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## **Australia's Compliance with Concluding Observations**

### **Update to the Human Rights Committee**

**July 2010**

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**Human Rights Law Resource Centre Ltd**  
Level 17, 461 Bourke Street  
Melbourne VIC 3000  
Australia  
[www.hrlrc.org.au](http://www.hrlrc.org.au)

## 1. Introduction

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1. On 2 April 2009, the Human Rights Committee (**Committee**) adopted Concluding Observations in respect of Australia's compliance with its obligations under the *International Covenant on Civil and Political Rights* (**Covenant**).
2. This submission by the Human Rights Law Resource Centre (**HRLRC**) provides a short update to the Committee on:
  - (a) the four Concluding Observations about which the Committee requested from Australia, within one year, relevant information on implementation of the Committee's recommendations, namely paragraphs 11, 14, 17 and 23; and
  - (b) the outcomes of the National Human Rights Consultation. While not a specific issue about which the Committee requested further information, the HRLRC considers that Australia's new "Human Rights Framework" is a significant development regarding compliance with the Covenant about which the Committee should be made aware.
3. Further background information on each of these issues is contained in the comprehensive NGO Report, Addendum and fact sheets provided to the Committee, which are available at <http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/>.

## 2. Counter-Terrorism Legislation and Practices

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4. Paragraph 11 of the Committee's Concluding Observations recommends that:

The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant. In particular, it should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences. The State party should in particular: a) guarantee the right to be presumed innocent by avoiding reversing the burden of proof; b) ensure that the notion of "exceptional circumstances" does not create an automatic obstacle to release on bail; and c) envisage to abrogate provisions providing Australian Security Intelligence Organization (ASIO) the power to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods
5. In early 2010, the Australian Government introduced proposed legislation to amend aspects of Australia's counter-terror laws. The two bills were referred to the Senate Committee on Legal and Constitutional Affairs for an inquiry and report and on 17 June 2010 the Senate Committee released its report.<sup>1</sup> Subject to there being very minor amendments, the Senate Committee recommended that the proposed Bills be passed.

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<sup>1</sup> National Security Legislation Amendment Bill 2010 and the Parliamentary Joint Committee on Law Enforcement Bill 2010. Details of the Senate Committee's inquiry, including a copy of the proposed Bills, submissions made by

6. While the proposed legislation has not passed, there remain serious concerns that its provisions raise serious human rights concerns, including:
- (a) some offences of urging group violence on the basis of race, religion or national origin may infringe the right to freedom of expression, whilst at the same time not adequately protecting against racial and religious vilification;
  - (b) some terror-related offences are defined so broadly that the law effectively criminalises thought and speech, such as the “praising” of a terrorist act;
  - (c) persons suspected of terrorism offences can be detained for up to 8 days without charge. While this is an improvement on the current laws, which contain no cap on time spent in pre-charge detention, the detention of a person without charge for 8 days raises concerns in relation to the prohibition against arbitrary detention; and
  - (d) new search powers allow the police broad discretion to enter private homes without a warrant if they suspect on reasonable grounds that a “thing” is on the premises that is relevant to a terrorist act (even one that has not occurred) and it is necessary to prevent the thing from being used in connection with a terrorist act. The search powers are not subject to adequate judicial oversight of police action.
7. In addition, the proposed legislation does not address some of the most intrusive elements of Australia's counter-terror laws, including:
- (a) control order and preventative detention order schemes;
  - (b) the excessively broad powers of ASIO to detain and question people, including non-suspects;
  - (c) the offences of associating, supporting and training with a terrorist organisation;
  - (d) a lack of guarantees to ensure the right to be presumed innocent, as well as having to fulfil exceptional circumstances for the grant of bail; and
  - (e) the overly-broad definition of “terrorist act”.
8. These concerns are explained in further detail in a joint submission to the Senate Committee by Amnesty International Australia and the HRLRC, which is available at <http://www.hrlrc.org.au/content/topics/counter-terrorism/human-rights-and-counter-terrorism-submission-to-senate-committee-on-national-security-legislation-reforms-3-may-2010/>.

