³⁷ Queensland Ombudsman, *Overcrowding at Brisbane Women's Correctional Centre: An investigation into the action taken by Queensland Corrective Services in response to overcrowding at Brisbane Women's Correction Centre*, September 2016, vii; Office of the Inspector of Custodial Services Government of Western Australia, *Western Australia's Prison Capacity*, December 2016, i available at <http://www.oics.wa.gov.au/wp-content/uploads/2016/12/Prison-Capacity-Review-Final.pdf> (accessed 31 July 2017); Office of the Inspector of Custodial Services Government of Western Australia, *Report of an Announced Inspection of Bandyup Women's Prison*, October 2014, vi available at <http://www.oics.wa.gov.au/wp-content/uploads/2014/12/93-Bandyup.pdf> (accessed 31 July 2017).

²³⁸ Dominic Cansdale, "Prison overcrowding leading to increasing tensions between inmates, says former guard" *Australian Broadcasting Company News* (online) 12 August 2016 available at <http://www.abc.net.au/news/2016-08-12/former-guard-raises-concerns-about-overcrowding-in-prisons/7720426> (accessed 31 July 2017).

²³⁹ Coroners Court of Queensland, *Inquest into the death of Leonard Raymond Gordon*, 28 February 2017, 14 available at http://www.courts.qld.gov.au/_data/assets/pdf_file/0014/511070/cif-gordon-lr-20170228.pdf (accessed 31 July 2017).

²⁴⁰ Stephanie Zillman, "Female prisoner in Darwin was taunted by her rapist while they were both inmates" *Australian Broadcast Corporation News* (online) 16 June 2017 available at <http://www.abc.net.au/news/2017-06-14/woman-at-darwin-prison-taunted-by-her-rapist-while-both-inmates/8610894> (accessed 31 July 2017).

²⁴¹ Gina McKeon, "Life on the inside: how solitary confinement affects mental health" *Australian Broadcasting Corporation News* (online) 9 October 2014 available at <http://www.abc.net.au/news/2014-10-08/solitary-confinement-mental-health/5789062?pfmredir=sm> (accessed 31 July 2017).

²⁴² Gina McKeon, "Life on the inside: how solitary confinement affects mental health" *Australian Broadcasting Corporation News* (online) 9 October 2014 available at <http://www.abc.net.au/news/2014-10-08/solitary-confinement-mental-health/5789062?pfmredir=sm> (accessed 31 July 2017).

In 2013 a judge reduced the sentences of three men found guilty of contempt on the basis that they would be subjected to “extremely harsh” extended periods of solitary confinement as members of Queensland Criminal Motorcycle Gangs.²⁴³ The use of solitary confinement to manage prisoners with mental health issues is concerning and contrary to article 7. In 2011, a woman who required mental health care was instead handcuffed to her bed for around 22 hours a day for eight months,²⁴⁴ while in 2009 a man was held in solitary confinement in a maximum security cell for 23 hours a day for more than four years.²⁴⁵

Australia should:

- ensure state and territory governments review and amend current legislation and internal policies governing the use of solitary confinement. The laws should prohibit prolonged solitary confinement and ensure that solitary confinement is only used as a last resort, for the shortest time possible and with safeguards around its authorisation and review.
- ensure state and territory governments mandate that prison operators record and disclose how many people are in solitary confinement and for how long.

10.3 ROUTINE STRIP SEARCHES

Prison operators in Australia are conducting routine strip searches against female inmates. These practices are unreasonable and disproportionate to prison security concerns,²⁴⁶ risk re-traumatising female prisoners who have often experienced sexual violence prior to their imprisonment,²⁴⁷ and are contrary to articles 7, 10, and 17. In one female prison in Queensland, staff implemented a strip searching practice in June 2013 which applied to prisoners receiving certain medication.²⁴⁸ The prisoners affected were strip searched before and after each dosage of medication, with some prisoners being subjected to 6 searches a day and up to 1,000 searches

over the 10 month period.²⁴⁹ An independent investigative report found the “intrusive, blanket and ongoing nature of the S8 strip search practice would likely have impacted upon prisoners’ dignity without justification in the circumstances”.²⁵⁰ Further, the lack of government oversight over such practices was unreasonable.²⁵¹

Australia should end the practice of routine strip searches in women’s prisons and only use strip searches with reasonable suspicion and as a measure of last resort.

10.4 MENTAL HEALTH CARE IN PRISONS

In 2015 almost half of prison entrants reported having a mental health disorder and more than 1 in 4 reported that they were currently on medication for a mental health disorder.²⁵² Prison operators are failing to provide adequate mental health care to prisoners, with sometimes fatal consequences, for example:²⁵³

- A man who suffered serious injuries after jumping off a landing in 2010 had earlier made frequent requests to continue receiving medication for schizophrenia and depression, but “was not provided with any medication to address these issues” nor any psychological or counselling services.²⁵⁴
- A 20 year old Aboriginal man who committed suicide in prison in 2013 had not seen a psychiatrist for seven months before his death, despite his history of ongoing psychotic symptoms. The Coroner described his mental health care as “inadequate” and mental health treatment across Western Australian prisons as “under resourced and underfunded”.²⁵⁵
- A judge in Victoria described mental health services for prisoners as “totally under-resourced” during a hearing in 2017 which featured testimony that there was a six-month waiting list for the state’s high-security psychiatric hospital.²⁵⁶

²⁴³ *Callanan v Attendee X* [2013] QSC 340, [49]; *Callanan v Attendee Y* [2013] QSC 341, [49]; *Callanan v Attendee Z* [2013] QSC 342, [47].

²⁴⁴ Ombudsman SA, *Final Report: Department for Correctional Services*, May 2013, 17 available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/Correctional-Services-2013.pdf> (accessed 31 July 2017).

²⁴⁵ Ombudsman SA, *Complaint by a prisoner – Final Report*, 9 April 2014, [39]–[40]; Miles Kemp, “State Ombudsman lashes prisons department for 4-year detention of US mental health patient Jason Fox” *The Advertiser* (online) 3 May 2014 available at <http://www.adelaidenow.com.au/news/south-australia/state-ombudsman-lashes-prisons-department-for-4-year-detention-of-us-mental-health-patient-jason-fox/news-story/5ca737d61a70d3859a811bfba643331> (accessed 31 July 2017).

²⁴⁶ Queensland Ombudsman, *The Strip Searching of Female Prisoners Report: An investigation into the strip search practices at Townsville Women’s Correctional Centre*, September 2014, IX.

²⁴⁷ Australian Institute of Family Studies, *Addressing Women’s Victimisation Histories in Custodial Settings* (Commonwealth Government, 2012); K P Moloney et al, “Women in Prison: The Central Issue of Gender Characteristics and Trauma History” (2009) 123 *Public Health* 426; Holly Johnson, “Drugs and Crime: A Study of Incarcerated Female Offenders” (Research and Public Policy Series No 63, Australian Institute of Criminology, 2004).

²⁴⁸ Queensland Ombudsman, *The Strip Searching of Female Prisoners Report: An investigation into the strip search practices at Townsville Women’s Correctional Centre*, September 2014, XI.

²⁴⁹ Queensland Ombudsman, *The Strip Searching of Female Prisoners Report: An investigation into the strip search practices at Townsville Women’s Correctional Centre*, September 2014, 5.

²⁵⁰ Queensland Ombudsman, *The Strip Searching of Female Prisoners Report: An investigation into the strip search practices at Townsville Women’s Correctional Centre*, September 2014, 17.

²⁵¹ Queensland Ombudsman, *The Strip Searching of Female Prisoners Report: An investigation into the strip search practices at Townsville Women’s Correctional Centre*, September 2014, IX.

²⁵² Australian Institute of Health and Welfare, *The health of Australia’s prisoners 2015*, 2015, xi–xii available at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129553682> (accessed 31 July 2017).

²⁵³ Greg Barns, “How we are failing mentally ill prisoners” *Crikey* (online) 31 May 2017 available at <https://www.crikey.com.au/2017/05/31/shayne-mace-suicide-attempt-shows-how-prisons-are-failing-the-mentally-ill/> (accessed at 31 July 2017).

²⁵⁴ *AAI Limited t/as Vero Insurance v GEO Group Australia Pty Limited* [2017] NSWCA 110, [8]–[9].

²⁵⁵ Coroner’s Court of Western Australia, *Inquest into the death of Jayden Stafford Bennell*, 28 February 2017, 49 available at http://www.coronerscourt.wa.gov.au/1/inquest_into_the_death_of_jayden_stafford_bennell.aspx?uid=1223-9325-7138-4479 (accessed 31 July 2017).

²⁵⁶ Emma Younger, “Court criticises ‘under-resourced’ system as man who killed mother waits for psychiatric bed” *Australian Broadcasting Corporation News* (online) 28 June 2017 available at <http://www.abc.net.au/news/2017-06-28/mental-health-services-for-vic-prisoners-totally-under-resourced/8659488> (accessed on 31 July 2017).

In some instances, the lack of beds in psychiatric hospitals is resulting in mental health patients being held in solitary confinement in maximum security prison cells for 22-23 hours a day, with little to no mental health treatment.²⁵⁷

Australia should take immediate action to improve the mental health services for prisoners in Australia and to increase the capacity of high-security psychiatric hospitals and community based alternatives.

10.5 INDEFINITE DETENTION OF PEOPLE WITH INTELLECTUAL, COGNITIVE OR PSYCHOSOCIAL DISABILITY (ARTS. 2, 9, 10 AND 14)

Certain legislative schemes that provide a mechanism for courts to determine whether a person is “unfit to be tried” or is “not guilty at law” can result in persons with an intellectual, cognitive disability or psychosocial disability being indefinitely detained in prisons or psychiatric facilities without conviction,²⁵⁸ breaching articles 2, 9, 10 and 14. In numerous cases, people are being detained for a longer period than if they had been convicted.²⁵⁹

The use of preventative detention is exacerbated by a lack of appropriate community-based housing and therapeutic and disability support options. In detention, people with disability are vulnerable to punitive treatment and practices, such as chemical and mechanical restraints and solitary confinement. In prisons this results in unconvicted people with disability being detained with convicted prisoners in breach of article 10(2)(a).

Indefinite detention in prisons and psychiatric facilities is disproportionately experienced by Aboriginal and Torres Strait Islander people with cognitive disability.²⁶⁰ Anecdotal figures suggest that there are at least 100 people detained across Australia without conviction under fitness to be tried legislation.²⁶¹ At least 50 people from this group are Aboriginal and Torres Strait Islander.²⁶²

The Australian Government’s voluntary commitment to improve the way the criminal justice system treats people with disability is welcome,²⁶³ but there has been little public information on what tangible outcomes have been achieved from the cross-jurisdictional working group established to implement this commitment.²⁶⁴ The Australian Government has also not responded to comprehensive, national inquiries and recommendations for law, policy and program reform to address this situation including the introduction of limiting terms combined with regular reviews of detention orders.²⁶⁵

Australia should establish uniform national legislation, in line with international human rights law, to facilitate due legal process to end indefinite detention of people with disability. This should include measures for culturally appropriate administrative and disability support frameworks that enable people with disability to receive adequate community based treatment, rehabilitation and support.

²⁵⁷ See Ombudsman SA, *Final Report: Department for Correctional Services*, May 2013, 17 available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/Correctional-Services-2013.pdf> (accessed 31 July 2017); Ombudsman SA, *Complaint by a prisoner – Final Report*, 9 April 2014, [39]–[40]; Miles Kemp, “State Ombudsman lashes prisons department for 4-year detention of US mental health patient Jason Fox” *The Advertiser* (online) 3 May 2014 available at <http://www.adelaidenow.com.au/news/south-australia/state-ombudsman-lashes-prisons-department-for-4-year-detention-of-us-mental-health-patient-jason-fox/news-story/5ca737d61a70d3859a811bfbc643331> (accessed 31 July 2017).

²⁵⁸ *Criminal Code Act 1996* (NT) s 432C; *Mental Health Act 2016* (Qld) ch 12 pts 3–4; *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 15–18, 24, 26 (Tasmania first requires a qualified finding of guilt); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27(1); *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16, 33.

²⁵⁹ Australian Human Rights Commission, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, Submission to the Senate Community Affairs References Committee, March 2016, 4 available at https://www.humanrights.gov.au/sites/default/files/AHRC_Submission_on_indefinite_detention2016.pdf (accessed 31 July 2017).

²⁶⁰ First Peoples Disability Justice Consortium, *Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment*, April 2016, First Peoples Disability Network http://fpdn.org.au/wp-content/uploads/2016/10/FPDN-Senate-Inquiry-Indefinite-Detention-Submission_Final.pdf

²⁶¹ Sotiri, M, McGee, P, & Baldry, E (2012) *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*. Sydney: University of NSW.

²⁶² Sotiri, M, McGee, P, & Baldry, E (2012) *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*. Sydney: University of NSW. See also Eileen Baldry, Ruth McCausland, Leanne Dowse, Elizabeth McEntyre, *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*, UNSW, October 2015, 104, available at https://www.mhdc.unsw.edu.au/sites/www.mhdc.unsw.edu.au/files/un8/pdf/a_predictable_and_preventable_path_2nov15.pdf (accessed 31 July 2017).

²⁶³ ‘Universal Periodic Review - Australia’s opening statement’, delivered to the UPR Working Group for Australia’s second UPR, 9 November 2015, <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx>

²⁶⁴ Committee on Economic, Social and Cultural Rights, ‘List of issues in relation to the fifth periodic report of Australia, Addendum, Replies of Australia to the list of issues, 61st session, UN Doc E/C.12/AUS/Q/5/Add.1, 29 May–23 June 2017, [133] – [134].

²⁶⁵ Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws’, ALRC Report 124, Commonwealth of Australia, (2014) rec 7-2; Australian Human Rights Commission, ‘Equal before the law – Towards Disability Justice Strategies’, February 2014; Community Affairs References Committee, ‘Indefinite Detention of people with cognitive and psychiatric impairment in Australia’, Commonwealth of Australia, 2016.

Aboriginal men in indefinite detention in the NT ²⁶⁶

The Australian Human Rights Commission (the **Commission**) reviewed the status of three Aboriginal men found unfit to be tried and held under indefinite detention in the Northern Territory;²⁶⁷ and found that:

- the men had been held in a maximum security prison in Alice Springs because no suitable places for forensic patients existed at the time;
- one of the men had been in detention for six years, despite the maximum penalty of the crime he was accused of committing being 12 months imprisonment under regular criminal processes;
- another of the men had been in detention for over four years, despite a maximum criminal penalty of 12 months imprisonment; and
- the third man had also been in detention for over four years, and remained so at the time of the Commission's reporting date.²⁶⁸

In relation to one, Mr KA, the Commission noted that it appeared he "has been subject to the most severe treatment while in prison, including frequent use of physical, mechanical and chemical restraints, seclusion, and shackles when outside his cell".

The Commission reported that: "[i]n November 2013, Mr KA's guardian wrote to responsible officials at ASCC and noted that there had been three incidents in the previous week of behaviour which caused harm to Mr KA and distress to those working around him, and which resulted in him being belted into a restraint chair and chemically restrained. Mr KA's guardian said that this was the sixteenth time that Mr KA had engaged in behaviour of a nature which injured him, caused prison officials to belt him into a restraint chair and inject him with tranquilizers, and resulted in him spending at least one hour and sometimes two hours in this kind of restraint."

The Commission found that the conditions of detention faced by Mr KA amounted to cruel, inhuman or degrading treatment contrary to article 7 of the ICCPR, and article 15 of the Disability Convention.

²⁶⁶ KA, KB, KC and KD v Commonwealth of Australia [2014] AusHRC 80, [108]. This summary is from Australian Human Rights Commission, 'Submission to the Senate Community Affairs References Committee Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia', March 2016, <http://www.humanrights.gov.au/submissions/indefinite-detention-people-cognitive-and-psychiatric-impairment-australia#fn175>.

²⁶⁷ Australian Human Rights Commission, KA, KB, KC and KD v Commonwealth of Australia [2014] AusHRC 80: Report into Arbitrary Detention, Inhumane Conditions of Detention and the Right of People with Disabilities to Live in the Community with Choices Equal to Others (2014).

²⁶⁸ Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 35–6.

10.6 PREVENTATIVE DETENTION OF PEOPLE WHO HAVE SERVED THEIR SENTENCES (ART. 9)

All Australian jurisdictions except for the Australian Capital Territory allow for preventative detention of people convicted of serious sexual or violent offences, on the basis of considerations including, safety of the community, and whether any less restrictive order could ameliorate the risk. Australia's use of preventative detention has been expanding in recent years. These regimes allow orders for continuing detention on the expiration of sentences for crimes committed, and infringe article 9.²⁶⁹

Federally, "continuing detention orders" (CDOs) can be made concerning someone who has been convicted of specified terrorism offences. If, at the time of their release, someone who had been convicted of a specified national security crime is considered to pose an "unacceptable risk" of committing a serious terrorism offence, they can be subjected to continuing detention.²⁷⁰ The kinds of offences that these CDOs can be made for include many non-violent crimes, such as being a member of a terrorist organisation, recklessly providing funds to a terrorist organisation or possessing a thing that is connected with preparing for an unspecified terrorist act.²⁷¹

These orders can be renewed an indefinite number of times, giving rise to a risk of indefinite preventive detention. They were considered by this Committee in 2010, prior to the introduction of the federal CDO regime. The Committee considered the detention to be arbitrary, in breach of article 9.²⁷²

Australia should:

- ensure that all detention fully complies with article 9 obligations, as detailed in General Comment 35, paragraph 21.
- repeal or amend laws allowing extension of detention at the expiration of the sentence ordered at conviction.

²⁶⁹ As noted by this Committee: "If a prisoner has fully served the sentence imposed at the time of conviction, Articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention"; Human Rights Committee, General Comment 35, CCPR/C/GC/35, [21].

²⁷⁰ A serious offence is defined as an offence for which the maximum sentence is seven years or more: *Criminal Code Act 1995* (Cth), div 105A.

²⁷¹ *Criminal Code Act 1995* (Cth), ss102.3, 102.6, 101.4.

²⁷² Human Rights Committee, 98th session (2010), *Fardon v Australia: Views Communication No. 1629/2007*, CCPR/C/98/D/1629/2007, [8]. For analysis of the legislation, see Australian Lawyers Alliance, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016: Submission to the Parliamentary Joint Committee on Intelligence and Security* (October 2016), <https://www.lawyersalliance.com.au/documents/item/695>, especially [9], [18]–[21], [27]–[31], [37]. See also submissions by the Law Council of Australia (submission No. 4) and Dr Rebecca Ananian-Welsh, Dr Nicola McGrath, Dr Tamara Tulich and Professor George Williams (Submission No. 6) to the Parliamentary Joint committee on Intelligence and Security's inquiry into this Bill: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTBill/Submissions.

11

Rights of children

(LOIPR 20)



11.1 CITIZENSHIP FOR REFUGEE CHILDREN (ART. 24)

Children born in Australia to non-resident parents do not acquire Australian citizenship by birth,²⁷³ meaning that children who are born to asylum seekers in Australia may be stateless.²⁷⁴ There is a legislative provision for the conferral of Australian citizenship on children who are otherwise stateless,²⁷⁵ but this sets a high standard of proof and evidence suggests it is rarely exercised.²⁷⁶ This breaches article 24(3).

Australia should exercise its obligations to confer citizenship to stateless children under section 21(8) of the Australian Citizenship Act 2007 (Cth).

11.2 TREATMENT OF CHILDREN IN JUVENILE JUSTICE SYSTEM (ARTS. 7, 10, 14 AND 24)

Youth detention services are failing to protect the rights of children across Australia. The last five years have seen a number of reports from children's commissioners' offices,²⁷⁷ independent inspectors,²⁷⁸ media,²⁷⁹ and civil society,²⁸⁰ all highlighting significant and widespread issues in management and practices within youth detention systems. These include:

- the improper use of isolation and segregation (including one report of isolation of up to 45 days);²⁸¹
- extensive use of lockdowns due to staff shortages;²⁸²

- inappropriate and unsafe use of restraint;²⁸³
- widespread deficiencies in staff training and over-reliance on inexperienced casual staff;²⁸⁴
- inadequate facilities, including reports of rusty toilets, mouldy showers, and insufficient air conditioning;²⁸⁵
- incompetent centre management;²⁸⁶
- insufficient or inadequate programs or interventions to assist children in detention including programs with sufficient intensity to change the behaviour of high risk offenders;²⁸⁷ and
- poor collection of data, monitoring, and oversight.²⁸⁸

These reports suggest the existence of cruel, inhuman or degrading treatment, in breach of article 7. They also suggest the use of practices that could amount to treatment that is inconsistent with the humanity and inherent dignity of detained persons and the rehabilitative aims of detention under article 10.

Australia should:

- **ensure that the national preventative mechanisms to be established implement the OPCAT in Australia include standardised and effective national, independent safeguards to defend the rights of children in detention. These mechanisms should be consistent with international standards, including the United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (The Havana Rules) and the United Nations Standard Minimum Rules for the Administration of Justice 1985 (The Beijing Rules). They should reflect the key tenets of these standards, including best interests of the child, rehabilitation as the purpose of juvenile justice, and prohibition of corporal punishment. The mechanisms should promote understanding of the rights of children and send a clear, consistent public message about the need to respect, promote and fulfil these rights.**
- **work cooperatively with state and territory governments through COAG to fully implement the recommendations to be made by the Royal Commission into the Protection and Detention of Children in the Northern Territory both in the Northern Territory and in other jurisdictions where relevant.**

²⁷³ Australian Citizenship Act 2007 (Cth) s 12.

²⁷⁴ Mary Anne Kenney and Mary Crock, 'Migrant and Non-Citizen Children' in Lisa Young, Mary Anne Kenney and Geoffrey Monahan (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2017) 263, 278.

²⁷⁵ Australian Citizenship Act 2007 (Cth) s 21(8).

²⁷⁶ Mary Anne Kenney and Mary Crock, 'Migrant and Non-Citizen Children' in Lisa Young, Mary Anne Kenney and Geoffrey Monahan (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2017) 263, 278; Refugee Council of Australia, *Delays in Citizenship Applications for Permanent Refugee Visa Holders* (October 2015) <<http://www.refugeecouncil.org.au/wp-content/uploads/2015/10/1510-Citizenship-Delays-for-Permanent-Refugees.pdf>>.

²⁷⁷ See eg National Children's Commissioner, Megan Mitchel, *Children's Rights Report 2016*, Australian Human Rights Commission (2016) https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf; Victorian Ombudsman *Investigation into conditions at the Melbourne Youth Justice Precinct*, October 2010 <<https://www.ombudsman.vic.gov.au/getattachment/47eb3cod-36fb-4b5b-b7fb-d584c03ca46f>>; Office of the Children's Commissioner, Northern Territory, *Own initiative investigation report – Services provided by the Department of Correctional Services at the Don Dale Youth Detention Centre* August 2015, Victorian Commission for Children and Young People *The same for walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, 2017; Kathryn McMillan QC and Professor Megan Davis, *Independent Review of Youth Detention Report (Queensland)*, 2016, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report*, <<https://childdetentionnt.royalcommission.gov.au/about-us/Documents/RCNT-Interim-report.pdf>>, 31 March 2017.

²⁷⁸ See eg Office of the Inspector of Custodial Services, Government of Western Australia, *Behaviour Management Practices at Banksia Hill Detention Centre* (June 2017) <<http://www.oics.wa.gov.au/wp-content/uploads/2017/07/Full-report.pdf>>.

²⁷⁹ See eg Author unknown, 'Queensland youth detention: Independent review ordered by Attorney-General Yvette D'Ath', *ABC News*, 19 August 2016 <<http://www.abc.net.au/news/2016-08-19/queensland-youth-detention-centres-independent-review-ordered/7767580>> and Sarah Gerathy, 'Juvenile Justice: NSW to review youth detention centres amid detainee isolation claims', *ABC News*, 27 October 2016 <<http://www.abc.net.au/news/2016-10-27/nsw-to-review-juvenile-detention-centres/7970194>>.

²⁸⁰ See eg Australian Child Rights Taskforce, *CRC25 Australian Child Rights Progress Report* (2016) <<http://www.unicef.org.au/Upload/UNICEF/Media/Documents/CRC25-Australian-Progress-Report.pdf>>.

²⁸¹ Victorian Commission for Children and Young People *The same for walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, 2017, p.14.

²⁸² Victorian Commission for Children and Young People *The same for walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, 2017, p.17.

²⁸³ Office of the Children's Commissioner, Northern Territory, *Own initiative investigation report – Services provided by the Department of Correctional Services at the Don Dale Youth Detention Centre* August 2015 ('2015 Children's Commissioner Report'), p.29.

²⁸⁴ National Children's Commissioner, Megan Mitchel, *Children's Rights Report 2016*, Australian Human Rights Commission (2016) https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf 165.

²⁸⁵ National Children's Commissioner, Megan Mitchel, *Children's Rights Report 2016*, Australian Human Rights Commission (2016) https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf 166.

²⁸⁶ Office of the Inspector of Custodial Services, Government of Western Australia, *Behaviour Management Practices at Banksia Hill Detention Centre: Inspector's Overview* (June 2017) <http://www.oics.wa.gov.au/wp-content/uploads/2017/07/Inspectors-Overview.pdf> 1; Michael Vita, *Review of the Northern Territory Youth Detention System Report* (January 2015) <https://www.nt.gov.au/_data/assets/pdf_file/0004/238198/Review-of-the-Northern-Territory-Youth-Detention-System-January-2015.pdf> 11.

²⁸⁷ Michael Vita, *Review of the Northern Territory Youth Detention System Report* (January 2015), 11 <https://www.nt.gov.au/_data/assets/pdf_file/0004/238198/Review-of-the-Northern-Territory-Youth-Detention-System-January-2015.pdf>.

²⁸⁸ Michael Vita, *Review of the Northern Territory Youth Detention System Report* (January 2015) 42 <https://www.nt.gov.au/_data/assets/pdf_file/0004/238198/Review-of-the-Northern-Territory-Youth-Detention-System-January-2015.pdf>.

Dylan Voller²⁸⁹

Dylan Voller was just 17 years old when he was subjected to gross mistreatment while detained at the Don Dale Youth Detention Centre. Dylan was tear gassed, placed in a spit hood and restrained in a chair by his ankles, wrist and neck for up to 2 hours after another inmate escaped from his cell. Dylan has stated he “thought he was going to die” during this incident. The Correctional Officer involved admitted there were instances when the spit hood was not fitted properly, causing breathing difficulties.

During his period at Don Dale, Dylan suffered the following additional mistreatment: being placed in isolation for 90 days of his 210 day sentence; being pinned down and stripped naked by guards; thrown into his cell by his neck and kicked to the ground by a guard after refusing to end a phone call; denial of food and water; regular strip-searches; and denial of access to legal representation. Footage of Dylan’s mistreatment being screened led to the establishment of Royal Commission into the Protection and Detention of Children in the Northern Territory.

²⁸⁹ Helen Davidson, ‘Dylan Voller says he felt defenceless and panicked in restraint chair’, *The Guardian* (online), 12 December 2016, <https://www.theguardian.com/australia-news/2016/dec/12/dylan-voller-says-he-felt-defenceless-panicked-restraint-chair-don-dale-northern-territory>; Neda Vanovac ‘Dylan Voller gives evidence before NT Royal Commission’ ABC News (online) 13 December 2016, <http://www.abc.net.au/news/2016-12-12/dylan-voller-evidence-nt-royal-commission-four-corners-don-dale/8112126>.

11.3 CHILDREN WITH DISABILITY IN THE JUVENILE JUSTICE SYSTEM (ART. 10)

Children with disability are over-represented across the juvenile justice system.²⁹⁰ In NSW, children with mental health disorders and/or cognitive impairment are six times more likely to be in prison than children without disability.²⁹¹ Imprisoning children with disability may breach article 10(3).

Currently, monitoring of youth detention facilities is carried out by individual state and territory bodies, with no national supervisory body. State and territory bodies have varying levels of power and independence, and in some jurisdictions, there is no fully separate and independent monitoring body at all.²⁹²

Australia should:

- **abolish the detention of children with disability in accordance with international law, and take measures for the provision of appropriate community-based, therapeutic support services.**
- **improve the medical and diagnostic services provided to children across the juvenile justice system to ensure that no child with a disability remains undiagnosed and/or untreated.**

11.4 CHILDREN IN ADULT DETENTION (ARTS. 7, 10 AND 24)

While every state and territory has child-specific detention facilities, there have been continued and repeated reports of children being held in adult facilities.²⁹³ As at 30 June 2015, there were three children being held in adult facilities in the Northern Territory,²⁹⁴ and 58-60 children being held in adult facilities in Queensland.²⁹⁵

Alarming, this practice is provided for by legislation in most jurisdictions. Children aged 15 and above in Northern Territory²⁹⁶ and 16 and above in New South Wales²⁹⁷ may be held on remand in adult facilities. Children aged 16 and above in New South Wales,²⁹⁸ Victoria²⁹⁹ and Western Australia,³⁰⁰ and aged 10 and above in South Australia,³⁰¹ Tasmania,³⁰² the Australian Capital Territory,³⁰³ and the Northern Territory³⁰⁴ may also be detained in adult facilities under specified circumstances, which vary across the jurisdictions.

In addition, governments in the Northern Territory, Western Australia and Victoria have re-gazetted adult prisons as youth detention centres to house children in response to recent conflict and damage to youth facilities. In Victoria these transfer and gazettal decisions were found to be unlawful in violation of a child's human rights.³⁰⁵ To protect the child's best interests, governments are expected to establish separate facilities for children deprived of their liberty, which include distinct, child-centered staff, personnel, policies and practices. Further it is generally not considered to be in the best interests of a child deprived of liberty to be placed in an adult prison or other facility for adults.³⁰⁶

This clearly breaches article 10(3).

Positively, Queensland should be commended for ending its practice of treating 17-year-old children as adults in the criminal justice system.³⁰⁷

Australia should:

- **immediately remove children currently in adult facilities, and legislatively prohibit the placement of children in adult facilities in the future.**
- **immediately remove its reservation to article 10 in relation to the segregation of adults and juveniles in detention.**

²⁹⁰ Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28 *Current Issues in Criminal Justice* 173, 175-176.

²⁹¹ Mental Health Commission of New South Wales, *Mental Health and... the Justice System* (5 April 2017) < <https://nswmentalhealthcommission.com.au/mental-health-and/the-justice-system> >.

²⁹² Australian Children's Commissioners and Guardians, *Human Rights Standards in Youth Detention Facilities in Australia: the Use of Restraint, Disciplinary Regimes and Other Specified Practices* (2016) 9-22.