### 3. Northern Territory Emergency Response (NTER)

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9. Paragraph 14 of the Committee's Concluding Observations recommends that:

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

10. Since the Committee's review of Australia, the NTER has also been criticised by the Committee on Economic, Social and Cultural Rights in May 2010 and the UN Special Rapporteur on the human rights of Indigenous peoples, Mr James Anaya, following his country visit to Australia in August 2009. The Special Rapporteur chose to devote special and urgent attention to the matter of the NTER by releasing a separate report. A copy of the report and a brief summary is available at <http://www.hrlrc.org.au/content/topics/equality/indigenous-rights-special-rapporteur-releases-report-on-northern-territory-emergency-response-feb-2010/>.

11. In June 2010, three pieces of legislation were passed that make minor amendments to the NTER measures and reinstate the operation of the *Racial Discrimination Act 1975* (Cth) (**RDA**) after 31 December 2010. However, there remain serious concerns that:

- (a) despite the reinstatement of the RDA, there are extremely limited ways in which it can be used to challenge the racially discriminatory measures of the NTER (explained further below);
- (b) the measures remain racially discriminatory and continue to violate a number of basic human rights; and
- (c) there continues to be manifestly inadequate consultation with affected Aboriginal communities.

#### 3.1 Reinstatement of the RDA

12. Under the new legislation, reinstatement of the RDA will take effect after 31 December 2010. However, the amendments made to the existing NTER legislation have only been to change the description of the "objects" (or purposes) of each of the NTER measures to declare that the measures are intended to qualify as "special measures" for the purposes of the RDA. As explained further below, there have been very few substantive amendments to the actual NTER measures themselves.

13. Despite the reinstatement of the RDA, the amendments to the objects clauses have the potential effect of limiting the utility of the RDA to be used to challenge whether, in fact, the NTER measures can properly be categorised as "special measures". In light of this clear statement of Parliamentary intention, and the interpretative principle that legislation enacted at a later time should prevail, it is unlikely that any potential challenge to the NTER measures on the basis of racial discrimination would be successful.

### **3.2 Continued Operation of NTER Measures**

14. One of the most controversial aspects of the NTER measures is the operation of compulsory income quarantining of welfare payments to all Aboriginal people living in prescribed communities. In order to ensure that this measure is not racially discriminatory, the new legislation has expanded compulsory income quarantining to apply across the entire country to apply to “disengaged youths”, “long-term welfare recipients” and people assessed as being “vulnerable”. As a trial of this expanded measure, the Australian Government has indicated that income quarantining will apply only to welfare recipients in the Northern Territory.
15. However, in light of the high percentage of the population in the Northern Territory who are Aboriginal, and the high number of Aboriginal people who receive welfare payments, the arbitrary income management provisions will continue to disproportionately affect Aboriginal people.
16. Apart from a move away from blanket alcohol bans towards community restrictions to be tailored on a case-by-case basis following community consultations, there were no other substantive amendments to the NTER measures such as pornography restrictions, compulsory land acquisition powers, law enforcement powers and powers to appoint government business managers of Aboriginal communities.

### **3.3 Consultation with Affected Communities**

17. Between June and August 2009, the Department of Families, Housing, Community Services and Indigenous Affairs undertook a series of consultations with affected Aboriginal communities with the purpose of looking at reform of the NTER measures.<sup>2</sup> The consultations took place in all 73 communities subject to NTER measures, as well as various layers of government and agencies involved in the operation of the NTER.
18. While the Australian Government has claimed that the consultations were “conducted in the spirit of genuine consultation and engagement with Indigenous people”, the consultations have been subject to severe criticism about their scope and adequacy, including that:<sup>3</sup>
  - (a) the Government Discussion Paper, which guided the consultations, provided limited options for discussion about the measures. For example, in the options proposed for redesign of income management provisions, it did not put forward the abolition of income management or its operation on a voluntary basis as being options for discussion;
  - (b) the consultations lacked independence because they were undertaken by Government Department representatives;

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<sup>2</sup> Policy Statement: *Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, 5.