²⁹³ National Children's Commissioner, *Children's Rights Report 2016* (2016) 335, 341; Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28 *Current Issues in Criminal Justice* 173, 182-183.

²⁹⁴ National Children's Commissioner, *Children's Rights Report 2016* (2016) 335.

²⁹⁵ National Children's Commissioner, *Children's Rights Report 2016* (2016) 341.

²⁹⁶ *Youth Justice Act* (NT) ss 65, 5; *Correctional Services Act* (NT) s 11.

²⁹⁷ *Children (Detention Centres) Act 1987* (NSW) ss 3, 28A; *Crimes (Administration of Sentences) Act 1999* (NSW) s 3.

²⁹⁸ *Children (Detention Centres) Act 1987* (NSW) ss 3, 28 28B; *Crimes (Administration of Sentences) Act 1999* (NSW) ss 3, 41C.

²⁹⁹ *Children, Youth and Families Act 2005* (Vic) ss 3, 467; *Corrections Act 1986* (Vic) s 3.

³⁰⁰ *Young Offenders Act 1994* (WA) s 178; *Prisons Act 1981* (WA).

³⁰¹ *Young Offenders Act 1993* (SA) ss 4, 5, 23(6).

³⁰² *Youth Justice Act 1997* (Tas) s 107; Although note children are rarely detained in adult facilities: Hobart Community Legal Service Inc, 'Sentencing Options for Youth Offenders', *Tasmanian Law Handbook* <<http://www.hobartlegal.org.au/tasmanian-law-handbook/crime/youth-justice/sentencing-orders>>.

³⁰³ *Children and Young People Act 2008* (ACT) ss 95, 166(3); *Criminal Code 2002* (ACT) s 25.

³⁰⁴ *Youth Justice Act* (NT) ss 6, 82(2); *Criminal Code Act* (NT) s 38(1); *Sentencing Act* (NT).

³⁰⁵ *Certain Children v Minister for Families and Children & Ors* (No 2) [2017] VSC 251.

³⁰⁶ *Certain Children v Minister for Families and Children & Ors* (No 2) [2017] VSC 251, [267].

³⁰⁷ See *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld).

11.5 AGE OF CRIMINAL RESPONSIBILITY

The current age of criminal responsibility in all Australian jurisdictions is 10 years with a rebuttable presumption (known as *doli incapax*) that applies to children aged between 10 and 14 years. This doctrine requires the prosecution to prove that at the time of the offence, the child had the capacity to know that he or she ought not to have done the act or made the omission constituting the offence. Amnesty International notes that the rate of overrepresentation of Aboriginal and Torres Strait Islander youth is particularly bleak for 10 and 11 year old Aboriginal and Torres Strait Islander children who made up more than 60 per cent of all 10 and 11 year olds in detention in Australia in 2012-13 and 74 per cent of all 10 and 11 year olds in detention in Australia in 2014-15.³⁰⁸

All Australian states should increase the minimum age of criminal responsibility to 12 years but also retain the presumption of *doli incapax* for 12 and 13 year old children. The abolition of this doctrine would impact significantly on children of this age group, especially those with developmental delays and cognitive impairment, and because the doctrine appropriately allows for a gradual transition to full criminal responsibility.

Australia should increase the age of criminal responsibility from 10 years to 12 years in all states and territories, and retain the rebuttable presumption of *doli incapax* for 12 and 13 year old children.

11.6 CHILDREN'S COURT PROCEEDINGS

Research indicates children who appear before Children's Courts routinely lack sufficient understanding of proceedings, including the implications of outcomes available to the Court.³⁰⁹ This is a systemic problem attributable to a range of factors, including overly complicated and formal court procedures, over-use of legal jargon, and insufficient time with counsel.³¹⁰ Inability to understand court proceedings prevents children from being able to fully participate in proceedings or make informed choices in decisions that affect them (for example, how to plead).³¹¹ This breaches their right to a fair trial under article 14.³¹²

Australia should:

- ensure Children's Courts make proceedings more child-friendly.
- ensure Children's Courts review the formality of their proceedings and the content, language and structure of their documentation.
- commit to funding Children's Court duty lawyer schemes so that every child who appears is provided with adequate legal advice and representation.

³⁰⁸ Amnesty International 2016:17 referring to AIHW, Youth Justice in Australia 2014-15 Table s78b.

³⁰⁹ Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 18, 32-33, 77, 137, 178.

³¹⁰ Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28 *Current Issues in Criminal Justice* 179.

³¹¹ Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 155, 204.

³¹² Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28 *Current Issues in Criminal Justice* 173, 179.

11.7 CURFEWS AND FREEDOM OF MOVEMENT (ART. 12)

There are at least two places in Australia where children do not have the same freedom of movement as adults. In Northbridge, Western Australia, children aged 12 years and under cannot be outside without a parent or guardian after dark; and children aged 13 to 15 years cannot be outside without a parent or guardian after 10:00pm. If they disobey the curfew, children may be physically removed by police or Child Protection Officers.³¹³ Similarly, in Miriam Vale, Queensland, children aged 15 and under cannot be outside without a parent or guardian after 8:00pm. If they disobey the curfew, children may be physically removed by police.³¹⁴ These curfews clearly violate article 12(1). While article 12(3) authorises restrictions on the right to freedom of movement in certain circumstances, these blanket and inflexible curfews which apply to offending and non-offending children equally, are unlikely to be justified by this exception.

Australia should:

- ensure the Western Australian Government repeals the Northbridge curfew.
- ensure the Queensland Government repeals the Miriam Vale curfew.

11.8 BIRTH REGISTRATION (ART. 24)

Article 24(2) requires that every child shall be registered immediately after birth. While this is mandated by law in every state and territory,³¹⁵ inadequate data is being collected by governments on whether this is translating into practice. What evidence is available shows that Aboriginal and Torres Strait Islander children in particular face barriers to having their births registered and obtaining a birth registration. For example, in 2005, one program indicated that 13 per cent of children born to Aboriginal and Torres Strait Islander mothers were not registered.³¹⁶

Australia should work cooperatively with state and territory governments through COAG to ensure comprehensive and universal access to birth registration and birth certificates for all children across Australia.

³¹³ Youth Legal Service, *The Northbridge Curfew* (2017) < <http://youthlegalserviceinc.com.au/fact-sheets/the-northbridge-curfew/> >

³¹⁴ Campbell Gellie, 'Town curfew keeps kids off the street at night,' *Gladstone Observer*, 12 November 2014.

³¹⁵ *Births, Deaths and Marriages Registration Act 1997* (ACT), *Births, Deaths and Marriages Registration Act 1995* (NSW), *Births, Deaths and Marriages Registration Act* (NT), *Births, Deaths and Marriages Registration Act 2003* (Qld), *Births, Deaths and Marriages Registration Act 1996* (SA), *Births, Deaths and Marriages Registration Act 1996* (Tas), *Births, Deaths and Marriages Registration Act 1998* (WA), *Births, Deaths and Marriages Registration Act 1996* (Vic).

³¹⁶ J. Orenstein, *Being Nobody – The Difficulties Faced by Aboriginal Victorians in Obtaining Identification*, Speech delivered at National Association of Community Legal Centres Conference, 14-17 September 2009 <<http://www.orenstein.com.au/NACLC%20conf%20paper.pdf>>; C. Clifford & K. Rigby, *Commonwealth interested in Armidale's Minimbah Project*, ABC News, 22 January 2014, <<http://www.abc.net.au/news/2014-01-22/commonwealth-interested-in-armidale27s-minimbah-project/5212306>>; and N. Croxon, 'Birth Certificates a Sign of Citizenship', *the Northern Daily Leader*, 14 February 2014. <<http://www.northerndailyleader.com.au/story/1302847/birth-certificates-a-sign-of-citizenship/>>.

12

Aboriginal and Torres Strait Islander children

(LOIPR 20)

12.1 CHILDREN IN OUT OF HOME CARE (ART. 24)

Aboriginal and Torres Strait Islander children are over-represented at every point in the child protection system that is measured at a national level. Aboriginal and Torres Strait Islander children are more likely than non-Indigenous children to be subject to child protection notifications, investigations and substantiations, to be placed on protection orders, and to reside in out-of-home care (OOHC).³¹⁷ At 30 June 2015, the rate of Aboriginal and Torres Strait Islander children on child protection orders was 9 times that for non-Indigenous children.³¹⁸

The number of Aboriginal and Torres Strait Islander children in OOHC is growing and they now represent 36.3 per cent of all children in statutory OOHC.³¹⁹ The population of Aboriginal and Torres Strait Islander children in OOHC is projected to triple by 2035 if today's conditions remain the same.³²⁰ This is a national crisis that requires an urgent revision of legislation, policy, and practice and genuine collaboration of government with Aboriginal and Torres Strait Islander communities and organisations.

The removal and placement of Aboriginal and Torres Strait Islander children in OOHC severs and disrupts connections to family, community, culture and country that are critical to positive self-identity, and often occurs without proper and effective efforts to maintain and

promote these connections. The Aboriginal and Torres Strait Islander Child Placement Principle (the **Principle**) is a key policy measure with a fundamental goal to enhance and preserve an Aboriginal and Torres Strait Islander child's connection with family, community, identity and culture. The Principle outlines that where Aboriginal and Torres Strait Islander children are removed from their home, placement must be determined with regard to the following order of priority; within family and kinship networks, with a non-related carer from the child's community or with a carer in another Aboriginal community.

The Principle is intended to ensure cultural and family connections, but its narrow conceptualisation and poor implementation is failing Aboriginal and Torres Strait Islander children. Even on a proxy measure of compliance with the Principle – the placement element only – it is clear that Australia is failing, with only 50.9 per cent of Aboriginal and Torres Strait Islander children in OOHC placed with Aboriginal and Torres Strait Islander kin or other family.³²¹

The UN Special Rapporteur on the Rights of Indigenous Peoples has also called for the urgent implementation of a national target to reduce child removal incidence and a national strategy to eliminate over-representation that prioritises community-led early intervention and family support programs in order to prevent Aboriginal and Torres Strait Islander children coming into contact with the child protection system in the first place.³²²

The failures of the current system raise issues under article 24.1; that every child shall have the right to such measures of protection as are required by his [or her] status as a minor, on the part of the State.

³¹⁷ SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016), Melbourne, 9; Australian Institute of Health and Welfare 2017, *Child protection Australia 2015–16*, Child Welfare series no. 66, Cat. no. CWS 60, Canberra: AIHW.

³¹⁸ See: Australian Institute of Health and Welfare 2006, *Child protection Australia 2014–5*, Canberra: AIHW. Viewed 29 August 2017, <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554973>>

³¹⁹ Australian Institute of Health and Welfare 2016, *Child protection Australia 2014–15*, Child welfare series no. 63, Cat. no. CWS 57, Canberra: AIHW; and Australian Institute of Health and Welfare 2017, *Child protection Australia 2015–16*, Child Welfare series no. 66, Cat. no. CWS 60, Canberra: AIHW. From 30 June 2015 to 30 June 2016, the number of Aboriginal and Torres Strait Islander children in OOHC increased from 15,455 to 16,846.

³²⁰ SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016), Melbourne, 23.

³²¹ Australian Institute of Health and Welfare 2017, *Child protection Australia 2015–16*, Child Welfare series no. 66, Cat. no. CWS 60, Canberra: AIHW.

³²² United Nations Human Rights Office of the High Commissioner, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia* (3 April 2017) <http://www.natsils.org.au/portals/natsils/Final%20statement%20SR%20IP%20Mon%203%20April.pdf?ver=2017-04-04-115415-617>.

Australia should:

- **develop a national target and strategy to address over-representation of Aboriginal and Torres Strait Islander children in out of home care.**
- **establish a national target to eliminate the over-representation of Aboriginal and Torres Strait Islander children in OOHC by 2040, supported through a resourced national strategy developed in partnership with Aboriginal and Torres Strait Islander peoples.**
- **increase its investment for early intervention family support services; Aboriginal and Torres Strait Islander family and community participation in decision-making; the development and resourcing of Aboriginal and Torres Strait Islander community controlled services; reforms to permanency planning measures that strengthen families and protect children's rights to family, community, culture, and country; and full and proper implementation of the Aboriginal and Torres Strait Islander Child Placement Principle.**³²⁴

12.2 ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN IN THE CRIMINAL JUSTICE SYSTEM

Aboriginal and Torres Strait Islander children are highly disadvantaged within the criminal justice system and disproportionately over-represented in custody.

In 2016 the Australian Bureau of Statistics reported that Aboriginal and Torres Strait Islander children were imprisoned at 25 times the rate of non-Indigenous youth.³²⁵

The preliminary findings of the Special Rapporteur on the Rights of Indigenous Peoples' visit to Australia in April 2017 observed that the offences Aboriginal and Torres Strait Islander children were imprisoned for were "relatively minor...and in the majority of instances the initial offence[s] [for imprisonment] were non-violent".³²⁶ The Special Rapporteur concluded that Aboriginal and Torres Strait Islander children in the criminal justice system "are essentially being punished for being poor and in most cases, prison will only aggravate the cycle of violence, poverty and crime".³²⁷

The data shows an inextricable link between the child protection and youth justice systems,³²⁸ including the increased likelihood of simultaneous contact with both systems³²⁹ and youth or adult criminal justice involvement after leaving care.³³⁰ This situation demands urgent attention and action.

12.3 PUNITIVE BAIL CONDITIONS (ARTS. 9 AND 14)

Punitive bail conditions that result in higher levels of contact with the justice system contravene article 9.3; that it shall not be the general rule that persons awaiting trial shall be detained in custody. This is particularly concerning where children are involved, given that punitive bail conditions often result in increased contact with the criminal justice system and harsher sentences. As such punitive bail conditions operate in contravention of both article 9.3 and article 14.4.

For Aboriginal and Torres Strait Islander young people who are granted bail, social and economic factors as well as cultural obligations can at times make onerous bail conditions difficult to abide by and can increase the risk of young people breaching those conditions and being taken into custody. The discriminatory effect of bail laws in Australia in relation to Aboriginal and Torres Strait Islander young people has resulted in a substantial increase in the proportion of juveniles in detention on remand. For example, the proportion of Aboriginal and Torres Strait Islander young people in detention on remand increased from 32.9 per cent in 1994 to 55.1 per cent in 2008.³³¹ More recently figures reveal that 57 per cent of all children detained nationally are on remand.³³² Of those remanded children, few are likely to receive an actual custodial sentence.³³³

Australian should:

- **amend bail laws to exempt children from the offence of breach of bail.**
- **insert child-specific pro-bail provisions to guide decision-making and ensure age-appropriate bail conditions.**

323 SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016) 21.

324 SNAICC – National Voice for our Children, *The Family Matters Roadmap* (2016); and SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016).

325 ABS (2016) *Corrective services, Australia, June quarter 2016*. Canberra: ABS; AIHW 2017 *Youth justice in Australia 2015–16* AIHW Bulletin no. 139. Cat. no. AUS 211.

326 United Nations Human Rights, Office of the High Commissioner, End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia, 3 April 2017, pg.10.

327 United Nations Human Rights, Office of the High Commissioner, End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia, 3 April 2017, pg.10.

328 Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report* (2017), 2.

329 Australian Institute of Health and Welfare 2016. *Young people in child protection and under youth justice supervision 2014–15*. Data linkage series no. 22. Cat. no. CSI 24. Canberra: AIHW; Wise, S. and Egger, S. (2007) *The Looking After Children Outcomes Data Project: Final Report*, Australian Institute of Family Studies, 15; and Katherine McFarlane, *Care-criminalisation: The involvement of children in out-of-home care in the NSW criminal justice system* (2015), UNSW.

330 Raman, S., Inder, B. and Forbes, C., *Investing for Success: The economics of supporting young people leaving care* (2005), Centre for Excellence in Child and Family Welfare, Melbourne; and McDowall, J., *Report Card: Transitioning from Care* (2008), CREATE Foundation, Sydney; McDowall, J., *Report Card: Transitioning from Care: Tracking Progress* (2009), CREATE Foundation, Sydney.

331 Richards, K., 'Trends in Juvenile Detention in Australia' (2011) Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice no.416, 4.

332 Australian Institute of Health and Welfare, *Youth Detention Population in Australia* (2016); Kelly Richards, Australian Institute of Criminology, *Trends in Juvenile Detention in Australia* (May 2011).

333 Australian Institute of Health and Welfare, *Youth Detention Population in Australia* (2016); Kelly Richards, Australian Institute of Criminology, *Trends in Juvenile Detention in Australia* (May 2011).

13

vilification and hate speech (LOIPR 21)



Zeinab ³⁴¹

Zeinab is Muslim and wears the hijab. One day, while waiting in line at a café, a fellow customer starting yelling at her. The customer said “go back to your country, terrorist”. When Zeinab went back to the café the following week, the same customer was there and yelled at her again, saying “If you love Islam...I’ll fucking show you”, calling Zeinab a “fucking murderer”, saying “maybe you have a knife to kill me because Muslims kill people”, and telling Zeinab to “fuck off”. Zeinab was very intimidated and shaken by this incident and reported it to the police. Her lawyers advised Zeinab that she was unable to take action under Australia’s racial vilification laws (section 18C of the *Racial Discrimination Act*), as it doesn’t protect Muslims against religious vilification.

³⁴¹ Based on a client at the Kingsford Legal Centre.

Article 20 provides that states must prohibit national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence. Whilst anti-vilification legislation exists in most Australian jurisdictions, the type of vilification covered by the legislation varies between jurisdictions.³³⁴ While a majority of states prohibit racial vilification (including New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory and South Australia), vilification on religious grounds is only unlawful in three states (Victoria, Queensland and Tasmania).

13.1 RACIAL VILIFICATION (ARTS. 20, 26 AND 27)

Racial vilification remains prevalent, with over 1 in 5 Australians experiencing racial vilification and 1 in 20 reporting being attacked for racial reasons.³³⁵ In 2016, 20 per cent of respondents to a national survey on social cohesion reported experiencing discrimination on the basis of skin colour, ethnic origin or religion in some form, up from 15 per cent in 2015.³³⁶ Research suggests that those who have been subject to racial vilification, can experience fear, intimidation, diminished self-esteem and alienation.³³⁷

The federal law provides it is unlawful to act in a way that is likely to offend, insult, humiliate or intimidate another person on the basis of race.³³⁸ Only religious groups belonging to a recognised racial group are protected, so recognised ethno-religious groups such as Jews and Sikhs can use section 18C to complain of vilification, but other religious groups such as Christians, Hindus and Muslims are not protected.³³⁹ Exemptions apply to conduct done “reasonably and in good faith” for a genuine academic, artistic, scientific or public interest purpose, as well as any fair and accurate reporting or commenting on an act or statement done for one of these purposes.

The government has sought to repeal and/or dilute the vilification protections despite widespread opposition. In 2017, the PJCHR could not agree on whether the *Racial Discrimination Act 1975* (Cth) (**RDA**) imposed unreasonable restrictions on freedom of speech. The PJCHR recommended that community leaders and politicians should identify and condemn racially hateful and discriminatory speech.³⁴⁰ The Government introduced a law to make it more difficult to make a racial vilification complaint, but the law did not pass.

Australia should:

- **introduce protections against religious vilification;**
- **abandon attempts to repeal and/or dilute racial vilification laws; and**
- **encourage Australian community leaders and politicians to exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public.**

³³⁴ *Racial Discrimination Act 1975* (Cth) pt 2A (racial hatred); *Anti-Discrimination Act 1977* (NSW) pt 2, div 3A (racial vilification), pt 3A, div 5 (transgender vilification), pt 4C, div 4 (vilification based on sexual preference), pt 4F (vilification based on HIV/AIDS status); *Racial and Religious Tolerance Act 2001* (Vic) (racial and religious vilification); *Anti-Discrimination Act 1991* (Qld) s 124A (racial and religious vilification); *Anti-Discrimination Act 1998* (Tas) s 19 (inciting hatred on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or activity); *Discrimination Act 1991* (ACT) pt 6 (racial vilification); and *Racial Vilification Act 1996* (SA) s 4 (racial vilification).

³³⁵ University of Western Sydney, *The Challenging Racism Project Study* <https://www.westernsydney.edu.au/challengingracism/challenging_racism_project>.

³³⁶ Andrews Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys* (2016) Scanlon Foundation <<http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf>>.

³³⁷ Katherine Gelber and Luke McNamara, ‘Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided’ (2016) 39 *UNSW Law Journal* 488, 505.

³³⁸ *Racial Discrimination Act 1975* (Cth) s 18C.

³³⁹ *Racial Discrimination Act 1975* (Cth) s 18C. Recognised ethno-religious groups such as Jews and Sikhs can use section 18C to complain of vilification, but other religious groups such as Christians, Hindus and Muslims are not protected.

³⁴⁰ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Freedom of Speech in Australia* (2016) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Report/a03>.



14

Minority rights of Aboriginal and Torres Strait Islander peoples

(LOIPRs 22 – 25)

Article 27 of the ICCPR recognises the protection that must be afforded to individuals belonging to minority groups, particularly the protection of cultural, religious and linguistic identities.³⁴²

Aboriginal and Torres Strait Islander peoples experience lower standards of living, health, and political participation and lack rights to self-determination, access to land, adequate housing and education.³⁴³ This has a detrimental impact on the preservation and development of Indigenous culture, religion and language, raising concerns under article 27.

³⁴²

³⁴³ See Australian Government, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016)

14.1 FUNDING CUTS TO ABORIGINAL AND TORRES STRAIT ISLANDER REPRESENTATIVE BODIES AND SERVICES

The establishment of an effective national representative body is essential for the realisation of article 27 rights. In 2010, the National Congress of Australia's First Peoples (**Congress**) was established as a national representative body for Aboriginal and Torres Strait Islander peoples. However, there are serious concerns that the government is not adequately supporting and resourcing Congress.³⁴⁴ The government has not made any allocations to Congress in its annual budgets since elected in 2013.

Furthermore, funding for Aboriginal and Torres Strait Islander services has been substantially reduced from \$2.4 billion in 2014 to \$860 million under the Indigenous Advancement Strategy (**IAS**), with 55 per cent of grants allocated to non-Indigenous bodies, effectively mainstreaming services.³⁴⁵ The IAS is the mechanism used by the Australian Government to fund and deliver a range of programmes targeting Aboriginal and Torres Strait Islander peoples. However, the reduction in funding has meant that many organisations, particularly smaller organisations, are now doing the same work with less funding.³⁴⁶

Additionally, many small Aboriginal and Torres Strait Islander community controlled organisations with less experience in applying for competitive funding are at a significant disadvantage against non-indigenous profit-driven corporations and government agencies with dedicated tendering teams.³⁴⁷ With inadequate funding under the current arrangement, the concern is that these organisations who provide targeted, culturally aware services, will be forced to turn away those needing help. The National Family Violence Prevention Legal Services Forum reports that 30 to 40 per cent of Aboriginal and Torres Strait Islander people seeking their assistance are turned away due to insufficient funding.³⁴⁸

Australia should:

- provide ongoing and sufficient funding and support for the National Congress of Australia's First Peoples in a way that acknowledges and respects decision-making by Aboriginal and Torres Strait Islander peoples, consistent with the Declaration on the Rights of Indigenous Peoples.
- provide increased and secured funding to Aboriginal community controlled organisations, and legal assistance services such as Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services.

14.2 NORTHERN TERRITORY INTERVENTION/ STRONGER FUTURES LEGISLATION

On 21 June 2007, the Australian Government introduced the "Northern Territory Emergency Response" (**NTER**), which was a "national emergency response to protect Aboriginal children in the Northern Territory" from sexual abuse and family violence.³⁴⁹ The *Racial Discrimination Act 1975* (Cth) was suspended in order for laws to be introduced which specifically targeted Aboriginal and Torres Strait Islander communities, including: compulsory acquisition of indigenous land through forced leasing without adequate compensation, quarantining of social security payments, banning of alcohol and deployment of military and police on traditional lands.³⁵⁰

Although the NTER regime was subsequently replaced by the *Stronger Futures* legislation package, many parts of the NTER were maintained. For example, all of the existing alcohol restrictions; the suspension of social security payments for parents whose children missed school; the increased policing levels in prescribed communities; and the removal of customary law and cultural practice considerations from bail applications and sentencing in criminal trials, remain in place. While the *Racial Discrimination Act 1975* (Cth) has been reinstated as part of the *Stronger Futures* legislation, the legislation continues to disproportionately affect Aboriginal and Torres Strait Islander peoples, as they make up the majority of people living in affected areas, raising concerns under articles 2 and 26.

344 National Congress of Australia's First Peoples, 'Australia's Second Universal Periodic Review' (Submission, 2015) <<http://nationalcongress.com.au/wp-content/uploads/2015/09/UPR-Australia-Congress-Shadow-Report-and-Factsheets-Final.pdf>>.

345 Australian Government, *Budget 2014-15, Budget Paper No. 2: Budget Measures* <http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-20.htm>.

346 Senate Finance and Public Administration Committee, Parliament of Australia, *Commonwealth Indigenous Advancement Strategy Tendering Processes* (2016) 61 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous/Report>.

347 Senate Finance and Public Administration Committee, Parliament of Australia, *Commonwealth Indigenous Advancement Strategy Tendering Processes* (2016) 61 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous/Report>.

348 Aboriginal Family Violence Prevention Legal Services (FVPLSs) report that up to 30-40% of Aboriginal women contacting them have to be turned away as the FVPLS don't have the capacity to support them, see National Family Violence Prevention Legal Services Forum *Submission to the Committee for Social Policy and Legal Affairs – Parliamentary Inquiry into a Better Family Law System to Protect Those Affected by Family Violence* (May 2017) 12 available at http://www.nationalfvpls.org/images/files/NFVPLS_submission_family_law_parl_inquiry_-_final.pdf.

349 Brough, M., Minister for Families, Community Services and Indigenous Affairs, 'National emergency response to protect children in the NT' (Media Release, 21 June 2007) available at: <<http://parlinfo.aph.gov.au/parlInfo/search/display/displayw3p;query=Id%3A%22media%2Fpressrel%2F8ZF6%22>>.

350 *Northern Territory National Emergency Response Act 2007* (Cth).

In 2016, the PJCHR reviewed the *Stronger Futures* legislation, finding that the blanket application of policies, lack of consultation and lack of review mechanisms for Aboriginal and Torres Strait Islander people limit human rights, raising concerns under articles 1, 2, 17 and 26.³⁵¹ The PJCHR determined that “compulsory income management is a disproportionate measure...that robs individuals of their autonomy and dignity and involves a significant interference into a person’s private and family life”.³⁵² In addition, the PJCHR’s report highlighted that the blanket measures taken to address alcohol abuse by criminalising conduct and prohibiting consumption in certain spaces such as the home, limit the right to equality, non-discrimination and private life by directly discriminating on the basis of race.³⁵³ The PJCHR noted with concern that the *Stronger Futures* alcohol abuse measures were not rationally connected or proportionate to the legitimate objective of reducing alcohol-related harm.³⁵⁴ The government has yet to address these concerns.

Australia should:

- **cease implementation of the Stronger Futures legislation, cease Income Management and return to community controlled voluntary financial management strategies that split fortnightly welfare entitlements into weekly payments, cease the leasing of Aboriginal lands and return to community management of remote Aboriginal communities. work collaboratively with Aboriginal and Torres Strait Islander peoples and their chosen representatives to ensure that policies and programs are effective and do not trespass on the rights and self-determination of Aboriginal and Torres Strait Islander peoples.**
- **work with Aboriginal and Torres Strait Islander peoples to implement the provisions of the Redfern Statement, which proposes a number of changes such as requesting the government to “establish a national Aboriginal and Torres Strait Islander representative body for education, employment and housing” and “commit to better engagement with Aboriginal and Torres Strait Islanders”.**³⁵⁵
- **commit to the implementation in Australia of the United Nations Declaration on the Rights of Indigenous Peoples.**

14.3 NATIVE TITLE (ARTS. 1, 2 AND 27)

Under the *Native Title Act 1993* (Cth) (**Native Title Act**), Aboriginal and Torres Strait Islander people have to prove a continuous connection to the land since colonisation in order to prove their native title (a form of land title that recognises Indigenous rights to land and waters). This ongoing connection is difficult to prove, given that in the absence of a written tradition, there are often no documentary records proving the existence of laws and customs prior to British sovereignty over Australia.³⁵⁶ Onerous requirements under the Native Title Act are incompatible with article 26 of the UN Declaration on the Rights of Indigenous Peoples as they deny and limit the ability for indigenous people to enjoy the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used.

Indigenous Land Use Agreements (**ILUAs**) are voluntary agreements that allow native title groups to make agreements with others about the use of native title land and waters. Previously, ILUAs required the approval of all registered traditional owners of the land or waters.³⁵⁷ The government recently amended the Native Title legislation to allow for ILUAs to remain valid without agreement from all registered traditional owners. In addition, there remains no capacity or right for traditional owners to deny mining on Native Title land and there are fears that these amendments may hasten the approval process for exploration and mining.

³⁵¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, 2016 *Review of Stronger Futures Measures* (2016) 10, 22 available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2/Final_report> (accessed 30 August 2017).

³⁵² Parliamentary Joint Committee on Human Rights, Parliament of Australia, 2016 *Review of Stronger Futures Measures* (2016) [4.100] available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2/Final_report> (accessed 30 August 2017).

³⁵³ Parliamentary Joint Committee on Human Rights, Parliament of Australia, 2016 *Review of Stronger Futures Measures* (2016) 22 available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2/Final_report> (accessed 30 August 2017).

³⁵⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, 2016 *Review of Stronger Futures Measures* (2016) 24 available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2/Final_report> (accessed 30 August 2017).

³⁵⁵ ‘The Redfern Statement: An Urgent Call for a More Just Approach to Aboriginal and Torres Strait Islander Affairs, (Statement, 9 June 2016) <<http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>>.

³⁵⁶ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993*, ALRC Report 126 (2015) <<https://www.alrc.gov.au/publications/problems-proof-02>>.

³⁵⁷ *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.

In 2015 the ALRC conducted a comprehensive review of the Native Title Act and in its final report made 30 recommendations for significant reform to the Native Title Act.³⁵⁸ These recommendations are yet to be enacted.³⁵⁹

Australia should:

- enact the recommendations of the ALRC's *Connection to Country* report.
- ensure that the lands, territories and resources of Aboriginal and Torres Strait Islander peoples are returned in accordance with human rights standards for ownership and development.
- reverse the onus of proof for title to lands to require evidence that lands, territories and resources have been legitimately acquired from Aboriginal and Torres Strait Islander peoples.
- ensure that Aboriginal and Torres Strait Islander people are afforded control over lands and waterways where native title has been determined with the capacity to deny exploration and mining.