- (c) the consultations were retrospective in nature, given that the decisions to initially implement and to continue the NTER measures had already been made; and
  - (d) there was a failure to notify communities and leaders about the consultations.
19. Indeed, even the independent consultants appointed by the Australian Government to oversee the consultations identified a number of problems.<sup>4</sup> While, overall, the consultant's report described the consultation as "extensive" and its approach as "comprehensive", it highlighted issues such as:
- (a) a failure to report the level of community anger and frustration expressed at meetings;
  - (b) government bias of consultation facilitators;
  - (c) insufficient time to fully explain the NTER measures; and
  - (d) a lack of interpreter assistance.
20. The inadequate consultations raise concerns in relation to the right of self-determination and the ability of Aboriginal people to participate in decision-making processes about matters that affect them.
21. These concerns are explained in further detail in a submission by the HRLRC to the Senate Legal and Constitutional Affairs Committee, which is available at <http://www.hrlrc.org.au/content/topics/equality/indigenous-rights-proposed-amendments-to-the-northern-territory-intervention/>.

#### **4. Violence Against Women**

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22. Paragraph 17 of the Committee's Concluding Observations recommends that:
- The State party should strengthen its efforts towards the elimination of violence against women, especially perpetrated against indigenous women. The State party is encouraged to promptly implement its National Plan of Action to Reduce Violence against Women and their Children, as well as the recommendations of the 2008 Family Violence and Homeless report.
23. In April 2009, the Australian Government released the "National Plan to Reduce Violence against Women – Immediate Government Actions", which prioritises the following nine actions to be undertaken immediately:
- (a) develop a national primary prevention framework;
  - (b) support men who oppose violence against women;
  - (c) build the capacity of the prevention education field;

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<sup>3</sup> Nicholson, Behrendt, Vivian, Watson and Harris, *Will they be heard? – a response to the NTER Consultations June to August 2009* (November 2009).

- (d) implement and evaluate educational programs encouraging respectful relationships;
  - (e) implement reforms as put forward in *The Road Home: A National Approach to Reducing Homelessness*;
  - (f) establish a professional national telephone and online crisis support service;
  - (g) ensure children exposed to violence do not have their safety or wellbeing compromised;
  - (h) make a reference to the Australian Law Reform Commission to examine the integration of domestic violence, child protection and federal family law; and
  - (i) fund and deliver a perpetrator research agenda.
24. Priority actions aimed at violence against Aboriginal women include to:
- (a) reduce overcrowding in Aboriginal communities; and
  - (b) establish "cooling-off" places for men in remote communities.
25. The Australian Government also promised to consult with States and Territories to develop national responses to a range of other issues.
26. To date, there have been no follow-up reports on the implementation or success of these government actions or commitments. As noted by Amnesty International Australia, the new National Action Plan represents no increase on the funding provided over the previous four year period.<sup>5</sup>

## **5. Mandatory Immigration Detention**

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27. Paragraph 23 of the Committee's Concluding Observations recommends that:

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

### **5.1 Mandatory Immigration Detention**

28. As identified in the NGO Report, in July 2008 the Australian Government announced its "New Directions in Detention" policy. As part of implementation of the policy, in June 2009 the

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<sup>4</sup> See Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation Final Report* (September 2009).

<sup>5</sup> Amnesty International Australia, 'National Plan must increase funding to services cautions Amnesty International', media release, 29 April 2009; Amnesty International, 'Setting the Standard: International Good Practice to Inform an Australian National Plan of Action to Eliminate Violence against Women' (2008), available at [http://www.amnesty.org.au/images/uploads/svaw/NPOA\\_report\\_-\\_Master\\_13June\\_opt\\_rfs.pdf](http://www.amnesty.org.au/images/uploads/svaw/NPOA_report_-_Master_13June_opt_rfs.pdf).