14.4 STOLEN GENERATIONS AND STOLEN WAGES (ARTS. 1, 2, 8, 17, 24, 26 AND 27)

Australia has failed to implement a national reparation scheme for members of the “Stolen Generations” and for the “Stolen Wages” of many Aboriginal and Torres Strait Islander peoples, with these policies raising concerns under articles 1, 2, 8, 17, 26, and 27. Stolen Generations refers to Aboriginal and Torres Strait children who were forcibly removed from their families under official government policies between 1909 and 1969 to promote assimilation. The UN Human Rights Committee, the Special Rapporteur on Indigenous People, and the Australian Human Rights Commission have all called on the government to provide compensation to the Stolen Generations.³⁶⁰

Children who were part of the Stolen Generations experienced loss of identity, connection to family and country, and many were abused in institutional care.³⁶¹ The impact of this trauma has been inter-generational, and has manifested in mental illness, substance abuse and family breakdown, with one-third of members of the Stolen Generation having their own children removed by the state.³⁶² Failure to properly redress the policies of the Stolen Generations, has led to ongoing escalation in the removal of Aboriginal and Torres Strait Islander children, raising concerns under articles 17 and 24. In 2016, Aboriginal and Torres Strait Islander children were 9.8 times more likely to be residing in out-of-home care than non-Indigenous children.³⁶³

Stolen wages is a term used to refer to the wages of “Indigenous workers whose paid labour was controlled by the Government” – in many cases, Aboriginal and Torres Strait Islander people did not receive any wages at all, or received insufficient wages.³⁶⁴

Australia should:

- establish a national reparations scheme, including compensation, for members of the Stolen Generations and implement all recommendations contained in the *Bringing Them Home Report*, especially in relation to current child removal practices.³⁶⁵
- establish a national compensation scheme for people adversely affected by Stolen Wages policies.
- take urgent action to address contemporary forced removal of children from Aboriginal and Torres Strait Islander families.

³⁵⁸ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993*, ALRC Report 126 (2015) <<https://www.alrc.gov.au/publications/problems-proof-o->>.

³⁵⁹ Australian Government, (2015) Australian Law Reform Commission Summary Report, 2, <<https://www.alrc.gov.au/publications/alrc-126-summary>>.

³⁶⁰ See, James Anaya, Special Rapporteur, *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)*, 50th sess, UN Doc A/HRC/15 (4 March 2010) [19]; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, ‘2008 Social Justice Report’ (Report, 2008) pt 4; Human Rights Committee, *Concluding Observations: Australia*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [15].

³⁶¹ Human Rights and Equal Opportunity Commission, *Bringing Them Home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) <<https://www.humanrights.gov.au/publications/bringing-them-home-report-1997>>.

³⁶² Human Rights and Equal Opportunity Commission, *Bringing Them Home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) <<https://www.humanrights.gov.au/publications/bringing-them-home-report-1997>>.

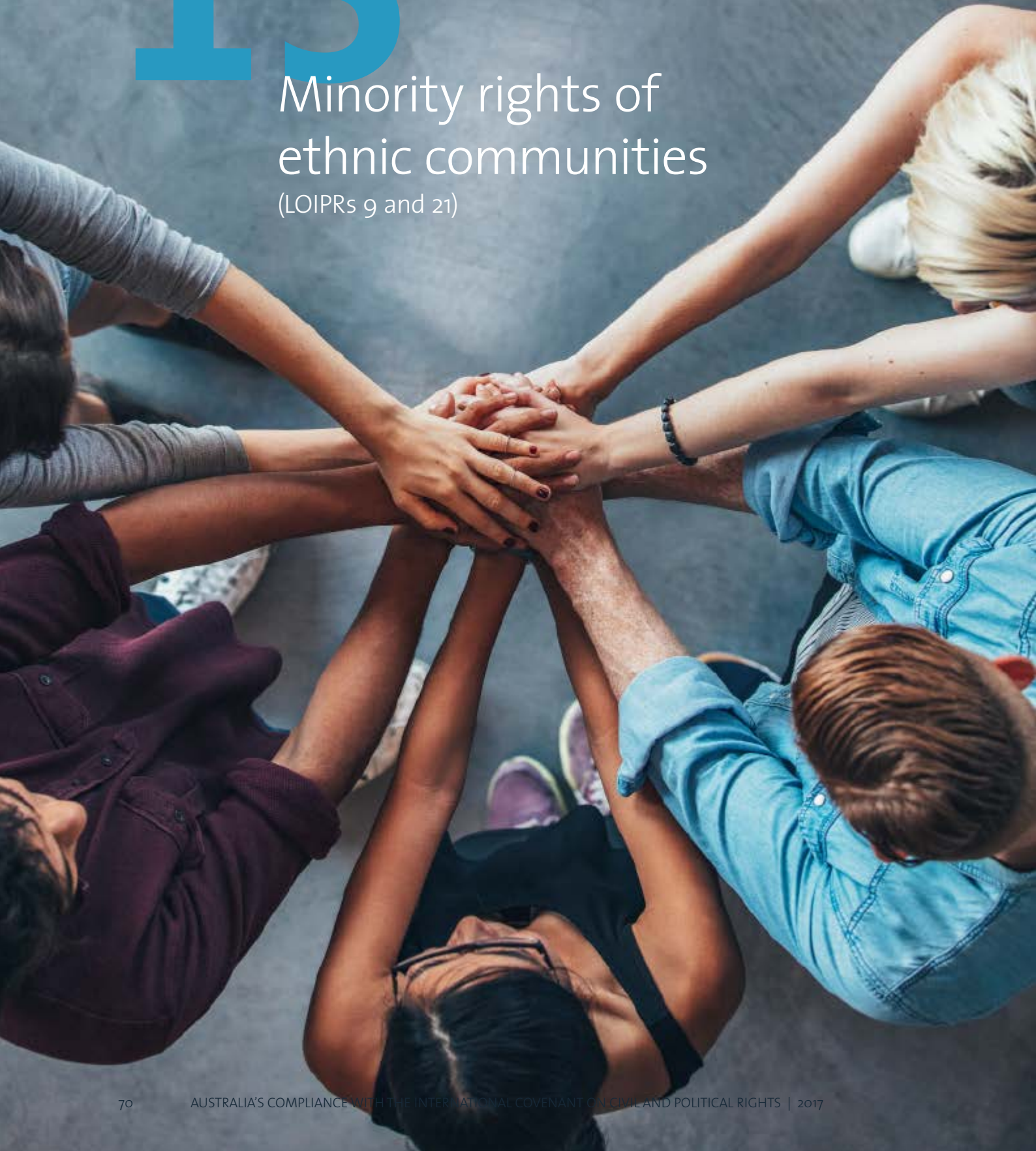
³⁶³ Productivity Commission, Steering Committee for the Review of Government Service Provision, ‘Volume F: Community Services’ in *Report on Government Services 2017* (2017) Table 16A.17.

³⁶⁴ See, Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006). States including NSW, QLD and WA have announced reparations schemes.

³⁶⁵ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997).

15

Minority rights of ethnic communities (LOIPRs 9 and 21)



15.1 MULTICULTURAL POLICY

Australia has largely implemented positive multicultural policies that have fostered social inclusion and embraced cultural diversity. In March 2017, the Australian Government launched the updated Multicultural Policy Statement “*United, Strong, Successful*”. This policy emphasises rights and responsibilities of migrants and the shared values of Australians regardless of their background. However, this policy statement also emphasises security measures and counter terrorism which needlessly draws a connection between multicultural Australians and acts of terrorism.

Australia should remove references to terrorism from the Multicultural Policy Statement as it draws negative connections between multicultural Australians and terrorism, and provides unintentional support for racist stereotypes and discrimination.

15.2 ACCESS TO SERVICES

Australia’s multicultural access policy, *Multicultural Access and Equity Policy: Respecting Diversity, Improving Responsiveness* provides that Australian government departments and agencies are obliged to provide equitable access to government services to all Australians, regardless of their cultural and linguistic backgrounds.³⁶⁶ This is a positive step, but there is further work to be done in ensuring that Australians from migrant or culturally and linguistically diverse (CALD) backgrounds have equal and equitable access to services and service outcomes. For example, Australians from CALD backgrounds are disadvantaged by the government’s migration to online services. CALD clients are particularly affected due to English skills, technological and institutional literacy.³⁶⁷

Language service professionals are also lacking in aged care, disability, health and legal services, resulting in a lack of informed consent for both medical and legal procedures.³⁶⁸ Often unqualified non-professionals are called upon to translate and interpret, resulting in conflicts of interest.³⁶⁹ Sufficient resourcing for accredited interpreters is essential to ensure CALD clients can equitably access government services.

Australia should:

- ensure that all public services are fully accessible to all Australians regardless of their level of English language proficiency via the appropriate resourcing for provision of accredited interpreters, translated print and online materials, bilingual and bicultural support workers.
- ensure all government departments and agencies implement the recommendations in the Multicultural Access and Equity Policy to provide access to services for CALD persons, and that all staff members are competent in interacting with, and meeting the needs of a diverse clientele.

15.3 REPRESENTATION IN LEADERSHIP ROLES

Currently, ethnic minorities are not adequately represented in leadership roles in business or politics in Australia. For example, despite 32 per cent of Australians being culturally diverse, in 2015, only 1 per cent of Australian Securities Exchange companies leadership roles were held by culturally diverse women, and 27.8 per cent were held by culturally diverse men.³⁷⁰ While 23 per cent of Australians are from a non-english speaking background, only 6 per cent of House of Representatives members are from a non-english speaking background.³⁷¹

Australia should implement measures to improve CALD representation in leadership roles, in politics, business, and public service.

³⁶⁶ Department of Social Services (Cth), *The People of Australia: Australia’s Multicultural Policy*, 2011; Department of Social Services (Cth), *Australia’s Multicultural Access and Equity Policy: Respecting Diversity, Improving Responsiveness*, 2014.; See also <<https://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/programs-policy/multicultural-access-and-equity>>

³⁶⁷ Federation of Ethnic Communities’ Councils of Australia, *Digital Access and Equity for Multicultural Communities* (2016) <http://fecca.org.au/wp-content/uploads/2017/01/feccadigitalconsultationreport.pdf>.

³⁶⁸ Federation of Ethnic Communities’ Councils of Australia, *Australia’s Growing Linguistic Diversity: An opportunity for a strategic approach to language services policy and practice* (2016) <<http://fecca.org.au/wp-content/uploads/2016/09/feccalanguagesreport.pdf>>.

³⁶⁹ Federation of Ethnic Communities’ Councils of Australia, *Australia’s Growing Linguistic Diversity: An opportunity for a strategic approach to language services policy and practice* (2016) <<http://fecca.org.au/wp-content/uploads/2016/09/feccalanguagesreport.pdf>>.

³⁷⁰ Diversity Council Australia, *Capitalising on Culture and Gender in ASX Leadership* (2017) https://www.dca.org.au/sites/default/files/capitalising_on_culture_and_gender_infographic_final_o.pdf.

³⁷¹ Nick Evershed, Ri Liu and Anna Livsey, ‘Are you reflected in the new parliament?’ *The Guardian* (online) 31 August 2016 <https://www.theguardian.com/australia-news/datablog/ng-interactive/2016/aug/31/are-you-reflected-in-the-new-parliament-diversity-survey-of-australian-politics>.

16 Democratic rights and civil society

(LOIPR 22)

16.1 STATE-BASED ANTI-PROTEST LAWS (ARTS. 19, 20, 21, AND 22)

A number of states in Australia have introduced anti-protest laws that prioritise business and political interests over rights to peaceful assembly.³⁷²

In Tasmania, an anti-protest law introduced in 2014 effectively criminalises peaceful protest, even for a short time, on public land. The laws criminalise all protest activity, peaceful or otherwise, that occurs on or near certain business premises and which “prevents, hinders or obstructs” access to business premises.³⁷³ This law applies to both public and private property and carries with it substantial penalties of up to \$10,000 and four years’ imprisonment.³⁷⁴ The UN Special Rapporteur on freedom of opinion and expression called the laws “disproportionate and unnecessary.”³⁷⁵ Tasmania’s law is currently the subject of a High Court action to strike it down for violation of the implied freedom of political communication in Australia’s constitution.

In 2016 the New South Wales government introduced anti-protest laws which allow police to stop, search and detain protestors without a warrant and to shut down peaceful protests which obstruct traffic.³⁷⁶ At the same time, the laws increase the penalty for the unlawful entry to enclosed land (ie any public or private land surrounded by a fence) from \$550 to \$5,500.³⁷⁷ The laws also expand the offence of “interfering” with a mine to cover coal seam gas exploration and extraction sites, with a penalty of up to seven years’ imprisonment.³⁷⁸

In Queensland, laws introduced ahead of the G20 Summit in 2014 created broad new offences such as “disrupting” the G20 and conduct causing “annoyance or inconvenience” in order to curb protest activities.³⁷⁹

In 2016, Western Australia proposed to introduce an anti-protest law that would create a broad and vague new offence of “physically preventing a lawful activity.”³⁸⁰ Three UN Special Rapporteurs warned that the proposed laws

“would result in criminalizing lawful protests and silencing environmentalists and human rights defenders.”³⁸¹ The law has been withdrawn from parliament.

The suite of anti-protest laws outlined above are disproportionate, unnecessary and are contrary to Australia’s international obligations under articles 19, 20, 21 and 22.

Australia should repeal laws that criminalise peaceful protest contrary to international law.

16.2 LIMITS ON INDUSTRIAL ACTION AND PICKETING

In December 2016, the Australian Government re-introduced the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**BCIIP Act**) which significantly increases monetary penalties for those organising and engaging in what is termed “unlawful industrial action” in the construction industry. A number of features of the BCIIP Act are contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self-incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive.

The BCIIP Act also introduces a prohibition on “unlawful picketing”, where any group of persons, including members of the general public, who have assembled with the purpose of preventing or restricting access, where that purpose is industrially motivated, would be infringing the provision and be exposed to fines and injunctions irrespective of whether they had actually done anything to restrict access. The mere organising of such action is also deemed to be unlawful, even before persons physically assemble. The Statement of Compatibility with Human Rights which was annexed to the Explanatory Memorandum for the Bill conceded that “The right to freedom of peaceful assembly is limited by the prohibition on unlawful picketing that is contained in s. 47 of the Bill.” This raises concerns under Article 22 of the ICCPR.

In August 2017, the Australian Government introduced the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Cth). The Bill interferes with the right to freedom of association, the right to form and

372 See, eg, *Workplaces (Protection from Protestors) Act 2014* (TAS); *G20 (Safety and Security) Law 2013* (QLD); *Inclosed Lands, Crimes and Law Enforcement Amendment (Interference) Act 2016* (NSW).

373 *Workplaces (Protection from Protestors) Act 2014* (TAS), s 6.

374 *Workplaces (Protection from Protestors) Act 2014* (TAS), ss 4, 17.

375 UN Special Rapporteur on freedom of opinion and expression, Media Release, “UN experts urge Tasmania to drop its anti-protest bill”, 9 September 2014, available at <https://un.org.au/2014/09/10/un-experts-urge-tasmania-to-drop-its-anti-protest-bill/#content> (accessed 10 July 2017).

376 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 45A – 45C, 200.

377 *Inclosed Lands Protection Act 1901* (NSW) s 4B.

378 *Crimes Act 1900* (NSW) s 201(2).

379 See *G20 (Safety and Security) Law 2013* (QLD).

380 *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA).

381 United Nations Human Rights Office of the High Commissioner, *Human rights expert urge Western Australia’s Parliament not to pass proposed anti-protest law* (15 February 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17047>>.

join trade unions and the right of trade unions to function freely. The amendments proposed by the bill, including disqualification of officers, cancellation of registration of organisations, allowing the imposition of an administrative scheme by the Federal Court and introducing a “public interest” test for amalgamations of organisations, unduly interfere with the free and democratic functioning of organisations. These amendments are proposed despite ongoing criticism of Australia for failing to comply with its international obligations in respect of non-interference in industrial organisations.

Australia should ensure that industrial relations laws and practices uphold the right to freedom of association, the right to strike and the right to form and join trade unions.

16.3 SILENCING OF CIVIL SOCIETY GROUPS (ARTS. 19 AND 22)

In the last few years, governments across Australia have been putting financial pressure on civil society organisations, creating an environment that deters critically important speech on matters of public interest. New laws and practices are slowly but surely eroding the independent voice of civil society and limiting its ability to engage in activism and advocacy work. The message to civil society is clear: if you speak out, your financial livelihood could be at risk. The financial pressure comes in a range of forms:

- **Restrictions in funding agreements:** For example, since 2015, government funding for community legal centres across Australia has expressly prohibited Commonwealth funding from being used to undertake law reform, policy or advocacy work including lobbying government or engaging in public campaigns, with very narrow exceptions.³⁸²
- **Threats to tax status:** Environmental advocacy groups have been resisting threats to strip them of their deductible gift recipient status (**DGR status**) – a tax classification that is critical to attracting support as it enables donors to make tax deductible donations. In May 2016, a majority of the House of Representatives Environment Committee recommended that in order to be eligible for DGR status, an environmental organisation be required to spend no less than 25 per cent of its annual expenditure on environmental remediation work, such as planting trees or land management.³⁸³
- **Banning foreign donations to civil society:** In March 2017, a parliamentary committee raised the spectre of banning foreign donations to Australian civil society organisations. In its interim report, the Electoral Committee recommended that foreign citizens be banned from donating to Australian registered political parties.³⁸⁴

The special minister for state has indicated his intention to introduce a law to ban foreign donations to that applies to all civil society groups.³⁸⁵

The trend violates the rights under articles 19 and 22.

Australia should not use financial pressure, including funding agreements, tax concessions or bans on foreign donations, to stifle the free speech of civil society.

16.4 BORDER FORCE ACT (ARTS. 19 AND 22)

In 2015 the Australian Government introduced the *Australian Border Force Act 2015* (Cth) (**Border Force Act**), which increased the culture of secrecy around Australia’s immigration and offshore detention policies. The law threatens immigration workers and contractors with two years in jail for recording or disclosing information about the events they witness, creating significant barriers to whistleblowing on human rights abuses and misconduct in immigration detention. These secrecy laws have been criticised by the UN special rapporteur on human rights defenders and the UN Special Rapporteur on the human rights of migrants for being incompatible with the right to freedom of expression.³⁸⁶

Since 2015, the Australian government has made some welcome amendments to the Border Force Act, including a 2016 exemption for medical professionals, but the Border Force Act still applies to civil society organisations, teachers, trade unions, lawyers, social workers and whistleblowers.³⁸⁷

The Australian Government is currently seeking amendments to the laws to change the type of information to which the offence applies.³⁸⁸ Although the amendments will in some respects broaden the information that can be shared, the Secretary of the department retains the power to prohibit the disclosure of information that “would or could reasonably be expected to prejudice the effective working of the Department or otherwise harm the public interest.”³⁸⁹ This leaves an unacceptable level of discretion with the secretary and the PJCHR has expressed its concern that the amendments do not pursue a legitimate objective and are neither rationally connected to that objective nor proportionate.³⁹⁰

Australia should repeal the secrecy provisions of the *Australian Border Force Act 2015* (Cth).

³⁸⁵ Paul Karp, “Limiting foreign donation ban to political parties creates ‘activist loophole’”, *The Guardian*, 7 June 2017, <https://www.theguardian.com/australia-news/2017/jun/07/limiting-foreign-donation-ban-to-political-parties-creates-activist-loophole>

³⁸⁶ Michel Forst, End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders Visit to Australia, 18 October 2016 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E>; François Crépeau, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, Thirty-fifth session, Human Rights Council, A/HRC/35/25/Add.3 (24 April 2017) [86].

³⁸⁷ See, Determination of Immigration and Border Protection Workers – Amendment No. 1, 30 September 2016, made by the Secretary of the Department of Immigration and Border Protection.

³⁸⁸ *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth).

³⁸⁹ *Australian Border Force Amendment (Protected Information) Bill 2017* (Cth). Section 4 subsection 7

³⁹⁰ 5 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report – Report 9 of 2017* (5 September 2017) [1.31] – [1.40].

³⁸² There is a very limited exception to that for providing community legal education or “where a legal assistance service provider makes a submission to a government or parliamentary body to provide factual information and/or advice with a focus on systemic issues affecting access to justice”.

³⁸³ Environment Committee, *Report into the Register of Environmental Organisations*, May 2016, Recommendation 5.

³⁸⁴ Alexandra Beech and Stephanie Anderson, “Political donations: Parliamentary committee recommends banning foreign contributions” *ABC* (online) 10 March 2017, available at <http://www.abc.net.au/news/2017-03-10/political-donation-reform-parliamentary-committee-suggests-ban/8342982> (accessed 8 May 2017).

16.5 ANTI-ASSOCIATION LAWS (ARTS. 21 AND 22)

Across Australia anti-association laws are being introduced or modernised to criminalise the act of people associating with each other and to undermine freedom of association.³⁹¹ Consorting (known as unlawful association in Victoria) is an offence in every Australian state and territory except the Australian Capital Territory, although the breadth of the laws vary across each jurisdiction.³⁹²

In South Australia, police are able to issue a notice prohibiting a person from consorting with a person they merely suspect has committed a crime.³⁹³ In New South Wales, anti-consorting laws re-introduced in 2012 make it an offence to speak to two or more convicted criminals on two or more occasions after being given a warning by police.³⁹⁴ The offence carries with it a penalty of up to three years imprisonment and/or a fine of \$16,500.³⁹⁵

The New South Wales laws were introduced to “deal with organised crime”, however, a 2016 report by the NSW Ombudsman notes that police issued 8,556 warnings to 2,412 people and that the laws are being misused against disadvantaged and vulnerable groups. The Ombudsman found that 44 per cent of people targeted by general duty police for consorting were Aboriginal Australians,³⁹⁶ in some instances people experiencing homelessness had stopped attending their support services for fear of being further targeted for consorting,³⁹⁷ and almost 80 per cent of children and young people whose associates were warned about consorting with them were mistakenly identified as “convicted offenders” by police. Unfortunately, notwithstanding these findings, in 2016 the Queensland Government replaced its existing anti-association laws with a consorting offence similar to that in New South Wales. The offence is accompanied by a mandatory sentencing regime which can only be avoided if the defendant provides “significant cooperation” to police and a reversed onus of proof which requires the accused to prove that the consorting was reasonable in the circumstances.³⁹⁸

These “association” offences raise serious concerns with articles 21 and 22 to the extent that they impact a person’s right to freedom of association and freedom of peaceful assembly.

Australia should amend relevant legislation to ensure that association does not form the basis of criminal conviction or punishment.

16.6 METADATA RETENTION AND WEB BLOCKING (ARTS. 17 AND 19)

The Australian Government recently passed a legislative data retention regime that requires telecommunication service providers to retain every customer’s metadata for two years.³⁹⁹ Law enforcement and security agencies can access the data:

- without a warrant or any prior independent authorisation (with the exception of journalists’ metadata);
- without a requirement that access is for the purpose of fighting serious crime; and
- without a requirement that a person be informed when their metadata is accessed.

The current regime effectively allows law enforcement bodies to watch everybody, all of the time, without them knowing.⁴⁰⁰

While there are some extra protections in place for accessing the metadata of journalists, which require agencies to obtain a special warrant, in at least one case the Australian Federal Police have admitted to unlawfully accessing a journalist’s metadata without the relevant warrant.⁴⁰¹ It is not possible for the journalist whose metadata was unlawfully accessed to confirm that they are the subject of the breach.

To be consistent with privacy rights, any law concerning the retention of metadata must limit the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted.⁴⁰² Australia’s data retention scheme is a source of significant concern for civil society organisations.⁴⁰³

³⁹¹ See, e.g., *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA); *Crimes (Criminal Organisations Control) Act 2012* (NSW); *Criminal Organisations Control Act 2012* (WA); *Serious Crime Control Act 2009* (NT); *Serious and Organised Crime Legislation Amendment Act 2016* (QLD); *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (VIC).

³⁹² See, e.g., *Crimes Act 1900* (NSW) Part 3A, Division 7; *Summary Offences Act 1953* (SA) s 13 and part 14A; *Criminal Associations Control Act 2012* (Vic) part 5A; *Summary Offences Act* (NT) s 55A; *Criminal Code 1913* (WA) ss 557J–557K; *Police Offences Act 1935* (TAS) s 6. In 2016 the former ACT Attorney General abandoned a proposal for anti-consorting laws on the basis that it had been “difficult to reconcile the operational needs of police with the concerns of human rights protection agencies”, see Markus Mannhein, “Proposed anti-consorting laws for bikies dropped over human rights concerns,” *The Canberra Times*, 22 July 2016, available at <http://www.canberratimes.com.au/act-news/proposed-anticonsorting-laws-for-bikies-dropped-over-human-rights-concerns-20160722-ggbju1.html> (accessed 10 July 2017).

³⁹³ *Summary Offences Act 1953* (SA) s 66A.

³⁹⁴ *Crimes Act 1900* (NSW) s 93X(1).

³⁹⁵ *Crimes Act 1900* (NSW) s 93X(1).

³⁹⁶ NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016, 4, available at https://www.omb.nsw.gov.au/_data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A-Division-7-of-the-Crimes-Act-1900-April-2016.pdf (accessed 10 July 2017).

³⁹⁷ NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016, 4, available at https://www.omb.nsw.gov.au/_data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A-Division-7-of-the-Crimes-Act-1900-April-2016.pdf (accessed 10 July 2017).

³⁹⁸ Explanatory Notes, *Serious and Organised Crime Legislation Amendment Bill 2016* (NSW), 37.

³⁹⁹ The relevant bill amended the *Telecommunications (Interception and Access) Act 1979* and received Royal Assent on 13 April 2015. See sections 187A, 110A and 176A. The specific metadata that must be retained is set out in a list in the statute.

⁴⁰⁰ See comments of Edward Snowden, Oliver Milman, “Edward Snowden says Australia’s new data retention laws are dangerous,” *The Guardian*, 9 May 2015 <https://www.theguardian.com/us-news/2015/may/09/edward-snowden-says-australias-new-data-retention-laws-are-dangerous>.

⁴⁰¹ Mark Colvin, “AFP admits AFP admits extreme surveillance on reporter, setting off media freedom row”, ABC radio, 16 April 2017, <http://www.abc.net.au/pm/content/2016/s4443273.htm>; Christopher Knaus, “Federal police admit to accessing journalist’s metadata without a warrant,” *The Guardian*, 28 April 2017 <https://www.theguardian.com/australia-news/2017/apr/28/federal-police-admit-accessing-journalists-metadata-without-a-warrant>.

⁴⁰² *Tele2 Sverige AB v Post-och telestyrelsen; Secretary of State for the Home Department v Watson and others* (C-203/15 and C-698/15), EU:C:2016:970, [108].

⁴⁰³ See for example Daniel Hurst, “Mandatory metadata retention becomes law as Coalition and Labor combine,” *The Guardian* 26 March 2015 <https://www.theguardian.com/australia-news/2015/mar/26/mandatory-data-retention-becomes-law-as-coalition-and-labor-combine>; GetUp! “Go dark against data retention,” <https://www.getup.org.au/campaigns/digital-freedom-and-privacy/go-dark-against-data-retention/go-dark-against-data-retention>; Ros Page, “Data retention regime now in effect,” *Choice*, 26 April 2017 <https://www.choice.com.au/electronics-and-technology/internet/internet-privacy-and-safety/articles/mandatory-data-retention-regime-on-its-way>; Will Ockenden, “Metadata retention scheme deadline arrives, digital rights advocates say ‘get a VPN’,” *ABC News*, 13 April 2017 <http://www.abc.net.au/news/2017-04-13/metadata-retention-scheme-deadline-arrives/8443168>.

There is little transparency around the functioning of the regime, which has very few requirements for public disclosure of requests made or actions taken under this framework. There have been reports that some organisations, including government departments, may be intentionally circumventing privacy protections within the legislation in order to gain access to data that they are not authorised to have.⁴⁰⁴ The relevance of such applications to protecting national security is questionable, and these reports serve as evidence of the risk of “scope creep” in such an expansive data collection regime.

The extensive, intrusive nature of the current data collection regime, in combination with a lack of transparency over which bodies are able to access it and for what purposes, risks creating a chilling effect on freedom of expression in Australia and violates the right to privacy.⁴⁰⁵

The Australian Government also introduced a legislative regime for blocking websites on application to a court by copyright-holders. To obtain an order under the regime, the rights-holder must show that the website infringes, or facilitates an infringement of, copyright and the primary purpose of the website must be to infringe, or to facilitate the infringement of, copyright. If the order is made to block the website,⁴⁰⁶ the Telco or ISP must take all reasonable steps to disable access to the website.⁴⁰⁷ There is very little by way of public disclosure of requests made or actions taken to restrict access to websites, other than by voluntary notification by users. This effectively sets up a process that is inherently weighted in favour of blocking websites, impinging on both freedom of expression and access to information in Australia.⁴⁰⁸

Australia should immediately repeal the metadata retention regime or alternatively amend legislation to put in place proper safeguards consistent with the rights to privacy and freedom of expression.

16.7 VOTING RIGHTS FOR PEOPLE WITH DISABILITY (ARTS. 2, 25, AND 26)

The *Commonwealth Electoral Act 1918* (Electoral Act) currently prevents a person who “by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting” from enrolling and voting in any federal election (the **unsound mind exclusion**).⁴⁰⁹ A similar exclusion exists in the electoral law of every state in Australia.⁴¹⁰

The unsound mind exclusion denies people with

disability the right to vote and the right to exercise their legal capacity on an equal basis with others.⁴¹¹ The exclusion disenfranchises people with a range of impairments, particularly those with intellectual disability, psychosocial disability, acquired brain injury and those with degenerative brain conditions such as dementia. Rather than excluding particular groups of people with disability from the right to vote, the focus should be on ensuring that voting processes and information are accessible and that appropriate supports and assistance are available.

All persons who are of voting age, regardless of any disability, should be enrolled to vote and should be provided with appropriate support, where necessary, to exercise their right to vote.⁴¹²

In 2014, the Australian Law Reform Commission recommended that the unsound mind exclusion be removed from the Electoral Act.⁴¹³

Australia should remove the unsound mind exclusion from the Electoral Act, and all reforms should reflect the fundamental principles of non-discrimination, presumption of legal capacity and supported decision in line with the Convention on the Rights of Persons with Disabilities.