Migration Amendment (Immigration Detention Reform) Bill 2009 was introduced into Parliament and referred to the Senate Legal and Constitutional Affairs Committee for inquiry. The Bill amends the *Migration Act 1958* (Cth) to reflect the seven “Key Immigration Detention Values” and is said to “increase clarity, fairness and consistency in the way the Minister and the Department of Immigration and Citizenship respond to unlawful non-citizens”.

29. However, most significantly, the proposed legislation maintains the policy of mandatory immigration detention. Other concerns with the proposed legislation are that the Bill:
- (a) while enshrining important new “principles”, at the same time introduces substantive new operational provisions that fundamentally contradict those principles;
  - (b) does not prevent the detention of children in all closed detention facilities;
  - (c) does not apply in exclusion zones, most notably on Christmas Island, and therefore denies to all asylum seekers on Christmas Island any improvements introduced by the Bill;
  - (d) does not impose a time limit on immigration detention or require authorised officers to consider granting temporary community access permissions. As a result, detention can continue for long periods of time in circumstances where detention is unnecessary; and
  - (e) does not provide that decisions to detain should be subject to independent judicial review, as required by international human rights law.
30. These concerns are explained in further detail in a submission by the HRLRC to the Senate Legal and Constitutional Affairs Committee, which is available at <http://www.hrlrc.org.au/content/topics/refugees-and-asylum-seekers/refugee-rights-submission-to-inquiry-into-immigration-detention-aug-2009/>.

## **5.2 Human Rights Commission – Immigration Detention Report Recommendations**

31. No legislative changes have been effected in response to the Australian Human Rights Commission's 2008 Immigration Detention Report. The Department of Immigration and Citizenship has indicated that, in implementing the Government's “New Directions in Detention” policy and “Key Immigration Detention Values”, it intends to initially implement administrative and regulatory reform and then pursue possible legislative changes.<sup>6</sup>

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<sup>6</sup> Department of Immigration and Citizenship, *Response to the Australian Human Rights Commission's 2008 Immigration Detention Report* <http://www.immi.gov.au/managing-australias-borders/detention/pdf/response-to-AHRC-immigration-detention-report.pdf>.



### **5.3 Christmas Island Detention Centre**

32. The Australian Government has not closed down the Christmas Island Detention Centre.
33. Furthermore, as described above, the amendments put forward in the Migration Amendment (Immigration Detention Reform) Bill 2009 specifically do not apply in exclusion zones, such as Christmas Island, meaning that any positive changes resulting from the Bill will not affect people in detention there.

### **5.4 Other Related Developments**

34. **Offshore regional processing centre:** On 6 July 2010, the Australian Government announced that it has been in negotiations with East Timor to establish an offshore regional processing centre that that would handle new boat arrivals before they landed in Australia and other countries in the region, such as New Zealand. Such an approach would perpetuate Australia's policy of mandatory immigration detention. As with issues relating to Christmas Island, there are concerns about access to judicial review of detention, as well as legal and other services in these remote locations.
35. **Opening of Curtin Detention Centre:** Disturbingly, earlier this year, the Australian Government reopened the controversial Curtin Detention Centre. The centre is located in the extremely remote West Kimberley region of Western Australia and has been described as a "gulag" and the most primitive of Australia's asylum seeker facilities.<sup>7</sup> Curtin was previously closed in 2002 following a series of riots and concerns over the mental health of detainees.
36. **Suspension of asylum seeker claims:** In April 2010, the Australian Government made a policy decision to suspend the processing of all new claims for asylum by Afghans and Sri Lankans. In addition to Australia's obligations under the Refugee Convention, the suspension policy raises serious concerns in relation to:
- (a) article 26 of the Covenant regarding discrimination on the basis of country of origin and nationality; and
  - (b) article 9(1) of the Covenant in light of the prolonged and arbitrary detention of persons for the duration of the suspension of processing of their refugee claims.
37. On 6 July 2010, the Australian Government announced that it would immediately lift the freeze on the handling of Sri Lankan asylum claims, but that the processing of asylum seeker applications from Afghans would remain in place while further discussions take place with the Afghan Government.

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<sup>7</sup> See PM, "Mixed reaction to reopening of Curtin detention centre", ABC Radio, 19 April 2010, available at <http://www.abc.net.au/news/stories/2010/06/12/2925566.htm>.

## 6. Outcome of the National Human Rights Consultation

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38. As identified in the NGO Report, on 10 December 2008, the Australian Attorney-General announced a national public consultation into the need for better human rights protection in Australia. In October 2009, the independent Consultation Committee released its report following one of the most extensive exercises in participatory democracy in Australian political history. The Committee received over 35,000 public submissions and hosted 66 roundtables in 52 locations throughout metropolitan, regional and rural Australia. Over 80 per cent of the submissions (almost 28,000) called for the enactment of an Australian Human Rights Act.
39. The Committee's comprehensive report made the following key findings:
- (a) there is strong public support for the enhanced promotion and protection of all human rights, including economic, social and cultural rights;
  - (b) while Australia has strong democratic and legal institutions, they do not provide comprehensive or even adequate protection of human rights. The patchwork quilt of human rights protection is missing pieces and this is felt most keenly by the marginalised and vulnerable;
  - (c) human rights are not enjoyed fully or equally by all Australians. Both in fact and in law, many groups within Australia experience profound disadvantage, including the homeless, people with mental illness, Aboriginal Australians, asylum seekers and children with disability;
  - (d) there is a need for better education about human rights within the community;
  - (e) there is a need for a better understanding of and commitment to human rights within government and greater consideration of human rights in the development of legislation and policy;
  - (f) there is strong support for strengthening and expanding the powers, functions and resources of the Australian Human Rights Commission; and
  - (g) there is very strong support for a Human Rights Act, with 87.4 per cent of submissions to the Committee which considered the issue supporting the enactment of a Human Rights Act.
40. A copy of the Committee's comprehensive report on the protection and promotion of human rights in Australia is available at <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>.

## 6.1 Government's Response to the Consultation Committee's Report

41. On 21 April 2010, the Attorney-General launched the Federal Government's response to the National Human Rights Consultation, entitled "Australia's Human Rights Framework".
- The Government's Framework fails to implement the key recommendation of the National Human Rights Consultation Report that Australia enact a federal Human Rights Act. As a result, the Covenant is not directly enforceable or justiciable under Australian law and there remains a lack of effective remedies for violations of the Covenant.**
42. The Government's Human Rights Framework does, however, contain a number of significant commitments to strengthen the promotion and protection of human rights in Australia:
- (a) establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations;
  - (b) requiring that each new Bill introduced into Federal Parliament is accompanied by a Statement of Compatibility with Australia's international human rights obligations;
  - (c) reviewing legislation, policies and practice for compliance with the seven core international human rights treaties to which Australia is party;
  - (d) investing over \$12 million over four years in various education initiatives to promote a greater understanding of human rights across the community;
  - (e) developing a new National Action Plan on Human Rights to 'outline future action for the promotion and protection of human rights';
  - (f) consolidating and harmonising federal anti-discrimination laws into a single Act; and
  - (g) creating a 'Human Rights Forum' to enable whole-of-government engagement with non-government organisations on annual basis.
43. A copy of the "Human Rights Framework" is available at [www.ag.gov.au/humanrightsframework](http://www.ag.gov.au/humanrightsframework).
44. The Government has committed to review the Framework in 2014 to "assess its effectiveness in the promotion and protection of human rights in Australia". However, without a robust enabling framework, such as a Human Rights Act, the effectiveness of such measures is likely to be substantially reduced.

Contact: Ben Schokman  
Director – International Human Rights Advocacy  
[ben.schokman@hrlrc.org.au](mailto:ben.schokman@hrlrc.org.au)