16.8 PRISONERS’ VOTING RIGHTS (ARTS. 2, 25, AND 26)

Queensland is the only Australian jurisdiction to maintain a blanket ban on prisoners voting. Queensland law currently prohibits all people who are serving a sentence of imprisonment from voting at Queensland elections: *Electoral Act 1992* (Qld), s 106(3).

Although the right to vote under the ICCPR can be limited, those limitations should be based on objective and reasonable criteria.⁴¹⁴ The blanket disenfranchisement of prisoners has been found to be an unreasonable limitation on similar articulations of the right to vote in Canada and in the United Kingdom.⁴¹⁵ The Committee has indicated that laws preventing all convicted prisoners from voting appear to lack justification in modern time.⁴¹⁶

Queensland’s blanket ban is unreasonable and disproportionate infringement on the right to vote.

Australia should ensure that prisoners in all states and territories are afforded the right to vote.

404 Benjamin Sveen, ‘Data Retention Bill: Government departments ask AFP to access metadata after legislation enacted,’ ABC, 3 October 2016 <http://www.abc.net.au/news/2016-10-04/government-departments-obtain-metadata-via-afp/7898648>.

405 ICCPR article 19 and article 17.

406 Section 115A(1) of the Copyright Act 1968.

407 Section 115A(2) of the Copyright Act 1968.

408 ICCPR article 19.

409 *Commonwealth Electoral Act 1918* (Cth) ss 93 and 118.

410 See *Commonwealth Electoral Act* s 93(8)(a); *Electoral Act 2004* (Tas) s 31(1); *Electoral Act 1992* (QLD) s 64; *Northern Territory (Self Government) Act 1978* (Cth) s 14(1); *Electoral Act 1992* (ACT) s 72(1); *Constitution Act 1975* (Vic) s 48(2)(d); *Parliamentary Electorates and Elections Act 1912* (NSW) s 25. See, Australian Law Reform Commission, *Equality Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (November 2014) ch 9.

411 Articles 2, 25 and 26 of the International Covenant on Civil and Political Rights; articles 4, 12 and 29 of the Convention on the Rights of Persons with Disabilities. See Section 3 and Appendix.

412 Committee on the Rights of Persons with Disabilities, General Comment No. 1, Equal Recognition before the Law, UN Doc CRPD/C/GC/1.

413 Australian Law Reform Commission (‘ALRC’), *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014).

414 Human Rights Committee, General Comment 25.

415 *Sauve v Canada (Attorney General)* [1993] 2 SCR 438 and *Hirst v The United Kingdom* (No 2) (Application No 74025/01) (6 October 2005).

416 Concluding Observations on United Kingdom, 2001.

A group of children with disabilities are shown from the chest up, cheering with their arms raised high in the air. They are outdoors at night, with bright stadium lights illuminating the scene from the right. The children are wearing various colored jackets: a blue jacket, a bright green jacket, a dark red jacket, and a pink jacket. The background is dark, suggesting a night sky or a dark stadium.

17

Rights of people
with disability

17.1 DISCRIMINATION AGAINST MIGRANTS AND REFUGEES WITH DISABILITY (ARTS. 2, 12 AND 26)

People with disability, and families who have members with disability, are liable to having their visa applications denied because they are unable to meet the strict health requirement under the *Migration Act 1958* (Cth).⁴¹⁷ People who have been ordered to leave Australia on this basis include a doctor from Kenya who is blind and who had lived in Australia for 11 years,⁴¹⁸ a 16-year old girl with a “moderate developmental delay” who had lived in Australia for 8 years with her mother who is a doctor⁴¹⁹ and an elderly 77-year old mother with an intellectual disability who is cared for by her children.⁴²⁰ Although the health requirement does not directly discriminate against people with disability, it is much more likely that people with disability will be unable to meet it, raising concerns under article 26.⁴²¹ Key legislative and policy reform is required, including reforms to amend the *Migration Act 1958* (Cth) and the *Disability Discrimination Act 1992* (Cth) “to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice.”⁴²² Australia has made an Interpretative Declaration to the *Convention on the Rights of Persons with Disabilities* (CRPD) article 18, which in effect means that Australia maintains the discriminatory health requirement.⁴²³

17.2 RESTRICTIVE PRACTICES (ARTS. 7 AND 12)

Children and adults with disability are routinely subjected to unregulated and under regulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraint and seclusion including in mental health facilities, schools, hospitals, aged care, disability facilities and prisons.⁴²⁴ These practices breach articles 7 and 12. The Committee on the Rights of Persons with Disabilities recommended that Australia end such practices.⁴²⁵

Australia should strengthen concerted efforts to eliminate restrictive practices, in all forms and settings, which restrict, inhibit and or limit the free movement and enjoyment of life of people with disability.

Australia should:

- **repeal the migration exemption in section 52 of the *Disability Discrimination Act 1992* (Cth) to ensure that discrimination on the basis of disability in migration law, policy and practice is unlawful.**
- **amend the health criteria in the *Migration Regulations 1994* (Cth) consistent with the recommendations of the Joint Standing Committee on Migration’s 2010 report into migration and disability, *Enabling Australia*.**
- **withdraw its Interpretative Declaration to article 18 of the CRPD.**

⁴¹⁷ *Migration Act 1958* (Cth) s 65. See e.g. Rajan, S. (2016), ‘Yet another example of disability discrimination in Australian Immigration’, *The Stringer*, Available at: <http://thestringer.com.au/yet-another-example-of-disability-discrimination-australian-immigration-12070/>; David Ellery, ‘Canberra family split as right to live Australia revoked’, *The Canberra Times*, 19 April 2016, <http://www.canberratimes.com.au/act-news/watson-family-split-as-right-to-live-in-australia-is-revoked-20160415-g07nyb.html>; . *SBS Australia*, ‘Blind Kenyan Father ordered to Leave Australia’, 18th August 2015, <http://www.sbs.com.au/news/article/2015/08/18/blind-kenyan-father-ordered-leave-australia>

⁴¹⁸ *SBS Australia*, ‘Blind Kenyan Father ordered to Leave Australia’, 18th August 2015, <http://www.sbs.com.au/news/article/2015/08/18/blind-kenyan-father-ordered-leave-australia>.

⁴¹⁹ Ruth Balint, ‘Australia has kept disabled migrant children out for decades - it’s time we gave them protection instead’ *The Conversation* (online) available at <http://theconversation.com/australia-has-kept-disabled-migrant-children-out-for-decades-its-time-we-gave-them-protection-instead-73677> (accessed 30 August 2017).

⁴²⁰ Miki Perkins, ‘Disability a ‘burden’ to Australian community, immigration rules’ *The Sydney Morning Herald* (online) 1 December 2016 available at <http://www.smh.com.au/national/disability-a-burden-to-australian-community-immigration-rules-20161128-gs28yc.html> (accessed 30 August 2017).

⁴²¹ See e.g. Francois Crepeau, ‘Report of the Special Rapporteur on the human rights of migrants of Australia and the regional processing centres in Nauru’, 35th sess, Human Rights Council, Agenda item 3, UN Doc A/HRC/35/25/Add.3 (24 April 2017) [92]; Joint Standing Committee on Migration, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (2010) x, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=mig/disability/report.htm.

⁴²² Committee on Economic, Social and Cultural Rights, ‘Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant’, Australia, UN Doc E/C.12/AUS/CO/4, 42nd sess, 12 June 2009, [16].

⁴²³ Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013)’, UN Doc CRPD/C/AUS/CO/1, (21 October 2013) [8]-[9].

⁴²⁴ See e.g., NSW Ombudsman, *Inquiry into behavior management in schools – A Special Report to Parliament under s31 of the Ombudsman Act 1974*, August 2017, <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/community-and-disability-services/nsw-ombudsman-inquiry-into-behaviour-management-in-schools-august-2017>; Julia Holman, ‘Physical restraints in aged-care homes reported to have caused five deaths over 13-year period’, ABC News (online) 6 January 2017 <<http://www.abc.net.au/news/2017-01-06/physical-restraints-in-aged-care-homes-have-caused-deaths-study/8165468>>; Senate Community Affairs References Committee, ‘Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and linguistically diverse people with disability’ (November 2015), <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>; National Mental Health Commission, ‘A Contributing Life, the 2013 National Report Card on Mental Health and Suicide Prevention’ (2013); Melbourne Social Equity Institute (2014) *Seclusion and Restraint Project Report*, Melbourne: University of Melbourne, 67.

⁴²⁵ Committee on the Rights of Persons with Disabilities, *Concluding Observations for Australia’s 1st periodic review*, UN Doc CRPD/C/AUS/CO/1, [35]-[36].

Frank ⁴²⁶

Frank has multiple impairments including Autism Spectrum Disorder. Frank told his mother he was taped to a chair while at school, and this was confirmed by the tape marks on his wrists. He was locked in rooms and subjected to restraint on numerous occasions, at least once witnessed by his mother. When attempting to make a complaint some years later, the school refused to admit the abuse occurred, and said they had no documentation so could not investigate the complaint. Frank was a young primary school child, and still suffers the trauma of those years. No assistance has ever been offered by the State Government Education Department at any time and Frank ended up being hospitalised halfway through his primary school years due to psychological damage.

⁴²⁶ Evidence of violence, abuse and neglect provided to the Senate Community was prolific, see e.g., Australian Cross Disability Alliance, 'Personal Stories and Testimonies: Accompanying document to submission', August 2015,

17.3 VIOLENCE AGAINST PEOPLE WITH A DISABILITY (ARTS. 2, 7 AND 26)

In 2015 an Australian Senate Committee found that people with disability experience unconscionable levels of violence and abuse including in the disability and mental health service system, aged care, childcare, schools and educational settings, hospitals and prisons.⁴²⁷ Documented mistreatment includes assault, excessive use of force, rape, neglect, and physical restraint of children.⁴²⁸ This infringes articles 2, 7 and 26.

The Senate Committee called for a Royal Commission to fully investigate this issue,⁴²⁹ and this call was reinforced by the Committee on Economic, Social and Cultural Rights at Australia's 5th periodic review in May 2017.⁴³⁰

Australia has ruled out a Royal Commission, stating that the new National Disability Insurance Scheme (NDIS), which is a disability support system will be provided within a Quality and Safeguarding (Q&S) Framework.⁴³¹ While the Q&S Framework establishes complaint mechanisms and oversees NDIS service registration and quality assurance, it is an insufficient measure by itself to address violence and abuse of people with

disability.⁴³² The Q&S Framework is limited in scope as it is only relevant for approximately 10 per cent of people with disability who will receive services via the NDIS, and it will not address violence and abuse across the broad circumstances in which it occurs. The Q&S Framework does not address, nor hold people and systems accountable for past injustices.

Many UN recommendations to Australia, including from the UPR, call on Australia to address all forms of violence against people with disability, including violence in institutional settings, and in particular violence experienced by women and girls with disability.⁴³³

Australia should:

- **establish a Royal Commission into violence and abuse against people with disability. The Royal Commission should have specific and broad powers to compel witnesses, undertake a comprehensive investigation of all forms of violence and refer matters to law enforcement agencies.**
- **through the National Disability Strategy, act on the recommendations from the 2015 Senate Committee to provide nationally consistent measures to address all forms of violence against people with disability in a broad range of settings.**

⁴²⁷ Senate Community Affairs References Committee, 'Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and linguistically diverse people with disability' (November 2015) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report>

⁴²⁸ Evidence of violence, abuse and neglect provided to the Senate Community was prolific, see e.g., Australian Cross Disability Alliance, 'Personal Stories and Testimonies: Accompanying document to submission' (August 2015) <http://www.wda.org.au/wp-content/uploads/2013/12/ACDA_SuppDOC_Sen_Inquiry_Violence_Institutions.pdf>.

⁴²⁹ A Royal Commission is an independent, judicial investigation with broad powers and functions.

⁴³⁰ Committee on Economic, Social and Cultural Rights, Concluding Observations for Australia's 5th periodic review, UN Doc E/C.12/AUS/CO/5, July 2017, [36].

⁴³¹ The NDIS is a social insurance mechanism to provide individual funded plans to eligible people with disability so that they can choose, purchase and manage their own disability supports.

⁴³² Australian Government, 'Australian Government response to the Senate Community Affairs References Committee report' (2 March 2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Government_Response>.

⁴³³ See e.g., UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review, Australia', 31st sess, UN Doc A/HRC/31/14 (13 January 2016).

17.4 SUPPORTED DECISION-MAKING (ART. 16)

A number of Australian laws, policies and practices deny or diminish recognition of people with disability as persons before the law, or deny or diminish the right of a person with disability to exercise legal capacity, violating article 16. This takes place in guardianship, estate management and mental health laws and affects areas such as financial services, voting, public office, board participation, access to justice, will making and deposition, providing evidence in court proceedings, and the opportunity for people with disability to choose what disability supports they need, who will provide them and when.

The Australian Law Reform Commission has made recommendations for law reform to ensure consistency with international human rights law,⁴³⁴ but Australia has not responded to this report. Australia's Interpretative Declaration to article 12 of the CRPD provides for the ongoing practice of substitute decision making. The Committee on the Rights of Persons with Disabilities has stated that "the maintenance of substitute decision making regimes is not sufficient to comply with article 12 of the Convention."⁴³⁵ The UN has recommended that Australia withdraw its Interpretative Declaration, and implement a framework of supported decision-making.⁴³⁶

Australia should:

- **establish a nationally consistent supported decision-making framework that strongly and positively promotes and supports people to effectively assert and exercise their legal capacity and enshrines the primacy of supported decision-making mechanisms.**
- **withdraw its Interpretative Declaration to article 12 of the CRPD.**

17.5 COMPULSORY TREATMENT (ARTS. 7, 10 AND 16)

Laws, policy and practice for compulsory treatment of people with disability limit individual rights to liberty and security and equal recognition before the law, raising concerns under articles 7, 10 and 16. Laws have failed to prevent, and in some cases actively condone unacceptable practices, including invasive and irreversible treatments, such as the authorisation of psychosurgery, electroconvulsive therapy and forced sterilisation, chemical, mechanical and physical restraint and seclusion.⁴³⁷ Australia's Interpretative Declaration in

respect of article 17 of the CRPD effectively means that Australia believes that compulsory treatment complies with international law. The UN has recommended law reform and withdrawal of the Interpretative Declaration.⁴³⁸

Australia should:

- **conduct a comprehensive audit of laws, policies and administrative arrangements underpinning compulsory treatment to eliminate such laws and practices.**
- **withdraw its Interpretative Declaration to article 17 of the CRPD.**

17.6 FORCED STERILIZATION OF WOMEN AND GIRLS WITH DISABILITY (ARTS. 7, 17, 23, 24 AND 26)

Forced sterilisation of people with disability, particularly women and girls with disability, and people with intersex variations (see also section 18.3 below), is an ongoing practice in Australia, and breaches articles 2, 7, 17, 24 and 26.⁴³⁹ Since 2005, UN human rights treaty bodies, the Human Rights Council, UN special procedures and international medical bodies have made recommendations to Australia to enact national legislation to prohibit forced sterilisation.⁴⁴⁰ In 2013, an Australian Senate inquiry into the involuntary or coerced sterilisation of people with disability in Australia released a report making a number of recommendations regarding reform to law and policy and the development of reproductive health support programs and educative information and programs for families and the medical profession.⁴⁴¹ However, the report did not recommend complete prohibition of forced sterilisation, which has enabled Australia's focus to remain on better regulation and non-binding guidelines rather than the prohibition of forced sterilisation.⁴⁴²

Australia should develop and enact national uniform legislation prohibiting the forced sterilisation of children with disability, and adults with disability in the absence of their prior, fully informed and free consent.

⁴³⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124 (2014).

⁴³⁵ Committee on the Rights of Persons with Disabilities, General Comment No. 1, Equal Recognition before the Law, UN Doc CRPD/C/GC/1, [28].

⁴³⁶ United Nations Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th Session (4 October 2013) [8]-[9] and [24]-[25].

⁴³⁷ Bevan, N, and Sands, T, (2016) Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia, Australian Cross Disability Alliance, Sydney, Australia, [21]-[26] and [37]-[44].

⁴³⁸ United Nations Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th Session (4 October 2013) [8]-[9] and [33]-[34].

⁴³⁹ See eg, *Re Carla* (Medical procedure) [2016] FamCA 7; Morgan Carpenter, *The Family Court case Re: Carla* (Medical procedure) [2016] FamCA 7, Oll Australia, 2016, <https://oil.org.au/31036/re-carla-family-court/>; People With Disability Australia, Submission No 50 to Senate Standing Committee on Community Affairs, *The Involuntary or Coerced Sterilization of People with Disabilities in Australia*, March 2013.

⁴⁴⁰ See UN Docs: CAT/C/AUS/CO/4-5; CRPD/C/AUS/CO/1; CRC/C/AUS/CO/4; A/HRC/WG.6/10/L; CEDAW/C/AUS/CO/7; CRC/C/15/Add.268; A/67/227; A/HRC/22/53; Human Rights Council, 31st sess, UN Doc A/HRC/31/14 (13 January 2016) rec 136.180-184, p.22. See also: FIGO (International Federation of Gynaecology and Obstetrics), *Female Contraceptive Sterilization* <<http://www.wda.org.au/FIGOGuidelines2011.pdf>>

⁴⁴¹ Senate Standing Committees on Community Affairs, *Involuntary or coerced sterilisation of people with disabilities in Australia* (2013) Commonwealth of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Communities?url=clac_ctte/involuntary_sterilisation/first_report/index.htm>.

⁴⁴² Australian Government, Australian Government response to the Senate Community Affairs References Committee reports (May 2015) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Additional_Documents>.



18

Sexual Orientation, Gender Identity and Intersex Status

18.1 VIOLENCE AND HARASSMENT AGAINST LGBTI PEOPLE (ARTS. 2, 17 AND 26)

Lesbian, gay, bisexual, transgender and intersex (LGBTI)⁴⁴³ Australians, particularly young people, continue to face high levels of violence, abuse and harassment, including in institutional settings, without adequate protections.⁴⁴⁴ 61 per cent of same-sex attracted young people report experiencing verbal homophobic abuse, 18 per cent report physical homophobic abuse and 9 per cent report other types of homophobia, including cyberbullying, graffiti, social exclusion and humiliation.⁴⁴⁵ 80 per cent of this homophobic bullying occurs at school and has a profound impact on their well-being and education.⁴⁴⁶ Transgender young people experience significantly higher rates of both non-physical and physical abuse.⁴⁴⁷ In a 2015 survey of intersex Australians, 66 per cent of participants had experienced discrimination on the basis of their intersex variation from strangers.⁴⁴⁸ However, there are no specific government programs designed to address violence against LGBTI people, and national funding for programs to address violence faced by LGBTI students in schools lapsed in June 2017.⁴⁴⁹

Australia should reduce the high levels of violence faced by LGBTI Australians by implementing activities to reduce the bullying and harassment of LGBTI people, particularly youth.

18.2 DISCRIMINATION AND VILIFICATION TARGETING LGBTI PEOPLE (ARTS. 2, 17 AND 26)

Landmark federal anti-discrimination laws were introduced in Australia in 2013 that prohibit discrimination on the basis of sexual orientation, gender identity and intersex status.⁴⁵⁰ However, LGBTI people continue to face high levels of discrimination in practice⁴⁵¹ and permanent exemptions allow discrimination against LGBTI people in areas including employment, schools, sport and the delivery of services (except the delivery of aged care services), most notably exemptions available for religious organisations.⁴⁵²

At the state and territory level, there is inconsistency in the level of protection from discrimination afforded to LGBTI people. Sexual orientation is protected in all states and territories, but gender identity is not protected in the NT. The attribute of “intersex status” is now protected in the ACT, Tasmania and South Australia but other states and territories either incorrectly conflate intersex with gender identity or do not contain any protections against discrimination on this ground. Since the last reporting period, Victoria, NSW, South Australia and the ACT have passed legislation to provide redress for individuals with leftover criminal records for homosexual conduct and a number of jurisdictions have adopted formal state apologies for the past criminalisation of homosexual conduct.⁴⁵³ Schemes have been established to allow people to apply for their historical homosexual convictions to be “expunged”, “extinguished” or “spent”. The Victorian, South Australian, Tasmanian and Queensland Premiers also delivered formal state apologies for the harm caused by these laws. These are welcome steps to start to repair the psychological harm caused by these discriminatory laws of the past and address the practical discrimination people face from having criminal records from before consensual same-sex activity was decriminalised.

⁴⁴³ LGBTI communities are not homogeneous and the issues facing each of these population groups, along with the legislative and programmatic solutions, vary.

⁴⁴⁴ Tiffany Jones and Western Australian Equal Opportunity Commission, *A report about discrimination and bullying on the grounds of sexual orientation and gender identity in Western Australian education* (2012) 11; William Leonard et al, *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, ARCSHS, La Trobe University, Melbourne (2012). See also, the ‘gay panic defence’ in *Lindsay v The Queen* [2015] HCA 16.

⁴⁴⁵ Australian Research Centre in Sex, Health and Society, La Trobe University, *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010) 39.

⁴⁴⁶ Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives 2: The second national survey of the health and wellbeing of GLBT Australians* (2012) 39.

⁴⁴⁷ Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives 2: The second national survey of the health and wellbeing of GLBT Australians* (2012) 47.

⁴⁴⁸ OII Australia, *New publication “Intersex: Stories and Statistics from Australia”* (3 February 2016).

⁴⁴⁹ Simon Birmingham MP, ‘Statement on Safe Schools Coalition’ (18 March 2016).

⁴⁵⁰ *Sex Discrimination Act 1984* (Cth) pts 1-2.

⁴⁵¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 14-21; OII Australia, *Intersex: Stories and Statistics from Australia* (2016); Australian Research Centre in Sex, Health and Society, La Trobe University, *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010), p 39.

⁴⁵² Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives 2: The second national survey of the health and wellbeing of GLBT Australians* (2012) 46.

⁴⁵³ Victoria, Tasmania and Queensland state parliaments have held formal state apologies for the past criminalisation of homosexual acts and the South Australian parliament has apologised for all laws that discriminated against LGBTI people.

Public comments inciting discrimination and violence are also inconsistently sanctioned across Australia.⁴⁵⁴ This raises concerns under articles 2, 17 and 26.

Australia should introduce comprehensive and strengthened legal protections from discrimination and vilification consistent with international human rights standards.

18.3 FORCED MEDICAL INTERVENTIONS ON INTERSEX PEOPLE (ARTS. 7, 9, 17 AND 24)

Surgeries and other medical interventions are performed on infants and children with intersex variations without their informed consent or evidence of necessity.⁴⁵⁵ Evidence shows that these procedures can have deleterious effects, including impaired sexual function and sensation, incorrect gender assignment, and consequences for physical and psychological development of these infants and children.⁴⁵⁶ These interventions violate rights to bodily integrity, autonomy and self-determination of infants and children with intersex variations.⁴⁵⁷ These interventions also restrict their agency over their own physical and psychological development. So-called “normalising” interventions are invasive and irreversible procedures.⁴⁵⁸ If conducted without an evidence-based therapeutic purpose, evidence of necessity, and the consent of the patient they may constitute torture or ill-treatment, and medical experimentation.⁴⁵⁹ These breach obligations under articles 7, 9, 17 and 24.

An Australian Senate Committee’s report on the Involuntary and Coerced Sterilisation of Intersex People in Australia made a series of recommendations to address such medical interventions.⁴⁶⁰ In particular, the Senate Committee recommended that irreversible medical treatment, especially surgery, only be performed on people who are unable to give consent if there is a health-related need to undertake that surgery, and that need cannot be as effectively met at a later date.⁴⁶¹ The OHCHR and WHO have called for all States to end forced or coerced medical interventions against intersex people and CESCR has recommended that Australia study and implement the Senate recommendations.⁴⁶²

Australia should:

- **adopt the Australian Senate’s recommendations to ban unnecessary medical interventions on people with intersex variations.**
- **develop and enact legislation prohibiting non-medically necessary sterilisation, genital normalising and hormonal interventions on people with intersex variations without their prior, fully informed and free consent.**

18.4 CLASSIFICATION OF SEX/GENDER (ARTS. 2, 17 AND 26)

While there have been welcome steps since the last reporting period to better recognise sex and gender, the various jurisdictions in Australia have inconsistent laws and policies for the recognition of sex and gender outside the categories of male and female, and in respect of the requirements for a person applying for the alteration of the sex marker on their birth certificate. The Australian Capital Territory and South Australia have reformed laws to remove the requirement that a person undergo “sex reassignment surgery” to change the sex marker on a birth certificate document. The Commonwealth, Australian Capital Territory, New South Wales and South Australia provided limited recognition for sex and gender outside the categories of male and female.

⁴⁵⁴ Civil and criminal anti-vilification protections exist on the basis of sexuality and gender identity in the ACT and Queensland and on the basis of homosexual status and transgender status in NSW. Civil anti-vilification and offensive conduct protections exist on the basis of sexual orientation, gender identity and intersex status in Tasmania. See *Criminal Code 2002* (ACT) s 750; *Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1977* (NSW) s 49ZTA, 49ZXC, 49ZT, 49ZXB; *Anti-Discrimination Act 1991* (QLD) s 131A, 124A; *Anti-Discrimination Act 1998* (Tas) ss 16 & 19.

⁴⁵⁵ See e.g. The Senate Community Affairs References Committee, *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013) ch 3; Elders MJ, Satcher D, Carmona R. Re-Thinking Genital Surgeries on Intersex Infants. Palm Center (2017) <<http://www.palmcenter.org/wp-content/uploads/2017/06/Re-Thinking-Genital-Surgeries-1.pdf>>; Zillén K, Garland J, Slokenberga S, ‘The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties’ *Committee on Bioethics of the Council of Europe* (2017).

⁴⁵⁶ The Senate Community Affairs References Committee, *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013). See also, Re Carla (*Medical procedure*) [2016] FamCA 7.

⁴⁵⁷ The Senate Community Affairs References Committee, *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013).

⁴⁵⁸ The Senate Community Affairs References Committee, *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013).

⁴⁵⁹ The Senate Community Affairs References Committee, *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013).

⁴⁶⁰ Australian Senate Community Affairs References Committee, *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013). See also, *Darlington Statement: Joint consensus statement from the intersex community retreat in Darlington* (March 2017).

⁴⁶¹ The Senate Community Affairs References Committee, *Involuntary or coerced sterilisation of intersex people in Australia* (October 2013).

⁴⁶² Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia* (Advance Unedited Version) UN Doc E/C.12.AUS/CO/5) (23 June 2017) [50].

The Australian Government Guidelines on the Recognition of Sex and Gender have improved access to passports in the affirmed gender of Australian citizens without invasive medical procedures and improved access to an “X” marker (in addition to M and F).⁴⁶³ However, most state and territory laws fall short of this policy and generally require surgical intervention,⁴⁶⁴ a person to be over 18, a person to be unmarried⁴⁶⁵ and only allow access to “male” and “female” classifications.⁴⁶⁶ This infringes on articles 2, 17 and 26.

Australia should:

- recognise self-affirmed sex/gender without requiring medical treatment, a person to be unmarried or a person to be 18 years of age, including classifications other than male and female.
- as a long-term objective, work to remove sex/gender classifications from birth certificates and other identification documents, in consultation with the affected communities disproportionately impacted by such requirements.

18.5 LGBTI PARENTING (ARTS. 2, 17, 23, 24 AND 26)

Since Australia was last reviewed by the Committee, there have been significant advances in the recognition of LGBTI families. A number of states have removed discriminatory adoption laws or restrictions on access to assisted reproductive technology for same-sex couples.

However, the legal recognition of LGBTI parents in Australian states and territories is inconsistent, causing practical problems for LGBTI parents who provide stable, loving care for their children. In the Northern Territory, although legal amendments have been proposed, same-sex couples are unable to adopt children,⁴⁶⁷ including those children who are already lawfully in their care. In Western Australia, access to reproductive technologies is limited to couples of the opposite sex.⁴⁶⁸ Further, if a woman wishes to access reproductive technologies as an individual (rather than as a member of a couple), she may only do so if she is unable to conceive a child due to medical reasons, restricting the use of these technologies

by fertile homosexual and bisexual women. Also in Western Australia, a same-sex couple may only complete an altruistic surrogacy arrangement – in particular, the process for the transfer of legal parentage from the surrogate to the couple – if one member of the couple is a woman who is unable to conceive or give birth to a child for medical reasons.⁴⁶⁹ In the Northern Territory, there are no laws governing access to reproductive technologies and altruistic surrogacy arrangements. However, there is evidence that same-sex couples have been prevented from accessing these services.⁴⁷⁰ These practices raise concerns under articles 2, 17, 23, 24 and 26.

Australia should harmonise legal protections of children in LGBTI-headed families.

18.6 FREEDOM TO MARRY AND EQUAL RELATIONSHIP RECOGNITION (ARTS. 2, 17, 23, 24 AND 26)

Despite overwhelming public support for marriage equality, Australia only recognises marriages between “a man and a woman”,⁴⁷¹ raising concerns under articles 2, 17, 23, 24 and 26.⁴⁷² Relationship recognition and civil union/partnership schemes provide couples with alternative legal recognition in the absence of marriage in all states and territories except Western Australia and the Northern Territory.⁴⁷³

Australia should legislate for marriage equality and ensure relationship recognition is available across all states and territories.

⁴⁶³ Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender* (updated November 2015).

⁴⁶⁴ Except the ACT and SA. See *AB & AH v State of Western Australia and Anor* [2011] HCA 42; *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

⁴⁶⁵ Except the ACT and NSW.

⁴⁶⁶ Except the ACT, NSW and SA.

⁴⁶⁷ *Adoption of Children Act* (NT) s 13.

⁴⁶⁸ *Human Reproductive Technology Act* 1991 (WA) s 23.

⁴⁶⁹ *Surrogacy Act* 2008 (WA) s 19. Altruistic surrogacy for same-sex couples is permitted under the laws of the other states and territories.

⁴⁷⁰ Georgia Hitch, ‘Gay couples denied access to IVF after refusing to claim infertility, NT advocate group says’ *ABC News* (online) 25 June 2017 <<http://www.abc.net.au/news/2017-06-24/gay-couples-refused-ivf-in-nt-forced-to-go-interstate/8648890>>.

⁴⁷¹ *Marriage Act* 1961 (Cth) s 5(1). See also, *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55.

⁴⁷² Australian Human Rights Commission, *Marriage Equality in a Changing World: Position Paper on Marriage Equality* (September 2012).

⁴⁷³ *Civil Unions Act* 2012 (ACT); *Relationships Register Act* 2010 (NSW); *Civil Partnerships Act* 2011 (Qld); *Relationships Register Act* 2016 (SA); *Relationships Act* 2003 (Tas); *Relationships Act* 2008 (Vic).

